



LEGISLATIVE UPDATE

Real Estate Law

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This article summarizes bills passed during the Legislature's 82nd regular session that affect real estate, lending, and other commercial matters. A more detailed version of these materials, including a list of effective dates, is available to members of the State Bar Real Estate, Probate, and Trust Law Section at www.reptl.org.

Finance – Assignment of Rents Act

The most significant finance-related bill of the past session was Senate Bill 889, which created Chapter 64 of the Texas Property Code. S.B. 889 clarifies the legal status of assignments of rent under Texas law. Previously, a lender typically required a borrower to execute an absolute assignment of rents, which assigned ownership of the rents to the lender, but allowed the borrower to continue to collect rents until default. S.B. 889 simplifies assignments of rent by providing that every deed of trust, mortgage, or other lien instrument is an assignment of rents, unless it specifically provides otherwise. Thus a commer-

cial lender will automatically acquire a security interest in proceeds from real property collateral.

S.B. 889 clarifies confusing case law saying that an assignment of rents does not automatically reduce the security obligation except to the extent the lender collects rents and applies, or is obligated to apply, the rents to the secured obligation. An assignment of rents is perfected upon recordation and has priority over subsequent creditors and transferees. An assignment of rents may be enforced by: (i) notification to the borrower; (ii) notification to tenants; or (iii) methods permitted under common law. A lender is entitled to rents that have accrued but remain unpaid on the date of enforcement and rents that accrue on or after that date. The lender is not entitled to rents that accrued and were paid before enforcement because those severed rents would be subject to numerous competing claims. A borrower is personally liable for rents and reasonable attorney's fees and costs if the borrower fails to turn over such rents.



S.B. 889 provides that the enforcement of an assignment of rents does not make the lender a mortgagee in possession of the real property. Tenants are entitled to a grace period for payment of rent after receiving the notice in order to seek the advice of counsel. This bill further provides that the lender is not obligated by virtue of collecting rents to pay expenses to protect or maintain the real property.

Restrictive Covenants – Private Transfer Fee

House Bill 8 adopts Subchapter G of Chapter 5 of the Property Code to tighten restrictions on private transfer fees. H.B. 8 provides that a fee payable on the transfer of real property and which is created on or after the effective date of the subchapter is void, subject to certain exceptions. H.B. 8 permits the continuation of existing transfer fee obligations, but requires that a notice disclosing certain information regarding the fee be filed of record on or before Jan. 31, 2012, and every third anniversary thereafter. The failure to file such notice results in the obligation becoming void. H.B. 8 also provides that if payment is not accepted within 30 days after payment is made, then the private transfer fee obligation becomes void. A waiver of a purchaser's rights under the subchapter is prohibited.

POA – Collections and Foreclosures

H.B. 1228 amends Chapter 209 of the Property Code to require certain property owners' associations (POAs) to adopt and file reasonable guidelines allowing owners to make partial payments for delinquent assessments, regulates the use of collection agents and transfer of accounts and regulates foreclosure of assessment liens, including notices and court orders. This bill also requires the Supreme Court to adopt rules for expedited foreclosure proceedings.

Construction – Retainage

H.B. 1390 amends Chapter 53 of the Property Code to change the time for a derivative claimant to give notice to an owner of contractual retainage to the earlier of the 30th day after the date the claimant's agreement providing for retainage is completed, terminated, or abandoned, or the 30th day after the date the original contract is terminated or abandoned. This bill also modifies the contents of the derivative claimant's notice and provides that the claimant has a lien on retainage if it gives the above notice and either complies with the requirements of the retainage subchapter or files an affidavit within certain time periods.

Ad Valorem Taxes – Protests and Appeals

H.B. 1887 provides that an owner is only required to pay, before delinquency, the amount of tax attributable to the portion of appraised value not in dispute to preserve the owner's right to a final determination of a motion to correct an appraisal roll or a protest of an appraisal district's failure to provide proper notice. H.B. 1887 also provides certain "paid under protest" rights for

prepaid taxes and clarifies that certain defective notices of taxpayer protests are not, in certain circumstances, invalid merely for failing to properly identify the owner. It also requires court ordered mediation upon motion by a party to any appeal of a determination of the appraisal review board.

Co-Owners of Residential Property

S.B. 1368 adds Chapter 64 to the Property Code to permit certain co-owners of property to file an affidavit in the county clerk's office to establish the authority to act as agent and attorney-in-fact for the other co-owner to enter into mechanic's and materialman's liens and deed of trust liens. This action is limited to a co-owner who has occupied residential property for more than five years, paid all ad valorem taxes without contribution from co-owner, and who has a homestead exemption on the property.

