

Community Association Newsletter

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Sipra Boyd joins Frank Carroll and Mia Lorick on *Houstonia Magazine's* Top Lawyer List.

We are proud to announce, in addition, to Shareholder Frank Carroll and Associate Mia Lorick, Shareholder Sipra Boyd has also been named a Top Lawyer by *Houstonia Magazine*. You can find all three attorneys listed in the December 2018 edition of the magazine, or by going to <https://www.houstoniamag.com/lawyers/#?page=1>

Clayton Hearn Named to CAI Dallas/Fort Worth Chapter Board of Directors

Clayton Hearn, Managing Shareholder of our Dallas office, has been elected to the Board of Directors of CAI Dallas/Fort Worth chapter for 2019. In his role on the board of directors, Clayton will help oversee every aspect of the chapter from publications, to events and more.

Congratulations Clayton from everyone at RMWBH.



Texas Legislative Watch 2019

By Brady Ortego and Noelle Hicks



The Texas Legislature begins its Regular Session on January 8, 2019. In the coming weeks, RMWBH will be monitoring new bills introduced for the 2019 legislative session to provide updates on any developments affecting the power of community associations to regulate and function independently. The following are legislative issues that, to date, are most notable.

Regulation of certain religious displays.

SB 227, filed on December 11, 2018, seeks to amend Section 202.018 of the Texas Property Code to expand owners' rights to install and include most types of religious displays. There is a limitation, however, in that the association would be entitled to enforce any already existing provisions of its dedicatory instruments. Restrictions include prohibitions against displays that threaten public health or safety, violate a law, or contain offensive language or images. In addition, associations can prohibit religious displays on association-owned property or common areas, having little impact on condominiums. Finally, pursuant to Section 202.009, there is a time restriction imposed wherein associations can restrict religious displays in connection with a holiday that are installed more than 30 days before the start of the "religious event or holiday" and later than 14 days afterward.

SB 227 also lists other prohibited religious displays:

- Displays that contain building components, balloons or lights;
- Displays attached to a traffic control device, a light, or vehicle;
- Displays that include the painting of architectural surfaces;
- Displays that are larger than 3x3x2;
- Displays that violate building lines, right-of-ways, setbacks or easements; or
- Displays that include music, sounds, lights, or are distracting to motorists.

However, the language of the proposed bill suggests that if the religious item will be displayed for 30 days or less, the association cannot restrict the display based upon any of the above requirements.

This bill does not prohibit an owner from affixing a religious display to the entry door or door frame of the residence.

Eliminating distinctions in the application of consent annexation requirements.

On November 14, 2018, HB 347 was introduced to eliminate the distinction between Tier 1 and Tier 2 counties

to unify the annexation process regardless of county size. Previous bills created a distinction between annexation by municipalities in more populated counties versus less populated counties. In order for a Tier 2 county (population of 500,000 or more) to annex additional land, the municipality was required to obtain consent of at least a majority of the property owners in the area to be annexed. Tier 1 counties were still able to utilize involuntary annexation but could petition the residents to approve conversion to a Tier 2 county.

As a result, many Tier 1 counties sought to convert to Tier 2 counties to benefit from the provisions available to Tier 2 counties. However, the process to petition for a ballot measure to convert to a Tier 2 county was difficult. Thus, this bill would eliminate the distinction between the Tiers and all annexations would be administered by the same process.

Carrying, storage or possession of a firearm or firearm ammunition by certain persons on residential or commercial property.

HB 302 seeks to amend Sections 82.002, 82.121, 92.026 and 93.014 of the Texas Property Code to allow lawful possession, carrying, transporting or storing a firearm and its components. Specifically, Section 82.121 would allow lawful possession, carrying, transporting or storing a firearm in a condominium owner’s unit, in a vehicle parked in a space reserved for unit owners and their guests, or in common areas such as those used for entering and exiting the property, unless otherwise prohibited by state or federal law.

In this bill, introduced on November 12, 2018, Section 92.026 of the Texas Property Code would likewise allow the possession of a firearm on lease premises. The suggested amendment permits the lawful possession, carrying, transporting or storing a firearm and its components on a rental unit, vehicle parked in a space reserved for tenants or their guests and in other locations controlled by the landlord such as those used for entering and exiting the property, unless otherwise prohibited by state or federal law. The same amendment is proposed for Section 93.014 of the Texas Property Code, related to commercial tenancies.

Prohibition of housing discrimination on the basis of sexual orientation or gender identity or expression and to the enforcement of that prohibition; providing an administrative penalty; creating a criminal offense.

