CHECKLISTS AND FORMS FOR STATUTORY COMPLIANCE BY SINGLE FAMILY HOMEOWNER ASSOCIATIONS AND CONDOMINIUM ASSOCIATIONS

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DISCLAIMER

This article is not intended to be relied upon as a final analysis in resolving legal questions regarding property owner associations and statutory compliance. The information presented herein is intended to identify some of the issues and requirements surrounding these matters. Due to the summary nature of the article, the level of detail necessary for a proper legal analysis of any particular situation cannot be reached. There is no substitute for a thorough review of the relevant statutes and cases of a particular jurisdiction and facts of a particular case by an experienced and competent attorney.

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CHECKLISTS AND FORMS FOR STATUTORY COMPLIANCE BY SINGLE FAMILY HOMEOWNER ASSOCIATIONS AND CONDOMINIUM ASSOCIATIONS

I. INTRODUCTION

Property owners associations are complex entities that have a variety of responsibilities and serve many purposes for the subdivisions and condominiums in which they manage and govern. In order to effectuate these responsibilities and purposes, Texas law obligates property owners associations to adopt and enforce certain rules and regulations to ensure proper functionality and provide members with certain information and safeguards. Furthermore, custom and convention have established policies that are often recommended in the industry.

The scope of this paper is to introduce and analyze the major policies, guidelines and other forms required under Texas law and customarily recommended in the industry. This paper will mainly focus on Chapters 209, 202, 204, 82, 5 and 207 of the Texas Property Code. The areas to be discussed apply to single family homes, townhomes, and condominiums unless otherwise indicated.

Please be advised that the terms "single family homeowner association" and "condominium association" (two terms frequently used throughout this article) are two separate and distinct classifications of residential-use property owners associations. The term "single family homeowner association" used herein relates to a property owners association that is subject to Chapter 209 of the Texas Property Code. The term "condominium association" used herein relates to a property owners association that is subject to Chapter 81 or 82 of the Texas Property Code. As discussed below, other provisions and chapters of the Texas Property Code may also apply to single family homeowner associations and condominium associations.

To begin, we will address a few initial concepts that should always be considered when handling property owners associations.

A. Incorporation

In most cases, non-profit organizations such as single family homeowner associations and condominium associations are incorporated under the laws of the State of Texas. Incorporation provides many benefits, such as tax incentives and volunteer immunity protection for the volunteer leaders of an association. The process is initiated by filing a certificate of formation, previously referred to as articles of incorporation, with the Texas Secretary of State pursuant to the Texas Business Organizations Code. Incorporation is necessary for condominiums; however, there is no statutory requirement for single family homeowner associations.

Section 82.101 of the Texas Property Code states that a condominium association "must be organized as a profit or non-profit corporation."[1] [this requirement is for condominium associations formed after January 1, 1994]. Units may not be sold by the declarant until the Secretary of State issues a complete certificate of formation[2]. This makes us ponder what happens if the declarant sells units before the association is incorporated. While there is no consequence set forth in the property code, it does make one ponder the question. There is no equivalent for single family homeowner associations. Regardless, most associations will incorporate and take advantage of the many benefits it provides. Furthermore, some single family subdivision declarations may specify that incorporation is required, so it is always important to closely analyze an association's dedicatory instruments to ensure compliance. Generally, it is recommended that an association become an incorporated entity, whether required or not.

Once an association is successfully incorporated, its information may be located on both the Texas Secretary of State website and the Texas Comptroller website. The association's legal name (as reflected in its certificate of formation) and its registered agent may be found through the Comptroller's taxable entity search engine.[3] It is prudent to periodically check both websites to verify that an association is in good standing with both the Secretary of State and Comptroller. This will ensure that an association has the continued ability to transact business in Texas. Also, it is important to determine whether an association has a franchise and/or sales tax exemption. If not, it may be eligible for an exemption depending on specific criteria as provided by the Comptrollers' office and approval of the requisite application.

B. Recordation

In Texas, a dedicatory instrument is ineffective if it is not properly recorded in the real property records

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[1] TEX. PROP. CODE §82.101
[2] *Id.*
[3] *Taxable Entity Search*, TEX. COMPTROLLER OF PUB. ACCOUNTS, https://mycpa.cpa.state.tx.us/coa/search.do?userType=public

of the county where the land at issue is situated.[4] Under Section 202.006(a) of the Texas Property Code, an association is required to file all dedicatory instruments with the appropriate county clerk.[5] If an association fails to file a document, the instrument is essentially unenforceable. These rules apply to both incorporated and unincorporated single family homeowner associations and condominium associations.[6] The term "dedicatory instrument" within the statute is all encompassing, and includes any restrictions, bylaws or other similar governing documents implemented by an association.[7] Please note that there is case law that suggests bylaws may not be a dedicatory instrument; however, the case law appears to contradict the terms of both Section 202.001(1)(A-C) and Section 209.002(4) of the Texas Property Code (Chapter 209 only applies to single family homeowner associations as discussed below).[8] For purposes of this paper, we will use the term "dedicatory instrument" generally unless we are referring to a specific type of dedicatory instrument.

Even though Texas law compels recordation, it is both logical and beneficial to record all dedicatory instruments in the real property records of the applicable county. Recordation provides constructive notice. An instrument that is properly recorded in the proper county provides notice to all persons of its existence and contents.[9] This comes in handy when owners attempt to argue that they were not aware of any dedicatory instruments or requirement to pay assessments. The doctrine of constructive notice essentially precludes an owner from asserting ignorance of a dedicatory instrument. Accordingly, arguments disputing notice of dedicatory instruments will typically be defeated if the documents are properly recorded.

II. CHAPTER 209 OF THE TEXAS PROPERTY CODE (*SINGLE FAMILY AND TOWNHOMES*)

For most single family homeowner associations, Chapter 209 of the Texas Property Code is arguably the most important reference for statutes and laws affecting single family homeowner associations in the state. Also known as the "Texas Residential Property Owners Protection Act," Chapter 209 contains an abundance of knowledge pertaining to both the corporate and collection side of single family homeowner association law in Texas. However, the statutory provisions are only applicable to residential subdivisions and do not pertain to condominiums.[10] A "residential subdivision" or "subdivision" is defined as "a subdivision, planned unit development, townhouse regime, or similar planned development in which all land has been divided into two or more parts and is subject to restrictions."[11] Moreover, the restrictions must: 1) provide that the land is limited to residential use by single-family, townhome or duplexes only; 2) be properly recorded in the real property records where the land is situated; and 3) compel membership in an association that may levy regular and special assessments.[12] After it has been confirmed that an association is subject to Chapter 209, an association must meet specific requirements in order to comply with the provisions therein.

A. Requirements

A single family homeowner association that is subject to Chapter 209 must possess a management certificate and the following three policies: 1) open records policy; 2) payment plan policy; and 3) records retention policy. The execution and recordation of a management certificate and each of the policies above not only ensures compliance, but also provides protection for an association should any scenario arise that concerns the requisite documents. Of course, these scenarios are very common and an association that is caught without the necessary certificate or policy may be subject to future liability and/or hardship.

1. Management Certificate

A management certificate essentially presents an overview of an association, including its plat and declaration instrument recording information, and provides notice of management and contact details pertaining to the association. Under Texas law, a single family homeowner association is required to record a management certificate in the county in which the property is located.[13] The certificate must be executed and acknowledged by an officer or agent of the association and list the following information:

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[4] TEX. PROP. CODE §202.006
[5] *Id*. at §202.006(a)
[6] *Id*. at §202.001(2)
[7] *Id*. at §202.001(1)
[8] *Storck v. Tres Lagos Prop. Owners Ass'n*, 442 S.W.3d 730, 738 (Tex.App. —Texarkana 2014, pet. denied); *See* TEX. PROP. CODE §202.001(1)(A-C) & §209.002(4).
[9] *Id*. at §13.002
[10] *Id*. at§209.003(d)
[11] *Id*. at §209.002(9)
[12] *Id*. at§209.002(9)(A-C)
[13] *Id*. at §209.004(a)

1) the name of the subdivision;
2) the name of the association;
3) the recording data for the subdivision;
4) the recording data for the declaration;
5) the name and mailing address of the association;
6) the name and mailing address of the person managing the association or the association's designated representative; and
7) other information the association considers appropriate.[14]

Oftentimes, the content of the certificate is organized in the manner provided above. In other words, it can be advantageous to simply list each item in order as provided by the statute. Depending on the association, the certificate may be extensive or concise. For example, an association that was established decades ago may have multiple declarations, amendments and other relevant documents of record that would need to be included in the management certificate. In contrast, a fairly new association will likely only have a few instruments that would need to be listed. Once the certificate is complete and submitted to the appropriate county clerk, the document is required to be indexed and labeled as a "Property Owners' Association Management Certificate." [15] However, it has been observed on many occasions that the county clerks have not complied with this requirement making the certificates harder to locate than intended by the code section.

If any of the information provided above (1-7) is subsequently changed, an association is required to record an amended management certificate within 30 days after receiving notice of the change or alteration. [16] If an association fails or refuses to properly record a management certificate or amendment thereto in accordance with the statute, the purchaser, lender or title insurance company in a transaction involving real property located in the community will not be responsible for: 1) any amounts owed to the association on the date of transfer to a bona fide purchaser; and 2) any debt or claim of the association that arose before the date of the transfer to a bona fide purchaser. [17] Moreover, an association's lien to secure an amount due on the date of the transfer of the property to a bona fide purchaser will only include amounts incurred after the effective date of the purchase. [18] Thus, it is critical that an association observe and follow the requirements provided under Chapter 209 regarding management certificates

Practice tip: Although not required, it is a good practice to review the certificate annually and record an updated management certificate if an association's policies, rules and/or regulations are updated or amended.

