

Community Association Newsletter

EXPERIENCED. EFFICIENT. EFFECTIVE.

JUNE 2019

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Preparing for Hurricane Season

By Teddy Holtz

This coming August marks 2 years since Hurricane Harvey devastated Texas. Damage from Hurricane Harvey is estimated at \$128.8 billion dollars, and over 30,000 people were displaced and 200,000 homes and businesses were damaged or destroyed¹. For the Houston area in particular, in the past several years we have seen numerous devastating storms in addition to Harvey, including the Tax Day Flood in 2016 and the Memorial Day Flood in 2015.

Like many of our fellow Texans, those of us who work with or serve on the boards of community associations were left shocked and feeling helpless by the magnitude of the devastation. Devastating storms are inevitable, so preparedness and proactivity are of critical importance in coping with and overcoming the damage these storms cause. This article will discuss a number of topics that your association should consider to prepare for the 2019 hurricane season and beyond.

1. Flood Insurance

For your community association, the sorts of conversations and decision-making factors regarding flood insurance may be highly different from those of another association. First, particularly for condominiums, if your

¹NOAA National Centers for Environmental Information (NCEI) U.S. Billion-Dollar Weather and Climate Disasters (2019). <https://www.ncdc.noaa.gov/billions/>

association is located in a high-risk flood zone, a master flood policy may be required as a condition of purchase or sale of units. Additionally, for condominiums, understanding the differences in coverage between the Residential Condominium Building Association Policy (RCBAP) and a master hazard policy is vitally important. It is also important to note that owners should consider insuring the contents of their unit over and above what may be provided for in a RCBAP or master hazard policy.

For other associations, a review of the governing documents should be undertaken to determine the sorts of insurance policies the Association must maintain. It's possible flood insurance may be one of these policies.

Flood insurance can be a significant expense for an association, so shopping around for quotes is recommended. Additionally, inviting insurers to speak at an association meeting can be highly beneficial in determining what sort of policy and rates make the most sense for your association.

2. Reserve Study/Reserve Account

A review of your association's finances in preparation of hurricane season is recommended. If your association does not already have a capital reserve account, opening one is a good idea. Following a devastating storm, your association will likely have significant repairs to or even replacement of association-owned buildings and other property. It is not advisable to dip into the association's operating account to fund these projects. A reserve study is also recommended. A reserve study provides the Board with a funding plan for anticipating and preparing for major repair and replacement projects. Please refer to my article ["Planning for the Future: Strategic Planning in a Community Association"](#) from the firm's April 2019 newsletter for additional information on this topic.

3. Communication and Assistance

One of the silver linings of a severe weather event like Harvey is the triumph of the human spirit. With regard to Harvey, it was inspiring to see financial and physical aid not only from Houstonians but also from all corners of the country and even the globe.

You may be asking what, if anything, your association can do to aid owners before, during, and after the storm. Staying informed and making sure others are informed is essential for coping with a devastating storm. If it is possible and safe to do so, your association can play its part by keeping owners informed of local weather conditions and assisting displaced owners with information or referrals to nearby shelters and humanitarian aid groups by use



Flooding during Hurricane Harvey.



The cleanup process on a street after Harvey.

of the association's online portal/messaging service or other social media. I had recently moved to the Energy Corridor prior to Harvey, an area that was heavily affected by the controlled releases after the storm. Up-to-date information was critically important, especially before and during the controlled releases. I utilized a number of different resources, including word of mouth from neighbors, social media, weather-tracking websites such as spacecityweather.com, and the Harris County Flood Control District press conferences that made an overnight celebrity out of Jeff Lindner. The Association can do its part by making sure owners are aware of these resources. For associations outside of the Houston area, utilize the resources of your local area and county officials.

Be cautioned that the association's charity should be measured and limited: outright donations of association funds to one or more owners affected by the storm can draw claims of favoritism, a misuse of association funds from other owners and can subject the association to potential liability. If you have questions concerning what actions are appropriate for your association to take to assist owners in connection with a severe weather event, do not hesitate to consult our firm.

Your association should take stock of how your particular community was affected when considering how to proceed with collection and deed restriction compliance actions following a severe weather event. A compassionate and understanding approach is recommended and eliciting feedback from owners may be beneficial. However, barring extreme conditions, collection and compliance efforts should resume as normal without a significant delay. Also, board members should be aware that while an owner's obligation to pay mandatory assessments can be deferred, the obligation cannot be waived.