Finally, although not related to a community association’s power to govern, HB 188, 244 and 254 seek to amend several sections of Chapter 301 of the Texas Property Code related to the Texas Fair Housing Act. Currently, this chapter provides for fair housing practices in the state of Texas and creates a procedure for investigating and settling complaints of discriminatory housing practices. To date, the Act does not include protection for discrimination against individuals for their sexual orientation or gender identity or expression.

The above-referenced bills would amend Chapter 301 of the Texas Property Code to include prohibition of discrimination on the basis of sexual orientation or gender identity or expression, provide provisions for enforcement of that prohibition, impose administrative penalties for violation of these provisions.

The deadline for the unrestricted filing of bills and joint resolutions is March 8, 2019. We will continue tracking the legislative process and provide updates on the status.



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

Noelle Hicks is an associate with the firm’s Real Estate section and is a member of the Community Association Team. She litigates community association deed restriction enforcement and assessment collection throughout the state of Texas. Her practice area also includes, post judgment collections and foreclosure. Noelle graduated from Thurgood Marshall School of Law at Texas Southern University in 2008.



What Property Owners' Associations Need to Know Before Filing a Lawsuit

By Mia Lorick, Clayton Hearn and Frank Carroll



Introduction

Typically, if a property owners' association wants to enforce a deed restriction violation in its community, it has the option, under its governing documents, to file a lawsuit to enforce the applicable restrictive covenants. Similarly, if a homeowner fails to pay her assessments, a property owners' association may have the option to file a collection lawsuit to recover the past due assessments. But recently, the Dallas Court of Appeals issued a decision in *Candle Meadow Homeowners Association v. Jackson*, that details the actions an association is required to take prior to filing a lawsuit: otherwise the association runs the risk of the court dismissing its suit.¹

Candle Meadow Homeowners Association v. Jackson

In the *Candle Meadow* case, the president of a five-person board of directors had suspicions that three former board members “improperly used funds belonging to the HOA” while they were on the board of directors. Based on the suspicions, the board of directors voted and approved the hiring of an attorney to look into the suspicions, with the understanding that the board would consider the attorney’s findings and then decide whether to initiate a lawsuit. However, a year later, despite there being no vote, the board president emailed the attorney and stated that the board of directors voted to “start a lawsuit” against the three former board members. Notably, the other board members were not copied on the board president’s email to the attorney. In April of 2015, the attorney filed suit on behalf of the association against the three former board members. Clayton Hearn with our law firm was retained to represent the three former board members and provide a defense.

After discovery was conducted in the lawsuit, it became even more apparent that despite the board president’s representations that the board of directors voted to initiate the lawsuit, no vote occurred. Specifically, three of the people who were board members at the time the lawsuit was filed testified that while there were discussions about looking into certain allegations, there was never a board of directors vote as to whether to actually file a lawsuit.

Once it became apparent that the board president “approved” the lawsuit without a vote, the three former board members filed a motion to show authority under Texas Rule of Civil Procedure 12. Rule 12 states that any

¹*Candle Meadow Homeowners Association v. Jackson*, 2018 Tex. App. LEXIS 9648, at *1 (Tex. App.—Dallas Nov. 27, 2018).

party in a lawsuit may file a motion stating that he believes the lawsuit is being prosecuted without authority.

A hearing was held on the motion to show authority in which a majority of the then-board of directors testified that there was no open meeting, as required by Chapter 209 of the Texas Property Code, there was no vote regarding the initiation of a lawsuit and there were no meeting minutes reflecting a vote. Based on the testimony and evidence before the court, the motion to show authority was granted and the association's pleadings were stricken: effectively dismissing the lawsuit. The association filed a notice of appeal and the Dallas Court of Appeals considered the issue.

On November 14, 2018, the court of appeals heard oral argument on whether Candle Meadow Homeowners Association had authority to file a lawsuit against the former board members. Mia Lorick and Frank Carroll argued the appeal. The court issued an Opinion on November 27, 2018, finding that there was no such authority to file a lawsuit. In reaching its conclusion the court considered the following:

1. Chapter 22 of the Texas Business Organizations Code

The court looked to statutes governing nonprofit corporations to determine whether a proper board of directors' action was taken when it filed the lawsuit. Section 22.214 of the Texas Business and Organizations Code states that the act of the board of a nonprofit corporation is the act of the majority of the directors present in person or by proxy at a meeting in which quorum is present. The court noted that a corporation's president cannot unilaterally authorize litigation unless such power is expressly delegated to her. And, the court determined that there was no evidence of proper board action or delegation of power to the board's president.

2. Chapter 209 of the Texas Property Code

The court also looked to the Texas Property Code which governs Texas residential property owners' associations. The court held that under section 209.0051(c) the association was required to hold an open meeting with the members of the association prior to initiating a lawsuit. Further, the court held that under section 209.0051(e), the members of the association were entitled to notice of the general subject matter of the meeting, including any matter to be brought up for deliberation in executive session. And, under section 209.0051(d), the court held that meeting minutes, of a vote approving the lawsuit, are required.