2. Open Records Policy

Texas law requires the books and records of an association to be available and open to an owner upon request. In essence, owners have the right to inspect or obtain copies of the association records that are subject to disclosure. Accordingly, single family homeowner associations are required to implement and record a records production and copying policy, commonly known in the industry as an "open records policy."[19] The policy must specify the costs the association will charge an owner for the "compilation, production and reproduction" of the documents and other information requested under the statute. [20] The costs may encompass any reasonable amounts for the materials, labor and other expenses associated with compiling and producing the necessary documents; however, the charges cannot exceed the costs listed under Section 70.3 of the Texas Administrative Code.[21]

In addition to stating the costs associated with the records request, the policy should mirror the statutory requirements listed under Section 209.005 of the Texas Property Code, especially those related to the owner's obligations and association's rights regarding the request. The policy should provide notice of the requirements for a statutorily compliant request and the owner's right to either inspect or obtain copies of the records. Under the statute, an owner must submit a written request by certified mail to the association's mailing address as displayed on the most recent management certificate of record.[22] The request must also contain details of the specific books and records the owner is seeking and must include the election to obtain copies or inspect the specified documents. [23] Any request that does not meet the requirements under the statute may not be fulfilled and will not trigger the

[14] *Id*. at §209.004(a)(1-7)
[15] *Id*. at §209.004(a-1)
[16] *Id*. at §209.004(b)
[17] *Id.* at §209.004(d)
[18] *Id.* at §209.004(e)
[19] *Id*. at §209.005(i)
[20] *Id*.
[21] *Id*.
[22] *Id*. at §209.005(e)
[23] *Id.*

time requirements as provided under Section 209.005(e).

The association has certain rights with regards to an open records request and these rights should also be reflected in the policy. For example, if the association is unable to meet the requisite deadline for the production or inspection of documents (10 business days after the association receives the request), the association may notify the owner in writing before the deadline of the association's inability to provide the information within the requisite timeframe and the date in which the documents will be provided (not later than 15 business days after the notice is sent). [24] Furthermore, an owner's request for information may not encompass everything under the sun. Texas law limits the information that is subject to disclosure and, by including a provision referencing this law, owners are provided with notice of what can and cannot be obtained or what does not exist. [25] It is further recommended that the policy include a reference to Section 70.3 of the Texas Administrative Code and describe the costs and charges provided therein. This will assist the association and requesting owner in calculating the estimated costs of materials, labor and overhead for the production of the requested information and inform owners of the necessity of advance payment before the information will be released.

Please note that if an association fails or refuses to record an open records policy, any owner who requests the information subject to disclosure will not be liable for any costs incurred by the association for the compilation, production or reproduction of the requested records.[26] Open records requests can be time consuming and burdensome for associations. Moreover, open records requests can be quite extensive. If an association does not have a recorded policy in place, it will ultimately be obligated to produce and provide the requested information for free which can represent a substantial expense.

Practice Tip: It is often assumed by the owner or association that the association must produce exactly what the owner has requested. To the extent a document does not exist, there is no obligation to create it.

3. Records Retention Policy

Pursuant to the requirements discussed above regarding open records, single family homeowner associations composed of more than 14 lots are required to adopt and record a records retention policy. [27] This policy prescribes the documents that must be retained by an association and the required retention periods for each type of record. At the very least, the policy must include the following information:

1) certificates of formation, bylaws, restrictive covenants, and all amendments to the certificates of formation, bylaws, and covenants shall be retained permanently;
2) financial books and records shall be retained for seven years;
3) account records of current owners shall be retained for five years;
4) contracts with a term of one year or more shall be retained for four years after the expiration of the contract term;
5) minutes of meetings of the owners and the board shall be retained for seven years; and
6) tax returns and audit records shall be retained for seven years.[28]

Of course, the information above is the bare minimum of what must be included in the policy, and it is prudent to provide an exhaustive list in order to be thorough and avoid any confusion or disagreement in the future concerning record retention. Additional items that should be considered are other dedicatory instruments of an association (such as any rules, guidelines and policies), insurance policies and claims, reserve studies, legal opinions and any files related to previous law suits. A provision regarding the destruction of documents is also recommended and should provide the rules and procedures for the disposal of documents retained past the required retention period. Remember, each association is unique, so each records retention policy should be tailored to fit the needs of the association at issue.

4. Payment Plan Policy

A property owners association that contains more than 14 lots is obligated to adopt and record an "alternative payment schedule" under Texas law that allows an owner to submit partial payments for any assessments or other charges that are due and owing on

[24] *Id*. at §209.005(f)
[25] *Id*. at §209.005(k)
[26] *Id*. at §209.005(i)
[27] *Id*. at §209.005(m)
[28] *Id*. at §209.005(m)(1-6)

the owner's account.[29] This policy is customarily referred to as a "payment plan policy". Under this policy, an owner may pay installments to meet his/her financial obligations under the restrictions without being charged monetary penalties, such as late fees or fines.[30]

The payment plan established under the policy must be a minimum of 3 months, but an association is not required to permit an owner to enter into a plan that is beyond 18 months.[31] The maximum number of months for a payment plan is ultimately at the discretion of the board; however, it is suggested that the board provide a cap in the policy (e.g. 6 months). The policy should explain the terms that will be included in a payment plan agreement, such as the total amount to be paid, the term, due dates and the address to which payments should be sent. If the board desires, a grace period provision may also be included in the policy. Typically, a grace period for a delinquent installment is 3-5 days. Of course, default is commonplace with payment plan agreements and a well-drafted payment plan policy will include terms regarding nonpayment of the debt. Additionally, the term "monetary penalties" under the statute does not include administrative costs or interest, so it is wise to mention these costs and amounts in the policy to provide notice to owners that such charges will still accrue after a plan has been executed.[32]

It is important to note that an association is not required to provide a payment plan agreement to an owner who has defaulted on a previous payment plan, and two years has not passed since said default.[33] An association is not obligated to offer a payment plan agreement to a delinquent owner more than once in a twelve month timeframe.[34] Furthermore, if an owner is in default under a payment plan, any payment received by an association will not have to be applied in accordance with Section 209.0063 of the Texas Property Code titled "Priority of Payments."[35] In other words, any payment received by an association after default does not have to be applied first to delinquent assessments, but may be applied to other charges, such as attorney's fees or costs; however, fines may not be given priority over any other charge.[36] These directives should also be embodied in the payment plan policy.

B. Recommendations

After reviewing the text of Chapter 209 of the Texas Property Code, you will notice that there are many concepts that are emphasized throughout the provisions. Some notable reoccurrences are the levying and collection of assessments, the enforcement of deed restrictions, and fines. Although not required under Texas statute, it is highly recommended that an association implement policies addressing these subjects in order to clarify the language provided under Chapter 209 and inform owners of the association's intention to enforce the restrictions encumbering the land and/or collect assessments. Moreover, these policies provide guides for the association to follow in case any future delinquency, violation or other infraction happens to occur.

1. Collection Policy

A collection policy is generally implemented to provide detailed standards for an association's collection process with a focus on assessment delinquency. Before drafting a collection policy, it is necessary to review the association's declaration to determine: 1) whether an association charges annual, biannual, quarterly or monthly assessments; 2) the due date for the assessments; 3) the interest rate for delinquent assessments and when interest begins to accumulate; and 4) whether the association has the authority to levy late charges for any unpaid assessments and costs, including attorney's fees and expenses. Note that statutory authority to levy late charges is only provided under Chapter 204 of the Texas Property Code which, as of the date of this paper, only applies to Harris and Montgomery County.[37] Consequently, if an association is not located wholly or partially in these counties, the association's declaration or bylaws must provide authority to levy late charges. If the declaration and bylaws are silent on this issue, then the association may not have the power to levy such fees.

Ideally, a well drafted collection policy will include all of the information stated above. In addition, the policy should describe the procedure the association will use when an owner fails or refuses to pay assessments. Typically, this entails language regarding an initial and final notice to be sent to the owner before proceeding with collection efforts and a

[29] *Id*. at §209.0062(a) & (d)
[30] *Id*. at §209.0062(a)
[31] *Id*. at §209.0062(b) & (c)
[32] *Id*. at §209.0062(a)
[33] *Id*. at §209.0062(c)
[34] *Id*.
[35] *Id*. at §209.0063(b)(1)
[36] *Id*. at §209.0063(b)(2)
[37] *Id*. at §204.010(10); §204.002(a)(1-3)

provision discussing possible attorney referral as the final course of action. If the association is required to offer a payment plan pursuant to Section 209.0062 (the association consists of more than 14 lots), language concerning an alternative payment schedule and partial payments should be included as well.