4. Utilize Your Network and Resources

Following Harvey, it was difficult for associations to secure contractors for repairs as delays and waiting lists were lengthy. Utilizing CAI, your management company's preferred vendors, and even suggestions from board members or owners to secure reliable contractors in a pinch is recommended. Though it may be impossible to avoid delays, having a phone number or email address handy for a contractor is always a good idea.

Though it's impossible to predict the short-term effects and the magnitude of damage in connection with a severe weather event, your community does not necessarily have to suffer long-term. Following these tips will assist your association in coping with a devastating storm at every stage.



Teddy Holtz joined the firm's Community Association Section in 2019. Teddy is originally from Houston. He completed the Business Honors Program at The University of Texas McCombs School of Business in 2009, and he earned his law degree from Indiana University Maurer School of Law in 2012.

86th Legislative Session Wrap-Up: What New Laws Are on the Way

By Brady Ortego



With Texas's 86th Legislature formally closing on May 27, those involved with legislation mentally take a deep breath as part of assessing what new laws may affect Texas property owners' associations (POAs). Governor Abbott has until June 16 to veto or sign bills that made their way through both the Senate and House of Representatives. Bills that have been sent to Governor Abbott left unsigned will become law unless vetoed by June 16. While this session was described as an uncharacteristically "kumbaya" session, reports on the last week or so of the tone in Austin indicated that many waited till the end to aggressively push legislative initiatives. RMWBH maintains its commitment to our readers with a final update on the results of Texas's 86th Legislature. We appreciate our readership and are proud to continue our commitment toward education.

New Laws Affecting POAs

SB 741 – Relating to restrictive covenants regarding firearms or firearm ammunition

- Bill by: Bryan Hughes (R), Tyler
- Bill Affects: Single-Family and Townhome Associations, Condominium Associations
- Final Status: Sent to the Governor
- Effective Date: September 1

The bill amends Chapter 202 of the Property Code adding Section 202.020. The bill restricts POAs from including in the dedicatory instrument provisions prohibitions against the lawful possession, transport, or storage of a firearm, firearm part, ammunition, or the lawful discharge of a firearm.

SB 339 – Relating to a seller's disclosure notice for a residential property regarding floodplains, flood pools, or reservoirs

- Bill by: Joan Huffman (R), Houston
- Bill Affects: Single-Family and Townhome Association, Condominium Associations
- Final Status: Sent to the Governor

- Effective Date: September 1

This bill adds Section 5.020 to Subchapter A, Chapter 5 of the Property Code to create a form to provide Seller's Disclosure Notice of Floodplain, Flood Pool, or Reservoir in the sale of a residential property. The flood plains are defined by FEMA's 100-year and 500-year flood plains. The bill would also create a cause of action for the buyer if the proper disclosures were not provided to the buyer.

HB 2554 – Relating to regulation of the display of signs containing political advertising

- Bill by: John Bucy (D), Cedar Park
- Bill Affects: Single-Family and Townhome Associations, Condominium Associations
- Final Status: Sent to the Governor
- Effective Date: September 1

This bill transfers the political signage statute currently in Chapter 202 of the Property Code to Chapter 259 of the Property Code.

HB 1025 – Relating to candidacy for and membership on the board of certain property owners' association

- Bill by: Dwayne Bohac (R), Houston
- Bill Affects: Single-Family and Townhome Associations
- Status: Sent to the Governor on May 29
- Effective Date: Immediately

The bill amends Section 209.00591 of the Property Code to allow a POA made up of multiple sections to in its governing documents a specified number of positions on the board that must be elected from an appointed section of the subdivision. The association could also require the members of the board from each subsection to live in the section he/she represents. The bill was amended during the legislative process to add the provision from HB 1396 prohibiting a person cohabiting with an association board member from serving on the board.

HB 234 – Relating to the local regulation of the sale of lemonade or other beverages by children

- Bill by: Matt Krause (R), Fort Worth
- Bill Affects: Single-Family and Townhome Associations, Condominium Associations
- Status: Sent to the Governor
- Effective Date: September 1

The bill amends Chapter 250 of the Local Government Code and Chapter 202 of the Property Code to the following:

- Section 250.009 of the Local Government Code prohibits a municipality, county, or other local public health authority from adopting or enforcing an ordinance, order, or rule, including a license, permit, or fee, preventing an individual younger than 18 from the occasional sale of lemonade or other non-alcoholic beverage.
- Chapter 202.020 prohibits a POA of a residential subdivision from adopting or enforcing a restrictive covenant prohibiting or regulating, including by a permit or fee, the sale of lemonade or other nonalcoholic beverage from a stand located in the subdivision by someone younger than 18.