Because there was no open meeting, no notice to the members, and no meeting minutes showing that a vote occurred, the court concluded that there was no authority to file a lawsuit.



3. Ratification by Silence

Although the court determined that there was no authority to file a lawsuit, the court next considered whether the board president's actions were ratified by the other members of the board. Said another way, the court considered whether the other board members—through their silence and lack of objection—consented to the lawsuit. The court looked to the fact that the association's attorney sent copies of the court filings and motions to all members of the board and no one asked him to dismiss the lawsuit.

But the court noted that silence and a lack of objection is only sufficient if the board members were made aware of all material facts relating to the lawsuit—they were not. Specifically, there was evidence in the record that board members were attempting to gain more information about the lawsuit from the board president, but she was unresponsive and failed to call them back. Because the other board members were not aware of all material facts related to the lawsuit, the court held that there was no ratification by silence.

Accordingly, the court ruled in favor of the three former board members and found that there was no authority for the association to file suit against them.

Conclusion

This case illustrates the trouble an association may run into if board of directors' acts are not properly documented. If an association is taking an act that is outside its normal course of business—such as filing a lawsuit—then the association must: (1) hold a meeting open to the association's members, (2) properly notice the meeting pursuant to the provisions of the Texas Property Code, (3) include the general subject matter on the agenda for the meeting, (4) conduct a board of directors' vote with quorum present, (5) ensure that the meeting minutes reflect any board action taken during the meeting, and (6) maintain documentation of such board action in the event that the authority to act is called into question.²

While this case is out of the Dallas Court of Appeals, we anticipate it being cited throughout Texas in litigation initiated by property owners' associations. So, make sure all requirements are met, otherwise you run the risk of your lawsuit being dismissed.

²This is not to be construed as legal advice and is merely a summary of the case discussed. Please consult an attorney to assist you or your property owners' association with taking the necessary steps to initiate a lawsuit.



Mia Lorick is an associate with the firm's Litigation and Appellate sections. Her practice focuses on general civil and complex commercial litigation as well as professional liability and labor and employment. Mia graduated from University of Houston Law Center.

Clayton Hearn is the managing Shareholder of the Dallas office. Clayton has extensive litigation and appellate experience in the areas of employment, community associations, non-profit, directors and officers liability, and commercial litigation. He is Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization.



Frank Carroll is a shareholder who practices in the firm's litigation and appellate groups and has represented individuals and corporations in a variety of legal disputes ranging from catastrophic injury to complex commercial litigation. He graduated from University of Houston Law Center.

Upcoming Events

Annual Checklist

Community amenities are not the only parts of the association that require regular maintenance. Even the association as a corporation and its document database require some maintenance or at least inspection. Brady will present RMWBH's annual checklist for both single family and condominiums which allows management to demonstrate the value it brings to the business relationship with the association.

January 16, 2019

**RMWBH Training Room
4630 N Loop 1604 West, Ste. 311
San Antonio, Texas 78249
4:00 p.m. – 6:00 p.m.**

*Appetizers and drinks will be provided

[Register Here >>](#)

Email and Social Media: Is It Helping or Hurting You?

Founding Shareholder Jeffery Roberts and Associate Mia Lorick will be speaking at Sienna Plantation's upcoming winter presentation on using email, social media, and common pitfalls on the internet. Jeff and Mia will be discussing:

- Proper use of the CC and BCC lines
- The danger in forwarding communications
- When you should stop typing and pick up the phone
- What you think is a harmless Facebook post could cost you your job
- And much more

January 10, 2019

**Sienna Plantation Sawmill Lake Club
10323 Mount Logan
Sienna Plantation, Texas 77459
7:00 p.m. – 8:00 p.m.**

[Register Here >>](#)

Follow link, click on register, select classes in catalog and click Register under Email and Social media.

News Media Strategies

Associations have been, but are increasingly becoming, the source of news reports. Learn why "no comment" and how a cold written statement may do more harm than good. Brady will present strategies on how to handle the call from the reporter, the folks you need to contact when the reporter calls, and who needs to be on camera. In some cases, the implementation of certain strategies up front may keep the association out of the news altogether.

February 20, 2019

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

*Lunch will be Provided

[Register Here>>](#)

Have You Inquired About a Presentation by One of Our Attorneys Yet?



Take advantage of your client services and receive a FREE presentation by one of our HOA attorneys at your management company office. Potential topics include:

- Bankruptcy 101
- Social Media Communications
- Property Code Comparison
- And much more

Email marketing@rmwbh.com for more information and to schedule your presentation!



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