Other important provisions that may be considered are terms concerning dishonored checks and potential costs related to same, and the members' mailing addresses. Oftentimes, owners will dispute charges and complain that they never received notice due to the association's alleged failure to send correspondence to the owner's mailing address. By adding a provision regarding owners' mailing addresses, owners will be informed that they have a duty to update a mailing address and that the association is not responsible for locating an absentee owner. The owner's property address in the community will be deemed the owner's mailing address for association purposes unless otherwise notified in writing by the owner. If a dispute should arise regarding notice as described above, the association will be able to direct the owner to the collection policy to review the community's position concerning mailing addresses.

2. Deed Restriction Enforcement Policy

One reason associations are formed is for the purpose of maintaining the common areas of a community and enforcing the terms of the declaration. In order to effectuate this purpose, associations are provided with the authority to enforce deed restrictions in order to preserve the appearance and value of the property and the homes. Thus, deed restriction enforcement policies are excellent tools to provide owners with a better understanding of the process of deed restriction enforcement.

These policies are often short (2-3 pages in length) and provide a step-by-step approach to enforcement of the applicable restrictions encumbering the property at issue. This typically involves a courtesy letter notifying an owner of a violation and a subsequent demand letter if the owner fails to cure the violation within the allotted timeframe. Please note that the demand letter may also be the initial correspondence sent to the owner depending on the severity of the violation.

Before an association may initiate an enforcement action, suspend an owner's rights to use the common areas, and/or levy fines, it must provide an owner with written notice sent by certified mail in accordance with Section 209.006 of the Texas Property Code. The notice must:

1) describe the violation or property damage that is the basis for the suspension action, charge, or fine and state any amount due the association from the owner; and
2) inform the owner that the owner:

   A) is entitled to a reasonable period to cure the violation and avoid the fine or suspension if the violation is of a curable nature and does not pose a threat to public health or safety;
   B) may request a hearing under Section 209.007 on or before the 30th day after the date the notice was mailed to the owner; and
   C) may have special rights or relief related to the enforcement action under federal law, including the Servicemembers Civil Relief Act (50 U.S.C. App. Section 501 et seq.), if the owner is serving on active military duty.[38]

The policy should mention the requirements above and elaborate on the information that will be included in the demand letter pursuant to Section 209.006. In addition, any remedies of the association should be discussed, including reimbursement of attorney's fees and costs incurred by an association in enforcing the restrictions, the right to file suit, and the association's ability to record a Notice of Dedicatory Instrument Violation in the real property records. Pursuant to Section 202.004(c) of the Texas Property Code, a court may also assess civil damages for a deed restriction violation in an amount not to exceed $200 for each day the violation persists, and it is prudent to add language regarding same in the policy.[39] Please note that Texas case law has indicated that the civil damages under Section 202.004(c) are punitive, and evidence of actual harm is not required for a court to award these penalties.[40]

Oftentimes, deed restriction enforcement policies will address fines as well, and may contain a schedule of fines or other arrangement detailing specific violations and the fines associated therewith. Take this into consideration when drafting this particular policy; however, note that a fining policy may be a better alternative.

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[38] *Id*. at §209.006(b)
[39] *Id*. at §202.004(c)
[40] *Uptegraph v. Sandalwood Civic Club*, No. 01-07-00764-CV, 2010 WL 457468 (Tex.App. —Houston [1st Dist.] 2010, no pet.)

Practice tip: It is also recommended that the notice required under Section 209.006 regarding enforcement actions be sent via regular mail and, if urgent, via courier as well.

3. Fining Policy

Fines are often a point of contention with owners, so it is beneficial for associations to provide information regarding these charges and guidance on what actions are not tolerated in a community. Although other policies may briefly address fines and fining authority, it is advantageous to have a separate policy addressing these charges in order for owners to better understand the reasons behind a particular fine and reaffirm the association's authority to charge fines to an owner's account.

Before proceeding with drafting a fining policy, it is necessary to confirm that an association possesses the power to levy fines. Single family homeowner associations do not have statutory fining authority, unlike condominiums. Therefore, fining authority must be found in the association's declaration or bylaws, or the association will be unable to charge fines. Customarily, key words such as "fines", "penalties" or "special charges" will trigger the authority to fine; however, be sure to pay attention to the context of the language. For example, if an association can charge "penalties for delinquent assessments," this language will likely be insufficient for deed restriction violation fines. In other words, the association would only be able to levy fines for an owner's failure to pay assessments, not for compliance violations.

A standard fining policy will begin by reciting an association's authority to levy fines and referencing the applicable provisions from either the declaration or bylaws for support. Thereafter, it is prudent to state that the fining policy supersedes any previous fining policies adopted by an association to ensure the current policy takes priority. Next, discuss the following types of violations provided under the Texas Property Code:

Uncurable

1. Shooting fireworks;
2. An act constituting a threat to health or safety;
3. A noise violation that is not ongoing;
4. Property damage, including the removal or alteration of landscape; and
5. Holding a garage sale or other event prohibited by a dedicatory instrument.[41]

Curable

1. A parking violation;
2. A maintenance violation;
3. The failure to construct improvements or modifications in accordance with approved plans and specifications; and
4. An ongoing noise violation such as a barking dog.[42]

There are two separate processes for each type of violation (curable and uncurable) that should be established in the policy. Curable violations are typically addressed with a courtesy letter followed by a violation letter. The violation letter should include a description of the violation, the required remedial action, a deadline to correct the violation, and language explaining that a fine may be levied if the owner fails to comply. If remedial action is not taken, it will be necessary to send a formal demand letter that meets the requirements of Section 209.006 of the Texas Property Code as previously discussed, including information concerning an owner's right to a hearing.[43]

Uncurable violations are infractions that are not continuous and are incapable of being corrected by affirmative action.[44] Uncurable violations may also be infractions that affect the safety and health of another owner.[45]As a consequence, a courtesy letter is typically not afforded to owners for these types of violations. A demand letter pursuant to Section 209.006 of the Texas Property Code is the appropriate initial course of action and it may contain cease and desist language if necessary. The policy should reflect this process and list the requisite contents of the demand letter, including information regarding an owner's right to a hearing and the procedure for same. Please note that, if an owner has been provided with a statutorily compliant notice regarding a violation (curable or uncurable) in the preceding six month period, notice will not be required as set forth under Section 209.006 for the recurrence of the same or similar infraction.[46]

Fining policies may also contain a fine schedule or other similar exhibit providing details on specific violations and fines. For example, an owner's failure to mow a lawn and maintain the appearance of a lot may result in a penalty of $25.00. Subsequent violations that are similar or substantially similar may result in a

[41] *Id*. at §209.006(h)

[42] *Id*. at §209.006(i)
[43] *Id*. at §209.006(b)
[44] *Id*. at §209.006(g)
[45] *Id*. at §209.006(f); §209.006(h)(2)
[46] *Id*. at §209.006(d)

higher fine or a fine may accrue each day a violation continues. However, under Texas law, fines must be reasonable. Always keep this in mind when drafting a fining policy to ensure an association doesn't levy fines that will later be condemned.

Drafting Tip: All recommended policies above should contain a provision or language explaining that the association does not a have a duty to enforce any of the provisions listed in the documents. The association should be provided the right, but not the obligation, to review each matter on a case-by-case basis and determine the best course of action for each specific matter.

C. Miscellaneous Policies/Guidelines for Single Family Homeowner Associations

Briefly, keep in mind that there are a plethora of policies for single family homeowner associations commonly utilized in the industry. Such policies may address a wide range of issues, such as code of conduct, owner forums, hearing policies, amenity rentals, holiday decorations, parking/towing, playground equipment, investment policies, pool rules, etc. If an association wishes to adopt a particular policy, an attorney should perform due diligence before proceeding and ensure the board has the power to establish and enforce the policy and that no conflict exists with the other dedicatory instruments or law. For example, parking and towing issues are a common concern of associations; however, many associations do not have control of the streets and thus cannot enforce rules regarding same. In many cases, the streets will be dedicated to the public and controlled by a municipality, so the association's authority will not extend to these areas. Ideally, before an attorney begins drafting a parking/towing enforcement policy, it should be confirmed that the community is gated, the streets have been dedicated as private per the applicable plat, and the dedicatory instruments indicate the association possesses parking/towing authority. In sum, there is no room for assumptions and any policy, whether it is prescribed by statute or simply recommended, requires careful research and consideration before initiating the drafting process.

III. CHAPTER 202 OF THE TEXAS PROPERTY CODE (*SINGLE FAMILY AND CONDOMINIUMS*)

Chapter 202 of the Texas Property Code, titled "Construction and Enforcement of Restrictive Covenants," sets forth a variety of regulations pertaining to controversial issues regarding property owner associations and restrictive covenants. The chapter discusses sensitive issues such as eco-friendly landscaping, religious items, and state/military flag displays. Moreover, the chapter prohibits certain restrictive covenants and voids any provision in a dedicatory instrument that is in violation of the code.[47] Unlike Chapter 209, Chapter 202 applies to both incorporated or unincorporated single family homeowner associations and condominium associations.[48]

A. Recommendations

In order to manage the rules and regulations established under Chapter 202 and inform owners of same, it is advisable for associations to adopt a handful of policies, all of which are described below. These policies are not required, but prove beneficial considering the likelihood that a dispute will arise concerning the subjects set forth in Chapter 202.