POA-Related Bills that Did Not Pass

HB 1396 – Relating to the eligibility of certain persons to serve on the board of a property owners’ associations

- Bill by: Sam Harless (R), Houston
- Bill Affected: Single-Family and Townhome Associations
- Final Status: Passed House, referred to Senate Business & Commerce Committee on May 7th. Did not pass.

The bill would have amended Section 209.00591, subsection (a-2) of the Property Code limiting Board eligibility to one director per primary residence. HB 1025 was amended to add this provision.

HB 660 – Relating to property owners’ association fines

- Bill by: Matt Shaheen (R), Plano
- Bill Affected: Single-Family and Townhome Associations
- Final Status: Left pending in House committee on April 30th. Did not pass.

The bill would have amended Chapter 209 of the Property Code by adding Section 209.0061. If passed, POAs would have been required to adopt and record fining policies. The policies would have established reasonable fine amounts for each type of violation and provided a copy of the fining policy to members. The copies of the policy would have been required to be given to members either by hard copy through mail, or electronically by email.

SB 807 – Relating to property insurance coverage for and the appraisal of certain condominium properties.

- Bill by: Nathan Johnson (D), Dallas
- Bill Affected: Condominium Associations
- Final Status: Referred to Senate Business & Commerce Committee on March 1st. Did not pass.

This bill would have amended Section 82.111 of the Property Code by adding Subsections (b-1) and (b-2).

- (b-1) would have required a written summary of the insurance coverage, amount of coverage and a comparison of the property’s coverage to what is required by law.
- (b-2) would have required an independent appraisal of property the association may insure, or is required to insure, every 36 months and deliver the report to the association’s members.

HB 3445 - Relating to Declarant control of certain property owners’ associations

- Bill by: Tracy King (D), Laredo
- Bill Affected: Single-Family and Townhome Associations and Developers
- Final Status: Left pending in House Committee on April 23rd. Did not pass.

This bill would have amended Section 209.00591 (c) of the Property Code mandating that a majority of the board members be elected by homeowners on or before the 120th day after 75 percent of the lots are conveyed to homeowners. If there is not a specified number of lots in the declaration, this bill would have mandated a majority of the POA board members be homeowners after the fifth anniversary of the date the declaration was recorded.

SB 2204 – Relating to declarant control of a property owner’s association board

- Bill by: Pat Fallon (R), Denton
- Bill Affected: Single-Family and Townhome Associations and Developers

- Final Status: Referred to Senate Business and Commerce Committee on March 21st. Did not pass.

This bill would have amended Section 209.0051 (c-1) of the Property Code. The bill would also have amended Section 209.00591 by amending Subsection (c) and adding Subsections (d) and (e).

- Section 209.0051 (c-1) would have been changed to require board meetings to be held within 10 miles of the subdivision.

Section 209.0059 would have been amended by the following:

- (c) The declaration may provide for a period of declarant control of the association during which a declarant, or persons designated by the declarant, may appoint and remove board members and the officers of the association, other than board members or officers elected by members of the property owners' association.
- (d)(1) would mandate at least one-third of the POA board members be elected by owners on or before the 120th day after a majority of lots have been conveyed to owners.
- (d)(2) would mandate a majority of the POA board members be elected by owners on or before the 120th date after 75 percent of the lots created by the declaration or conveyed to owners.
- (e) would mandate, a majority of the POA board members be elected by owners no later than the 10th anniversary of the declaration date if the number of lots that may be created is not defined in the declaration.

HB 4176 – Relating to the regulation of short-term rentals by a property owners' association

- Bill by: Angie Button (R), Garland.
- Bill Affected: Single-Family and Townhome Associations, Condominium Associations.
- Final Status: Referred to House Business & Industry Committee on March 25th. Did not pass.

The bill would have amended Chapter 202 of the Property Code adding Section 202.020. The new section would have defined short-term rental as “a residential property that is rented wholly or partly for a fee for a period not longer than 30 consecutive days. The bill would have allowed POAs to adopt or enforce provisions in the dedicatory instruments regulating the use of property covered by short-term rentals.

SB 639 – Relating to the operation and management of certain condominium unit owner's association.

- Bill by: Joan Huffman (R), Houston
- Bill Affected: Condominium Associations
- Final Status: Referred to Senate Business & Commerce Committee on March 1st. Did not pass.

The bill would have been a complete overhaul of Chapter 82 of the Property Code addressing topics relating to meetings, records and elections of board members.