1. Rain Barrels and Rain Harvesting Systems

Section 202.007 provides that an association may not implement and enforce a restrictive covenant that prohibits or restricts the installation of rain barrels or rainwater harvesting systems.[49] However, the section further states that an association is not required to authorize a rain barrel or rainwater harvesting system to be placed on a lot in particular circumstances.[50] For instance, an association does not have to permit the system if the property at issue is owned by the association, considered a common area, or located between the front of an owner's lot and the street.[51] Moreover, an association can prohibit the system if its color contrasts with the color of an owner's home or contains language or other content that is different than what is normally included on the system as it is originally made.[52]

Additionally, associations may restrict the size, type, materials, and shielding of rain water systems if the restriction does not prevent economical installation and there is a reasonable amount of room on an owner's lot in which to place the device.[53] Importantly, associations may encourage owners to submit detailed plans or applications to an architectural control committee to confirm statutory compliance before installing the rainwater barrel or system. Of course, the policy should embody the substance above and follow the criteria set forth under Section 202.007.

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[47] *Id*. at §202.007
[48] *Id*. at §202.001(2)
[49] *Id*. at §202.007(a)(2)
[50] *Id*. at §202.007(d)(6)
[51] *Id*. at §202.007(d)(6)(A)(i-iii)
[52] *Id*. at §202.007(d)(6)(B)(i-ii)
[53] *Id*. at §202.007(d)(7)(A-B)

Please note that Section 202.007 does not apply to an association that: 1) is situated in a municipality that has a population greater than 175,000 that is situated in a county in which a separate municipality with a population greater than one million is principally located; and 2) governs property in which at least 4,000 acres are subject to a covenant restricting the property to commercial use, multifamily units (e.g. apartment complexes), or open space.[54]

2. Solar Energy Devices

An association is prohibited from adopting and enforcing a restriction that bans or restricts the installation of solar energy devices.[55] The term "solar energy device" is defined as a "system or series of mechanisms designed primarily to provide heating or cooling or to produce electrical or mechanical power by collecting and transferring solar-generated energy".[56] The term also includes a "mechanical or chemical device that has the ability to store solar-generated energy for use in heating or cooling or in the production of power."[57] However, associations may prohibit a solar energy device in a limited number of circumstances. For example, solar energy devices may be prohibited or restricted if a court has determined the device is illegal or threatens the welfare of the public, it is located on property owned by an association or considered a common area, or violates the various size and location requirements set forth under the statute.[58] When drafting a policy regarding solar energy devices, the provisions of Section 202.010 should be carefully reviewed and observed. Other items that should be considered are devices mounted on a roof, visibility requirements, and installation and warranty.[59] Pursuant to the statute, a solar energy device may be prohibited if its installation would void the material warranty, and the policy should clearly reflect this concept.[60]

Again, the policy should also state that the prior approval of the architectural control committee is required before a device is installed; however, note that approval may not be withheld if the requirements of the statute are met.[61] Even if the device abides by the statutory requirements, the architectural control committee may still prohibit the device if it is established in writing that the device creates an annoyance or disturbance to other owners with "ordinary sensibilities."[62] Regardless, if all surrounding property owners provide written approval of the device, it will establish prima facie evidence that a disturbance or annoyance does not exist[63]

3. Storm and Energy Efficient Shingles

An association may not prohibit or restrict an owner from installing specific roof shingles if the shingles are designed to be hail or wind resistant, supply greater heating and cooling abilities than standard roof shingles, or have solar generation capabilities.[64] The shingles must also resemble other roof shingles used in the development, provide the same or greater durability as other roof shingles used in the development, and correspond with the overall aesthetics of the surrounding homes.[65]

The terms of the policy should inform owners of the details under Chapter 202 regarding storm and energy efficient shingles. The chapter essentially provides the bulk of the information that needs to be included in the policy, as described above. The only additional provision that is truly necessary concerns the prior approval of the architectural control committee. By urging owners to receive prior approval, owners may avoid the risk of having to uninstall roofing shingles due to a violation of Chapter 202 or the association's restrictions.

Drafting Tip: Guidelines regarding rain barrels, rain harvesting systems, solar energy devices and storm and energy efficient shingles are typically grouped into one single policy for efficiency purposes.

4. Flag Displays

An association may not restrict or prohibit an owner from displaying a U.S. flag, a Texas flag, or U.S. military flag for any of the branches of the armed forces.[66] However, associations may enforce certain regulations pertaining to the display of flags. According to Section 202.012 of the Texas Property Code, an association may require the U.S. flag to be displayed pursuant to the rules of 4 U.S.C. Sections 5-10 concerning the time, occasion, position and manner for displaying the U.S. flag, respect for the flag, and

[54] *Id*. at §202.007(e)(1-2)
[55] *Id*. at §202.010(b)
[56] *Id*. at §202.010(a)(2); TEX. TAX CODE §171.107(a)
[57] TEX. PROP. CODE §202.010(a)(2); TEX. TAX CODE §171.107(a)
[58] *See* TEX. PROP. CODE §202.010(d)(1-8)
[59] *See Id*.
[60] *Id*. at §202.010(d)(7)
[61] *See Id.* at §202.010(e)
[62] *Id*.
[63] *Id*.
[64] *Id*. at §202.011(1)(A-C)
[65] *Id*. at §202.011(2)(A-C)
[66] *Id*. at §202.012(a)(1-3)

hoisting, lowering and passing the U.S. flag.[67] Furthermore, an association may ensure a Texas flag is displayed in accordance with Chapter 3100 of the Texas Government Code, concerning the appropriate procedures for displaying a Texas flag in particular scenarios.[68] A flag attached to a dwelling may be required to be constructed of permanent, long-lasting materials that are compatible with the dwelling or structure, and a flag displayed on a flagpole (as well as the flagpole itself) may be required to be well-maintained and repaired/replaced if necessary.[69] Any display of a flag, or position or construction of its flagpole, may be required to abide by applicable zoning laws, easements and/or setbacks, if any.[70]

Additional restrictions that are permitted under Section 202.012 are restrictions that: 1) regulate the size, location and number of flagpoles on a property (except the restriction may not prevent installation or construction of at least one flag pole per lot that: A. is no more than 20 ft in height and placed in the front yard of a lot; or B. is attached to any part of a residential building that is neither owned or maintained by an association); 2) regulate the size of the flag; 3) regulate the size, placement and strength of any lights that may be used to exhibit a flag; 4) reasonably diminish any noise that may be produced from a halyard; and 5) prohibit an owner from erecting a flagpole or displaying a flag on any common areas or property owned by an association in a development.[71] If an owner has a front yard and complies with the restrictions permitted under Chapter 202, then he/she may elect to install a flagpole in accordance with the applicable provisions of the statute.[72]

All of the provisions above should be set forth in the policy and stay within the limitations provided under Section 202.012. Flagpoles should also be subject to architectural control committee approval. Generally, mounted flagpoles will not require approval if the terms of the policy and statute are met; however, freestanding flagpoles should require an application showing the flagpoles proposed location, material, and color.

5. Religious Items

Naturally, the display of religious items is always a point of contention for associations and owners. Any regulations pertaining to religious items may appear to an owner as a suppression of individual beliefs or rights and, of course, is often portrayed in a negative light. Luckily, Texas law supports the regulation of religious items to a certain extent and provides associations with specific criterion in which to base its rules and policies.

An association is not permitted to enforce or adopt a restriction that prohibits an owner from displaying one or more religious items on the entry of the owner's home; however, any religious item displayed must be based on the owner's "sincere religious belief."[73] In other words, the display of items should be motivated by an owner's genuine spirituality or faith. An association may prohibit the display of certain religious items on the entry of an owner's home if the item: 1) threatens the safety or welfare of the public; 2) violates the law; 3) contains content that is clearly offensive to others; 4) is placed in a location other than the entry door or door frame or extends beyond the boundaries of the door frame of the owner's home; or 5) is displayed on the entry door or door frame and has a total size that is larger than 25 square inches (it can be one item or a combination of items).[74]

Importantly, an association is authorized to remove a religious item that is displayed in violation of a restriction that is sanctioned under Section 202.018.[75] It is recommended that a policy regulating the display of religious items specifically mention this power to provide notice to owners and avoid any offense or outrage in the future. Again, the display of religious items is a delicate matter in communities and policies regulating religious items in accordance with state law provide direction and guidance in case a dispute should arise.

6. Drought Resistant Landscapes and Water Conserving Natural Turf

Pursuant to Section 202.007 of the Texas Property Code, an association may not enforce or restrict an owner from applying water-conserving natural turf or drought-resistant landscaping, also known as xeriscaping, subject to certain conditions.[76] An association may enforce restrictions that regulate the type of turf installed by an owner to promote or

[67] *Id*. at §202.012(b)(1)(A); *See* 4 U.S.C. § 5-10 (2007).
[68] TEX. PROP. CODE §202.012(b)(1)(B); *See* TEX. GOV. CODE Ch. 3100.
[69] TEX. PROP. CODE §202.012(b)(1)(C)&(E)
[70] *Id*. at §202.012(b)(1)(D)
[71] *Id*. at §202.012(b)(2-6)
[72] *Id*. at §202.012(c); *See Id*. at §202.012(b)(2)(A-B).
[73] *Id*. at §202.018(a)
[74] *Id*. at §202.018(b)(1-5)
[75] *Id*. at §202.018(d)
[76] *Id*. at §202.007(a)(4)

necessitate turf that is water-conserving.[77] Further, an association may enforce a restriction that regulates the installation of cacti, rocks or gravel, and regulates lot maintenance if the restriction does not hinder or bar turf or landscaping intended to promote water conservation.[78] Owners may also be required to submit information or plans to an association and obtain prior approval before installing drought-resistant landscaping or water-conserving natural turf to ensure the landscaping is harmonious with surrounding terrain.[79] To the extent that approval is necessary, an association may not unreasonably withhold or deny consent of an owner's proposal to install drought-resistant landscaping or water-conserving natural turf.[80]

Guidelines may be established to reflect the statutory language above and regulate xeriscaping in a subdivision or condominium. The guidelines may also address any general requirements the association wishes to implement, such as limiting front yards to natural green turf or limiting deviations approved by the architectural control committee to granite, hardwood, or mulch. It is also recommended that the guidelines or policy specify that all xeriscaping is subject to the same requirements as other landscaping under the declaration. For example, declarations will typically require landscaping to be maintained and retain an attractive appearance at all times.

As previously mentioned, Section 202.007 does not apply to an association that: 1) is situated in a municipality that has a population greater than 175,000 that is situated in a county in which a separate municipality with a population greater than one million is principally located; and 2) governs property in which at least 4,000 acres are subject to a covenant restricting the property to commercial use, multifamily units (e.g. apartment complexes), or open space.[81]

7. Standby Electric Generators

An association may not enforce or implement a restriction that prohibits or limits, or has the effect of prohibiting or limiting an owner from possessing, operating, installing or maintaining a standby electric generator that is permanently installed on the owner's lot, except as provided by Section 202.019.[82] This provision allows an association to enforce and implement the following restrictions in a dedicatory instrument regarding standby electric generators:

1) a dedicatory instrument provision that requires a standby electric generator to be installed and maintained in compliance with:

   A) the manufacturer's specifications; and
   B) applicable governmental health, safety, electrical, and building codes;

2) a dedicatory instrument provision that requires all electrical, plumbing, and fuel line connections to be installed only by licensed contractors;
3) a dedicatory instrument provision that requires all electrical connections to be installed in accordance with applicable governmental health, safety, electrical, and building codes;
4) a dedicatory instrument provision that requires all natural gas, diesel fuel, biodiesel fuel, or hydrogen fuel line connections to be installed in accordance with applicable governmental health, safety, electrical, and building codes;
5) a dedicatory instrument provision that requires all liquefied petroleum gas fuel line connections to be installed in accordance with rules and standards promulgated and adopted by the Railroad Commission of Texas and other applicable governmental health, safety, electrical, and building codes;
6) a dedicatory instrument provision that requires nonintegral standby electric generator fuel tanks to be installed and maintained to comply with applicable municipal zoning ordinances and governmental health, safety, electrical, and building codes;
7) a dedicatory instrument provision that requires the standby electric generator and its electrical lines and fuel lines to be maintained in good condition;
8) a dedicatory instrument provision that requires the repair, replacement, or removal of any deteriorated or unsafe component of a standby electric generator, including electrical or fuel lines;
9) a dedicatory instrument provision that requires an owner to screen a standby electric generator if the standby electric generator is:

   A) visible from the street faced by the dwelling;

[77] *Id*. at §202.007(c)
[78] *Id*. at §202.007(d)(4-5)
[79] *Id*. at §202.007(d)(8)
[80] *Id*. at §202.007(d-1)
[81] *Id*. at §202.007(e)(1-2)
[82] *Id*. at §202.019(b)

B) located in an unfenced side or rear yard of a residence and is visible either from an adjoining residence or from adjoining property owned by the property owners' association; or
C) located in a side or rear yard fenced by a wrought iron or residential aluminum fence and is visible through the fence either from an adjoining residence or from adjoining property owned by the property owners' association;

10) a dedicatory instrument provision that sets reasonable times, consistent with the manufacturer's recommendations, for the periodic testing of a standby electric generator;
11) a dedicatory instrument provision that prohibits the use of a standby electric generator to generate all or substantially all of the electrical power to a residence, except when utility-generated electrical power to the residence is not available or is intermittent due to causes other than nonpayment for utility service to the residence;
12) a dedicatory instrument provision that regulates the location of the standby electric generator; or
13) a dedicatory instrument provision that prohibits an owner from locating a standby electric generator on property:

A) owned or maintained by the property owners' association; or
B) owned in common by the property owners' association members.[83]

Accordingly, the guidelines or policy regarding standby electric generators is typically lengthier than other recommended policies under Chapter 202 since all of the provisions above should be addressed. The provisions within the policy must be reasonably exercised and enforced.[84] If a provision pertains to the location of a standby electric generator, it will be considered null and void if it: 1) increases the installation price by more than 10 percent; or 2) increases the price of installation and connection of essential electrical or fuel lines by more than 20 percent.[85]

Association approval should be mandated in a policy; however, approval cannot be denied if the owner's proposal for a standby electric generator satisfies or surpasses the requirements set forth under the applicable statute.[86] Moreover, if an association requires submission of an application for the installation of a standby electric generator that is to be located outside a residence, the application must be the same as any other application required for a standby electric generator, and cannot demand more details.[87]

IV. CHAPTER 82 OF THE TEXAS PROPERTY CODE *(CONDOMINIUMS)*

Condominium associations are distinct and separate from single family homeowner associations under Texas law. When dealing with a new client, of course, it is fundamental to determine whether or not the association is or is not a condominium. This designation will ultimately determine which chapter of the property code will govern any and all actions moving forward. If the association is indeed a condominium regime, then Chapter 82 of the Texas Property Code will apply depending on the date the declaration was recorded.[88] If an association's declaration was recorded on or after January 1, 1994, the provisions under Chapter 82 will be relevant; however, if the association's declaration was recorded prior to January 1, 1994, Chapter 81 and select retroactive provisions of Chapter 82 of the Texas Property Code will apply.[89] For purposes of this article, we will be focusing on requirements set forth under Chapter 82.[90]

Practice Tip: In order to determine whether a residential development is a condominium regime or single family community, it may be helpful to refer to Appendix C of this article. Note that Chapter 204 of the Texas Property Code mentioned in Appendix C used to

[83] *Id*. at §202.019(c)(1-13)
[84] *Id*. at §202.019(d)
[85] *Id*. at §202.019(e)(1-2)

[86] *Id*. at §202.019(f)
[87] *Id*. at §202.019(g)
[88] *Id.* at §82.002(a)
[89] *Id*.; *Id.* at §81.0011(a) & 82.002(c)
[90] Section 82.002(c) lists a handful of provisions that are applicable to all condominiums, whether the declaration was recorded prior to or after January 1, 1994. The following provisions apply to all condominium associations in Texas: Sections 82.005, 82.006, 82.007, 82.053, 82.054, 82.102(a)(1)-(7), (a)(12)-(21), (f), and (g), 82.108, 82.111, 82.113, 82.114, 82.116, 82.118, 82.157, and 82.161. The definitions under Section 82.003 will apply to a condominium subject to Chapter 81 of the Texas Property Code only if the definitions do not conflict with the association's declaration.

apply to Brazoria County and Galveston County; however, due to increases in the population of each area, these counties no longer fall under Section 204.002(a)(2). As of the date of this article, Chapter 204 only applies to Harris County and Montgomery County.

A. Requirements

Chapter 82 is quite extensive and contains a considerable amount of information regarding condominium associations. This can be both beneficial and troublesome for a community association attorney since it contains an abundance of powers and other attributes not bestowed upon single family homeowner associations, but implements many obligations and requirements as well. In order to comply with the provisions therein, condominium associations must satisfy specific criteria.

1. Management Certificate

Analogous to single family homeowner associations, condominium associations are required to prepare and record a management certificate in each county where the condominium is located.[91] For example, a condominium located in both Harris and Fort Bend County would require the association to record a management certificate in the county records of each region. The certificate must be signed and validated by an officer of the association, and include the following information:

1) the name of the condominium;
2) the name of the association;
3) the location of the condominium;
4) the recording data for the declaration;
5) the mailing address of the association, or the name and mailing address of the person or entity managing the association; and
6) other information the association considers appropriate.[92]

Once the certificate is filed, the county clerk will record the document in the real property records of the applicable county listed as a "Condominium Association Management Certificate."[93] If any subsequent changes occur to the necessary information included in the management certificate, the association is required to amend the certificate within 30 days of receiving notice of the change.[94] Fortunately, the statute does not impose liability on the association for any delay or failure to record a management certificate; however, delay or failure caused by willful conduct or gross negligence may negate the protective provision.[95] It is always recommended that the time limits provided under Chapter 82 of the Texas Property Code are carefully observed.

Note: Section 82.116 is retroactive and applies to all condominiums in Texas.