HB 589 – Relating to mechanic's, contractor's, or materialman's liens

- Bill by: Joe Deshotel (D), Beaumont
- Bill Affected: Single-Family and Townhome Associations, Condominium Associations, Developers
- Final Status: Left pending in House committee on April 23rd. Did not pass

The bill would have amended Chapter 53 of the Property Code by adding Subsection (e) to Section 53.022 of the Property Code allowing a lien for work on the common areas be extended to each unit owning an interest in the common area. If passed, the bill would allow the lien to be divided amongst the units based on their interests in the common area.

POA-related Bills that Almost Passed (and we've seen them before)

HB 2302 – Relating to regulation by a property owners' association of certain religious displays

- Bill by: Greg Bonnen (R), Galveston.
- SB 227 is the companion bill in the Senate.
- Bill Affected: Single-Family and Townhome Associations and Condominium Associations
- Final Status: Placed on House General State Calendar May 9th. Did not pass.

The bill would have allowed owners two religious displays (up from one), and the size of the displays allowed could have been up to 9 square feet (up from 25 square inches).

SB 86 – Relating to the regulation of raising or keeping six or fewer chickens by a political subdivision

- Bill by: Bob Hall (R), Rockwall
- Bill Affected: Single-Family and Townhome Associations, Condominium Associations
- Final Status: Passed Senate, House committee report sent to calendars on May 2nd. Did not pass.

The bill proposed to amend Chapter 202 of the Property Code by adding Section 202.020 and would have applied to restrictive covenants adopted on or after September 1, 2019. At one stage, the bill would prohibit the prohibition of an individual from raising 6 or fewer chickens by a POA. At its final status, the language regulating POA restrictions had been removed, and the bill was back in its initial form applying only to cities and counties with POAs maintaining the right to self-regulate chickens.

In closing, RMWBH thanks its readership for all the interest and participation in the legislative process. While it is rare that POAs are not the subject of at least some legislation, we hope that our lawmakers appreciate the notion that Texas communities have the right to self-govern. With the close of the legislative season, the political season begins anew. Creation and maintenance of relationships with our legislators is crucial between the legislative sessions. The current state of the law as it relates to POAs protects so many Texas communities. If the adage, "if it ain't broke, don't fix it," rings true anywhere, it does so in Texas.



Brady Ortego is an equity shareholder in the firm's San Antonio office and is a member of the Real Estate section as a leader of the Community Association Team. His practice areas include Community Association Law where he represents a variety of property owners' associations across the state of Texas. He is Board Certified in Residential Real Estate Law and Property Owners Association law by the Texas Board of Legal Specialization and a Fellow in the College of Community Association Lawyers. Brady graduated from South Texas College of Law in 2003.

Contingency Fee Agreements for Collection of Assessments Are Legal...Right?

By Clint Brown

If you work with a third party collection agency rather an attorney that regularly practices in Texas community association law, you may run into situations where the collection agency wants the manager or the board of the community association to sign an agreement that allows the agency to keep a percentage of whatever is collected from the delinquent owner. The perceived benefit is that the community association does not have to pay attorneys' fees or costs of collection unless the collection agent is successful.

It sounds great but is that legal? Well, if you live in a community that is bound by Chapter 209 of the Texas Property Code (i.e. a single family or townhome community) then the answer is a resounding NO as it would be a clear violation Section 209.0064 of the Texas Property Code. Specifically, in 2011 at the 82nd Texas Legislative Session, the Texas legislature added Section 209.0064 to the Texas Property Code which became effective January 1, 2012. This section provides, in pertinent part, that:

(c) An owner is not liable for fees of a collection agent retained by the property owners' association if:

(1) the obligation for payment by the association to the association's collection agent for fees or costs associated with a collection action is in any way dependent or contingent on amounts recovered (emphasis added); or

(2) the payment agreement between the association and the association's collection agent does not require payment by the association of all fees to a collection agent for the action undertaken by the collection agent.

...

(e) A property owners' association may not sell or otherwise transfer any interest in the association's accounts receivables for a purpose other than as collateral for a loan.

So, if the collection agency's contract allows that agency to keep a portion or percentage of whatever they recover from the delinquent owner, the collection agency, association and management company have violated Section 209.0064(c) and 209.0064(e) because the collection agency has made their recovery "dependent or contingent on" what they collect and the association has "otherwise transfer[red]" an interest in the association's accounts receivable. In other words, the association is giving the collection agent a "cut" of their recovery.

This clear violation of Texas law can subject the association, manager and collection agency to liability in the event an owner or class of owners file a lawsuit for the collection or foreclosure under the Texas Property Code, the Texas Finance Code and the Federal Fair Debt Collections and Practices Act. As you can imagine, this can result in significant money damages and, unfortunately, attorneys' fees that must be paid for defense of the various parties

to the contingency fee contract.