2. Contents of the Declaration

Briefly, it is important to mention the essential provisions associated with condominium declarations. Section 82.055 mandates that a condominium association include many different items within its declaration.[96] Specifically, a condominium declaration must state:

1) the name of the condominium, which must include the word "condominium" or be followed by the words "a condominium" or a phrase that includes the word "condominium," and the name of the association;
2) the name of each county in which any part of the condominium is located;
3) a legally sufficient description of the real property included in the condominium;
4) a description of the boundaries of each unit created by the declaration, including the unit's identifying number;
5) a statement of the maximum number of units that the declarant reserves the right to create;
6) a description of the limited common elements other than those listed in Sections 82.052(2) and (4);
7) a description of any real property, except real property subject to development rights, that may be allocated subsequently as limited common elements, together with a statement that the property may be so allocated;

[91] *Id*. at §82.116(a)
[92] *Id*. at §82.116(a)(1-6)
[93] *Id*. at §82.116(a-1)
[94] *Id*. at §82.116(b)
[95] *Id*. at §82.116(c)
[96] *See Id*. at §82.055

8) an allocation to each unit of its allocated interests;
9) any restrictions on use, occupancy, or alienation of the units;
10) a description of and the recording data for recorded easements and licenses\appurtenant to or included in the condominium or to which any portion of the condominium is or may become subject by reservation in the declaration;
11) the method of amending the declaration;
12) a plat or plan or the recording data of a plat or plan that has been recorded in the real property or condominium plat records;
13) a statement of the association's obligation under Section 82.111(i) to rebuild or repair any part of the condominium after a casualty or any other disposition of the proceeds of a casualty insurance policy;
14) a description of any development rights and other special declarant rights reserved by the declarant, together with a legally sufficient description of the real property to which each of those rights applies, and a time limit within which each of those rights must be exercised;
15) if any development right may be exercised with respect to different parcels of real property at different times, a statement to that effect, together with:

    A) either a statement fixing the boundaries of those portions and regulating the order in which those portions may be subjected to the exercise of each development right, or a statement that no assurances are made in those regards; and
    B) a statement as to whether, if any development right is exercised in any portion of the real property subject to that development right, that development right must be exercised in all or in any other portion of the remainder of that real property;

16) all matters required by this chapter to be stated in the declaration; and
17) any other matters the declarant considers appropriate.[97]

The declaration is required to be recorded in each county where any part of the condominium is located. [98] The strict requirements under Chapter 82 generally make condominium association declarations lengthier and more complex than single family homeowner association declarations. It is important to note that the requirements and provisions set forth under Chapter 82 may not be varied or altered by any agreement.[99] Furthermore, any rights granted to a party in accordance with the statute may not be waived.[100] Thus, the contents of the declaration must always include the information above.

Note: Section 82.055, 82.051 and 82.004 are not retroactive, meaning the provisions do not apply to condominiums subject to Chapter 81 of the Texas Property Code.[101]

3. Bylaws

Since condominium associations are required to be incorporated in accordance with Section 82.101, bylaws must be adopted to provide for the administration and operation of the condominium regime.[102] A condominium association's bylaws must contain the following:

1) the number of members on the board and the titles of the officers of the association;
2) election by the board of a president, treasurer, secretary, and any other officers the bylaws specify;
3) the qualifications, powers and duties, terms of office, and the manner of electing and removing a board member or officer and filling vacancies;
4) the powers, if any, that the board or an officer may delegate to other persons or to a managing agent;

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[97] *Id*. at §82.055(1-17)
[98] *Id*. at §82.051(a)
[99] *Id*. at §82.004
[100] *Id*.
[101] *Id*. at §82.002(c); Section 81.102 of the Texas Property Code sets forth the declaration requirements for a condominium for which the declaration was recorded prior to January 1, 1994.
[102] *Id*. at §82.106(a)

5) the designation of officers who are authorized to prepare, execute, certify, and record amendments to the declaration on behalf of the association;
6) the method of amending the bylaws; and
7) the manner of notice of meetings of the association.[103]

The bylaws may also address other items and provide information pertaining to matters the association believes is necessary and appropriate.[104] However, such additions are subject to the declaration and should not conflict with any provisions stated therein.[105] If a conflict arises between the terms of the declaration and bylaws, the declaration will always prevail unless the provision is contrary to the language of Chapter 82.[106]

Note: Section 82.106 is not retroactive, meaning it does not apply to condominiums subject to Chapter 81 of the Texas Property Code. However, Section 82.053 is retroactive and applies to all condominiums in Texas.

B. Recommendations

Condominium regimes are unique and have distinct needs in order to function properly. Accordingly, specific policies and guidelines are incredibly useful in order to run the day-to-day operations of a condominium. These policies are not required under Texas law; however, each one is highly recommended and plays a crucial role in the management and operation of a condominium. Due to the nature and structure of a condominium regime, the documents mentioned below are generally only associated with condominiums, not single family subdivisions.

1. Insurance Deductible Policy

Section 82.111 requires a condominium association to obtain both property insurance and commercial general liability insurance covering the common elements and occurrences associated therewith, such as death, bodily harm and property damage.[107] Additionally, the section addresses liability for the costs of repair to the units and common elements in particular situations. For instance, if the cost to repair a unit or common element that is included in the association's insurance policy is less than the relevant deductible, the party who would be considered responsible in the absence of insurance is liable for the repair costs.[108] On the other hand, if the cost to repair a unit or common element is higher than the relevant deductible, the statute provides that the dedicatory instruments will govern liability.[109] However, if the dedicatory instruments do not provide any guidance, the association is authorized to adopt a resolution to assign the costs of repair.[110]

The resolution or policy, known as an insurance deductible policy, will typically address two major categories: deductibles and claim procedures. The deductible provisions should clearly set out which party will be responsible for particular areas of the condominium in certain situations. For example, if damage covered by an association's policy is caused by an act or omission of an owner, tenant or guest, the owner may be held responsible for the total amount of the deductible on the association's insurance policy, as well as all other expenses that exceed the insurance proceeds. Moreover, the provisions may state that an owner is responsible for the total deductible if the damage arises from an owner's unit. Again, the main objective of this policy is to plainly distinguish which party will be held accountable for the costs of repair.

The claim procedures will simply state the "who, what, when, and where" of submitting claims in the event an owner or tenant suffers damage to a unit and is insured for the loss. In short, an owner should file a claim for the loss under their own insurance policy and, if appropriate, file a claim with the association's managing agent.

Note: Section 82.111 is retroactive and applies to all condominiums in Texas.

2. Application of Payments Policy

Chapter 209 concerning single family homeowner associations imposes restrictions on how payments shall be applied to delinquent assessments and other charges.[111] Any payment received by a single family homeowner association must be first applied in the order provided under Section 209.0063 (i.e. 1. delinquent assessments; 2. current assessments; 3. attorney's fees or third party costs related to collection of assessments, etc.)[112] However, there are no statutory

[103] *Id*. at §82.106(a)(1-7)
[104] *Id*. at §82.106(b)
[105] *Id*.
[106] *Id*. at §82.053(c)
[107] *Id.* at §82.111(a)(1-2)
[108] *Id*. at §82.111(j)
[109] *Id*. at §82.111(k)
[110] *Id.*
[111] *Id.* at §209.0063(a)(1-6)
[112] *Id.*

requirements for the priority of payments under Chapter 82.

According to Section 82.102(a)(13), condominium associations are provided with the power and authority to adopt rules and regulations concerning assessment collection and the application of payments.[113] As a result, condominium associations may develop their own method of applying payments to delinquent charges on an owner's account. Common terms may state that payments will be applied to assessments last to ensure all amounts are paid, not just the outstanding assessments. Alternatively, policies may provide that payments are applied first to the oldest charges on an owner's account.

Application of payments policies are not mandatory, but are sensible considering the benefits. These policies will establish uniform procedures in applying payments and balancing owner's accounts. Moreover, firm rules regarding payments provides owners with notice of the association's accounting practices and will be advantageous should a dispute arise.

Note: Section 82.102(a)(13) is retroactive and applies to all condominiums in Texas.

3. Maintenance Responsibility Matrix

A recurring issue with condominiums is the assignment of responsibilities for both owners and the association under the dedicatory instruments. Sometimes, declarations are very clear and the association's and owners' duties are easily identifiable. Unfortunately, many times it is the opposite and the governing documents lack guidance when issues arise concerning the parties' obligations and liability for same. Thus, it may be necessary to clarify the owners' and association's responsibilities by adopting a maintenance responsibility matrix and recording it in the real property records of the county where the property is situated.

These policies require an extensive review of all the association's governing documents, including the declaration, bylaws and rules (if any), and any applicable Texas statutes. If an association's dedicatory instruments lack guidance, Chapter 82 contains many provisions that may supplement the missing information. The following sections may be helpful: 82.052, 82.107, and 82.117.[114]

In basic terms, the association is generally responsible for the common elements and the owners are responsible for the units; however, the matrix does not have to simply address maintenance responsibilities. The document may also include insurance obligations, liability for guests, tenants or pets, and other information the association believes is necessary and appropriate.

Note: Section 82.052, 82.107 and 82.117 are not retroactive, meaning the provisions do not apply to condominiums subject to Chapter 81 of the Texas Property Code.

4. Miscellaneous Policies/Guidelines for Condominium Associations

Other notable policies and guidelines specifically tailored for condominiums include move-in/move out policies, pet registration/regulations, interior modifications and floor surface regulations, and balcony/terrace guidelines. Move-in/move out policies implement appropriate procedures for residents to follow when moving items in and out of the condominium. This protects the property from damage and typically expedites the moving process. Condominiums typically permit pets so it is important to establish clear guidelines regulating same. These guidelines may address factors such as breed, weight, and size, and should indicate that owners are fully responsible for the actions of their pets. Disturbances are common in condominiums, especially noise produced from upstairs neighbors. Accordingly, condominium associations may adopt rules and regulations regarding flooring and other interior items that may reduce noise for other unit owners. For example, carpet generates less noise than hardwood floors, so an association may decide to limit specific types of flooring in specific areas of a unit or prohibit hard floors altogether. Lastly, issues often arise with items and actions on balconies. If applicable, balcony/terrace guidelines may be adopted to regulate the amount or type of items allowed on a balcony or limit noxious activities such as smoking or noise.

Note: Section 82.102(a)(7) (retroactive) provides condominium associations with the ability to adopt and amend rules regulating the use, occupancy, sale, leasing, maintenance, repair, appearance and modification of units and common elements; however, only to the extent the regulated items affect other units in the condominium regime or the common elements.[115]

[113] *Id.* at §82.102(a)(13)
[114] *Id.* at §82.052, §82.107 & §82.117.
[115] *Id.* at §82.102(a)(7)

Practice Tip: Some of the policies required and recommended under Chapter 209 of the Texas Property Code may also be applicable to condominiums. Although not required, condominiums may find collection policies and deed restriction enforcement policies beneficial to the overall management and administration of the condominium.

An open records policy and records retention policy may also be useful to a condominium association considering that Chapter 82 contains similar language to Chapter 209 in regards to the production of records. Section 82.114 requires a condominium association to keep detailed financial records necessary for the preparation of a resale certificate, plans and information regarding the initial construction of the condominium, condominium information statements, names and mailing addresses of each unit owner, voting records and proxies, and minutes of board meetings.[116] Moreover, the financial records and other records of a condominium association are subject to examination by unit owners upon request. [117] Accordingly, an open records policy and record retention policy would establish procedures for such requests and other related matters.

Further, condominium associations may adopt fining policies to implement consistent fining methods and inform owners of same. Note that, unlike single family homeowner associations, condominium associations have statutory authority to levy fines.[118]

V. RESALE CERTIFICATES

Last, we will discuss the necessity of resale certificates and their importance in the community association industry. Resale certificates are a requirement for both single family homeowner associations and condominiums. Essentially, a resale certificate provides a prospective purchaser with information regarding the subdivision or condominium regime which may become their future abode. Importantly, it informs a purchaser of whether the community association managing the subdivision or condominium is financially stable and sound. Furthermore, it provides an overview to a purchaser of their obligations once he/she becomes a member of the association.

A. Single Family Homeowner Associations

Chapter 5 of Texas Property Code explains that a seller of real property must provide a purchaser with specific information prior to transfer of a lot. [119] However, this only applies to a piece of property used for residential purposes, subject to membership in a property owners association, and containing only one unit or residence.[120] Although this obligation appears to extend to the seller of the property, if the purchaser submits a request for a resale certificate to the association or the association's managing agent (which is very common), the association will have the obligation of preparing and delivering the certificate to the purchaser in compliance with Chapter 207 of the Texas Property Code.[121]

Under Chapter 207, an association must deliver a copy of the restrictions, bylaws and rules, and a resale certificate within 10 business days after the request is received (the association must also verify that the requestor has the authority to demand the information).[122] The request may be submitted by an owner, purchaser, title insurance company or a managing agent. [123] The resale certificate must be prepared not earlier than the 60th day before the date it is delivered and is required to include the following information:

1) a statement of any right of first refusal, other than a right of first refusal that is prohibited by statute, and any other restraint contained in the restrictions or restrictive covenants that restricts the owner's right to transfer the owner's property;
2) the frequency and amount of any regular assessments;
3) the amount and purpose of any special assessment that has been approved before and is due after the resale certificate is delivered;
4) the total of all amounts due and unpaid to the property owners' association that are attributable to the owner's property;
5) capital expenditures, if any, approved by the property owners' association for the property owners' association's current fiscal year;
6) the amount of reserves, if any, for capital expenditures;

[116] *Id.* at §82.114(a)(1-6)
[117] *Id.* at §82.114(b)
[118] *Id.* at §82.102(a)(12)

[119] *See Id.* at §5.012
[120] *Id.* at §5.012(a)
[121] *Id.* at §5.012(f)
[122] *Id.* at §207.003(a)
[123] *Id.*

7) the property owners' association's current operating budget and balance sheet;
8) the total of any unsatisfied judgments against the property owners' association;
9) the style and cause number of any pending lawsuit in which the property owners' association is a party, other than a lawsuit relating to unpaid ad valorem taxes of an individual member of the association;
10) a copy of a certificate of insurance showing the property owners' association's property and liability insurance relating to the common areas and common facilities;
11) a description of any conditions on the owner's property that the property owners' association board has actual knowledge are in violation of the restrictions applying to the subdivision or the bylaws or rules of the property owners' association;
12) a summary or copy of notices received by the property owners' association from any governmental authority regarding health or housing code violations existing on the preparation date of the certificate relating to the owner's property or any common areas or common facilities owned or leased by the property owners' association;
13) the amount of any administrative transfer fee charged by the property owners' association for a change of ownership of property in the subdivision;
14) the name, mailing address, and telephone number of the property owners' association's managing agent, if any;
15) a statement indicating whether the restrictions allow foreclosure of a property owners' association's lien on the owner's property for failure to pay assessments; and
16) a statement of all fees associated with the transfer of ownership, including a description of each fee, to whom each fee is paid, and the amount of each fee.[124]

As you can see, resale certificates require a vast amount of information and preparation can be time consuming. Luckily, an association can charge the requestor a fee for the preparation and delivery of the resale certificate and any update as required under the statute, unless the certificate is not properly delivered within the requisite timeframe.[125] If an updated resale certificate is requested, the timeframe is reduced and the association only has seven business days to deliver the resale certificate to the requestor (note that a request for an updated resale certificate can only be submitted by the original requestor and must be made within 180 days of the date the original resale certificate was furnished). [126] An updated resale certificate must contain the following information:

1) if a right of first refusal or other restraint on sale is contained in the restrictions, a statement of whether the property owners' association waives the restraint on sale;
2) the status of any unpaid special assessments, dues, or other payments attributable to the owner's property; and
3) any changes to the information provided in the original resale certificate.[127]

The time frames provided under Chapter 207 must be observed. If an association fails to timely deliver a resale certificate in accordance with the statute, the requestor may submit a second request. [128] If an association fails to comply with a requestor's second demand for the information within 7 business days after the request is received, the association may be subject to liability.[129] Specifically, the association may be subject to a judgment for $500, attorney's fees and court costs, and/or a deduction of the amounts awarded to the requestor from any future assessments, as well as other penalties as provided under Texas law. [130] Furthermore, an owner may provide a buyer with an affidavit stating that the owner, title insurance company or agent submitted two requests to the association for the requisite information and did not receive it in a timely manner.[131] Thereafter, the buyer, lender, title insurance company or its designated agent will not be liable for any unpaid amounts due to the association at the time the affidavit was produced and any other debt or claim of the association that existed before the affidavit was prepared.[132] The association's lien to secure the unpaid amounts due and owing on the property at issue will terminate automatically on the date the affidavit was prepared.[133] Evidently, any

[124] *Id*. at §207.003(b)(1-16); *Id*. at §207.003(a)(3)
[125] *Id.* at §207.003(c) & (c-1)
[126] *Id*. at §207.003(f) & (g)
[127] *Id*. at §207.003(f)(1-3)
[128] *Id*. at §207.004(a)
[129] *Id*. at §207.004(b)
[130] *Id*. at §207.004(b)(1)(A-D)
[131] *Id*. at §207.004(b)(2)
[132] *Id*. at §207.004(c)(1)(A-B)
[133] *Id*. at §207.004(c)(2)

request for a resale certificate should be fulfilled in a timely manner.

B. Condominium Associations

Similarly, Chapter 82 of the Texas Property Code provides that any owner who intends to convey a unit must first supply the purchaser with a copy of the association's declaration, bylaws, rules (if any), and a resale certificate.[134] The association is required to issue the resale certificate, and the document must have been prepared not earlier than 3 months before the date the certificate is provided to the purchaser. [135] The document must include an up-to-date operating budget and provisions regarding the following items:

1) any right of first refusal or other restraint contained in the declaration that restricts the right to transfer a unit;
2) the amount of the periodic common expense assessment and the unpaid common expenses or special assessments currently due and payable from the selling unit owner;
3) other unpaid fees or amounts payable to the association by the selling unit owner;
4) capital expenditures, if any, approved by the association for the next 12 months;
5) the amount of reserves, if any, for capital expenditures and of portions of those reserves designated by the association for a specified project;
6) any unsatisfied judgments against the association;
7) the nature of any pending suits against the association;
8) insurance coverage provided for the benefit of unit owners;
9) whether the board has knowledge that any alterations or improvements to the unit or to the limited common elements assigned to that unit violate the declaration, bylaws, or association rules;
10) whether the board has received notice from a governmental authority concerning violations of health or building codes with respect to the unit, the limited common elements assigned to that unit, or any other portion of the condominium;
11) the remaining term of any leasehold estate that affects the condominium and the provisions governing an extension or renewal of the lease;
12) the name, mailing address, and telephone number of the association's managing agent, if any;
13) the association's current operating budget and balance sheet; and
14) all fees payable to the association or an agent of the association that are associated with the transfer of ownership, including a description of each fee, to whom the fee is paid, and the amount of the fee.[136]