So beware, if the costs of collection seem too good to be true, they probably are.

So, the next time you are thinking about entering into a contract with a collection agency that is not an attorney that practices Texas community association law, be sure to read the contract very carefully to ensure payment is in no way contingent on the results obtained.



Clint Brown is a shareholder in the firm's Real Estate section as a leader of the Community Association Team. His practice includes Bankruptcy Law, Construction Law, Residential and Commercial Real Estate, Corporate Law, and Community Association Law. Clint is Board Certified in Property Owners Association Law and Residential Real Estate Law. Clint graduated cum laude from South Texas College of Law in 2009.

Firm Highlights

Clint Brown Named to the State Bar of Texas Real Estate Forms Committee

RMWBH is proud to announce Shareholder Clint Brown has been appointed to the State Bar of Texas Real Estate Forms Committee by State Bar President Randall Sorrels. The Real Estate Forms Committee was formed in 1970 and is charged with the duty to review, update and revise various real estate forms for the State of Texas. Clint will be focusing on forms for deed restrictions, bylaws, certificates of formation, policies and other community association governing documents. Congratulations Clint from everyone at RMWBH!



Mia Lorick Co-Chairs UHLC's 100% Challenge

We are proud of the work all of our employees do to give back to the community, and this month saw that continue. The University of Houston Law Center launched their annual [100% Challenge](#) this month, and this year Associate Mia Lorick is a co-chair for the challenge. The goal of the challenge is for companies to have 100% of their UH Law Center alumni contribute to the law fund. Good luck to Mia and UHLC on this year's challenge, and thank you Mia for all of your work in the community.



Photo Courtesy of University of Houston Law Center.

Upcoming Events

Dealing with Difficult: A Roundtable Discussion on Management of the Differing Personalities that Reside in or Serve Your Community Association.

Equity Shareholder, Brady Ortego, will discuss tips and strategies for dealing with owners and/or volunteer board members that may challenge the manager, their neighbors, and/or their (fellow) board members. While there may not be a playbook for instances not outlined by your governing documents or the law, there may be ways to minimize the substantial amount of time that difficult folks seem to command. One goal is reasonably minimizing the emails and phone calls. Another goal is a reduction of the level of risk to the association and your management entity.

June 19, 2019

**RMWBH Training Room
4630 N Loop 1604 West, Ste. 311
San Antonio, Texas 78249
11:30 a.m. – 1:00 p.m.**

*Lunch will be Provided
[Register Here>>](#)

San Antonio CAI June Luncheon

Join Equity Shareholder Brady Ortego at San Antonio CAI's June Luncheon as he co-presents a legislative update with Pam Bailey of Chaparral Management. Brady and Pam will be providing updates on the close of the legislative session, what bills passed, what nearly passed and the victories community associations gained from this session.

June 11, 2019

**San Antonio Petroleum Club
8620 N. New Braunfels, Suite 700
San Antonio, Texas 78217
11:30 a.m. - 1:00 p.m.**

*Lunch will be provided
[Register Here>>](#)

86th Texas Legislature Wrap-Up

After 140 furious and fast-paced days, the 86th Texas Legislature has come to an end. Thousands of bills were filed and debated. Join Shareholder Clint Brown as he takes you through an in-depth explanation of the law changes coming to the HOA and developer worlds and answers your questions.

June 20, 2019

**RMWBH Training Room
317 Grace Lane, Suite 140
Austin, Texas 78746
11:30 a.m. - 1:00 p.m.**

*Lunch will be provided
[Register Here>>](#)

41st Annual Advanced Real Estate Law Course

The State Bar of Texas's annual Advanced Real Estate Law Course will see several RMWBH attorneys participating as speakers. On Thursday, July 11, Associate Mia Lorick will be lecturing on "Reasonable Enforcement of Restrictive Covenants Following the *Tarr v. Timberwood Park* Case and What Does Tex. Prop. Code 202.003 Even Mean Anymore" at 1:45 p.m. The next day, Friday, July 12, Founding Shareholder Gregg Weinberg will be lecturing on "How to Bury the Donkey (i.e., Cover Your \$@!) When Representing a Client in a Real Estate Deal" at 3:45 p.m. And on Saturday, July 13, Founding Shareholder Marc Markel will be lecturing on "Why Am I Reading This Survey?" at 9:15 a.m.

July 11 - 13, 2019

**Hyatt Regency Hill Country Resort
9800 Hyatt Resort Drive
San Antonio, Texas 78251**

[Click For More Information and to Register>>](#)



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