Much like single family homeowner associations, condominium association resale certificates contain a great deal of information and may require much time and effort to complete. Regardless, when drafting a resale certificate, you must ensure that you are thorough and always include accurate information. If a resale certificate does not properly identify the total amount of delinquent charges owed by the seller to the association, the purchaser need not pay any outstanding amounts not included in the certificate.[137] Furthermore, any purchaser, lender or title insurer who depends on the information stated within the resale certificate will not be liable for any amounts the association fails to disclose.[138]

Although Chapter 82 provides a deadline for the association to deliver the resale certificate (within 10 days of receiving the written request), the statute appears to provide that there is no liability for failure or delay of delivery to a seller. [139] Nonetheless, associations should always endeavor to provide the resale certificate containing all the required information in a timely manner as provided by the statute. A finalized resale certificate must be executed and dated by either an officer or agent of the association prior to delivery.[140]

VI. CONCLUSION

Property owners associations have become widespread throughout Texas and will only continue to increase in the future. As a result, the laws, requirements and customs surrounding property owners' associations will become more intricate and demanding each year. Accordingly, it is necessary to

[134] *Id.* at §82.157(a)
[135] *Id.*
[136] *Id.* at §82.157(a)(1-14)
[137] *Id.* at §82.157(c)
[138] *Id.* at §82.157(e)
[139] *Id.* at §82.157(b)
[140] *Id.*

always stay informed and knowledgeable when it comes to the ever-changing legislation and statutes concerning property owners associations. The first step to ensuring an association is secure is to review the applicable chapters of the Texas Property Code and establish statutory compliance. Thereafter, an association and its community may be reinforced by adopting and enforcing the many recommended guidelines and polices that have become standard in the industry.

APPENDIX A
Checklist for Single Family Homeowner Associations

CHECKMARK (✓)	DOCUMENT/ACTION	DATE COMPLETED
	Is the management certificate filed? If so, does the management certificate need to be updated? *Required for single family* (Tex. Prop. Code §209.004)	
	Is there an open records policy filed? *Required for single family* (Tex. Prop. Code §209.005(i))	
	Is there a payment plan policy filed? *Required for single family (composed of more than 14 lots)* (Tex. Prop. Code §209.0062)	
	Is there a record retention policy filed? *Required for single family (composed of more than 14 lots)* (Tex. Prop. Code §209.005(m))	
	Are all dedicatory instruments recorded in the real property records in which the property at issue is located (i.e. certificate of formation, bylaws, rules, guidelines, amendments, etc.)? *Required for all dedicatory instruments* (Tex. Prop. Code §202.006)	
	Is the association an incorporated or unincorporated entity? *Incorporation is highly recommended for single family; however, it is not required by statute.*	
	Is the association in good standing with the Comptroller's office? *Required if incorporated*	
	Is the association in good standing with the Secretary of State? *Required if incorporated*	

	Is the registered agent/address up to date? *Required if incorporated*	
	Does the association have a sales tax and/or franchise tax exemption? *Recommended for single family*	
	Does the association have guidelines relating to rain barrels and rain harvesting systems, solar energy devices, storm and energy efficient shingles, flags, religious items, drought resistant landscaping and water conserving natural turf, and standby electric generators? *Recommended for single family* (Tex. Prop. Code Chapter 202)	
	Is there a collection policy filed? *Recommended for single family*	
	Is there a deed restriction enforcement policy filed? *Recommended for single family*	
	Is there a fining policy filed? *Recommended for single family*	
	Does the association have any miscellaneous guidelines or policies filed (e.g. code of conduct, owner forums, hearing policies, amenity rentals, holiday decorations, parking/towing, playground equipment, investment policies, pool rules, etc.)? *Recommended for single family*	

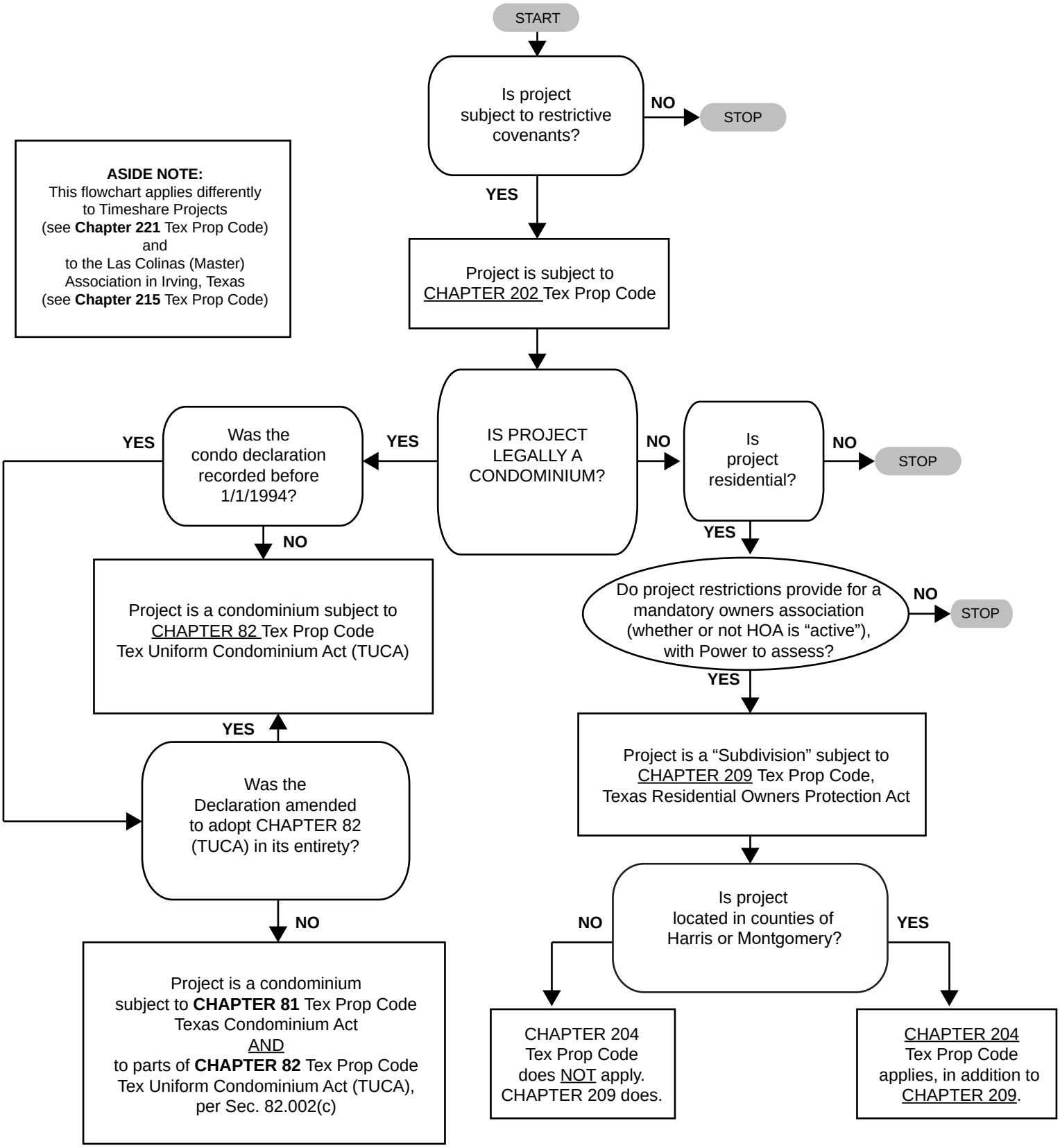
APPENDIX B
Checklist for Condominium Associations

CHECKMARK (✓)	DOCUMENT/ACTION	DATE COMPLETED
	Is the association an incorporated or unincorporated entity? *Required for condominiums subject to Chapter 82 of the Texas Property Code* (Tex. Prop. Code §82.101)	
	Is the association in good standing with the Comptroller's office? *Required for condominiums*	
	Is the association in good standing with the Secretary of State? *Required for condominiums*	
	Is the registered agent/address up to date? *Required for condominiums*	
	Are all dedicatory instruments recorded in the real property records in which the property at issue is located (i.e. certificate of formation, bylaws, rules, guidelines, amendments, etc.)? *Required for all dedicatory instruments* (Tex. Prop. Code §202.006)	
	Is the management certificate filed? If so, does the management certificate need to be updated? *Required for condominiums* (Tex. Prop. Code §82.116)	
	Does the association have a sales tax and/or franchise tax exemption? *Recommended for condominiums*	
	Is there an open records policy filed? *Recommended for condominiums*	
	Is there a record retention policy filed? *Recommended for condominiums*	

	Does the association have guidelines relating to rain barrels and rain harvesting systems, solar energy devices, storm and energy efficient shingles, flags, religious items, drought resistant landscaping and water conserving natural turf, and standby electric generators? *Recommended for condominiums* (Tex. Prop. Code Chapter 202)	
	Is there a collection policy filed? *Recommended for condominiums*	
	Is there a deed restriction enforcement policy filed? *Recommended for condominiums*	
	Is there a fining policy filed? *Recommended for condominiums*	
	Is there an insurance deductible policy filed? *Recommended for condominiums* (Tex. Prop. Code §82.111)	
	Does the association have any miscellaneous guidelines or policies filed (e.g. move in/move out policies, pet registration/regulations, interior modifications and floor surface regulations, balcony/terrace guidelines, etc.)? *Recommended for condominiums*	

FLOWCHART OF PRIMARY HOA STATUTES FOR TEXAS CONDOS & SUBDIVISIONS

(Prepared 2018)



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