Competition and Trade Practices – Licensed Real Estate Brokers and Salespersons

Senate Bill 1353 amends Texas Business and Commerce Code Section 17.49 to exempt from the Deceptive Trade Practices-Consumer Protection Act (DTPA) a claim against a person licensed as a real estate broker or salesperson arising from an act or omission by the person while acting as a broker or salesperson. This bill excludes a material misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion, a failure to disclose information concerning goods or services that was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed, or an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion.

Liability in Tort – Trespassers

Senate Bill 1160 amends Chapter 75 of the Texas Civil Practice and Remedies Code to provide that an owner, lessee, or occupant of agricultural land is not liable for damage or injury to any person or property arising from the actions of peace officers, including federal law enforcement officers who went to the land regardless of permission and regardless of whether damage or injury occurs on the land. S.B. 1160 provides that the owner, lessee, or occupant of agricultural land is not liable for any damage or injury to any person or property arising from the actions of an individual who, because of the actions of an officer, enters or causes another person to enter the agricultural land without permission. S.B. 1160 also provides that this provision does not limit the liability of an owner, lessee, or occupant of agricultural land for damage or injury arising from their willful or wanton acts or gross negligence. S.B. 1160 removes any duty that an owner, lessee, or occupant of land would owe to a trespasser, including liability for injury to the trespasser, except for injury occurring through willful or wan-



LEGISLATIVE UPDATE

ton acts or gross negligence of the owner, lessee, or occupant. S.B. 1160 provides that the attractive nuisance doctrine related to children allows for liability to an owner, lessee, or occupant of land if the owner, lessee, or occupant knew or reasonably should have known that children were likely to trespass, the artificial condition involves an unreasonable risk of death or serious bodily harm to a child, the utility of elimination of the danger is light compared to the risk and the owner, lessee or occupant fails to exercise reasonable care to eliminate the danger. This bill also provides that an owner, lessee, or occupant whose actions are justified under the Penal Code is not liable to a trespasser for resulting damages.

Competition and Trade Practices – Residential Real Estate Lending (Contract for Deed)

Senate Bill 1320 amends several Texas codes to restrict a seller of residential real estate or a person who makes an extension of credit and takes a security interest or mortgage against residential real estate from requesting or requiring the purchaser or borrower to execute and deliver a deed conveying the residential real estate to the seller or person making the extension of credit.

Competition and Trade Practices – Residential Mortgage Foreclosure Consulting Services

Senate Bill 767 adds Texas Business and Commerce Code Chapter 21, which includes requirements for each contract for the services of a foreclosure consultant. Such contract must be in writing, dated and signed by each homeowner and foreclosure consultant.

Conveyances – Correction of Instruments

Senate Bill 1496 amends Chapter 5 of the Property Code to permit a person with personal knowledge to execute a correction instrument to make nonmaterial changes resulting from clerical errors, including an incorrect element in a legal description and a correction of a party’s name or marital status. Such correction instrument must disclose the basis for the person’s personal knowledge of the facts and must be sent to all individuals who executed the original conveyance document.

Criminal Procedure – Criminal Prosecution Of Mortgage Fraud

Senate Bill 485 adds Article 13.271 to the Code of Criminal Procedure to broaden the definition of a “real estate transaction” that may be involved in criminal fraud, to include the sale, lease, trade, exchange, gift, grant, or other conveyance of real property interest.

Ad Valorem Taxes – ARB Hearings

Senate Bill 1546 amends Tax Code Section 41.45(e-1) to require that a person designated by a property owner as the owner’s agent to represent the owner at a hearing before an

appraisal review board who fails to appear at such hearing is entitled to a new hearing in the same manner as a property owner who fails to appear at such a hearing.

POA – Flags

House Bill 2779 also adds Section 202.011 to the Property Code (in addition to the new Section 202.011 added by H.B. 362) to prohibit a POA from adopting or enforcing restrictions on displaying the U.S., Texas, or armed forces flags, except as allowed by law (e.g., “reasonable” provisions relating to flags, flagpoles, lights, and noise).

POA – Solar Panels

House Bill 362 adds Sections 202.010 and 202.011 to the Property Code to prohibit a POA from restricting solar devices, except as allowed by statute. The bill also prohibits POAs and architectural review committees from withholding approval of certain solar devices unless the device substantially interferes with the use and enjoyment of land, etc.

Landlord and Tenant – Residential Certificates Of Occupancy

House Bill 1862 adds Section 92.023 to the Property Code to allocate liability for a landlord when a municipality or a county revokes a certificate of occupancy for a leased premises because of the landlord’s failure to maintain the premises. The landlord is then liable for the full amount of the tenant’s security deposit; the pro rata portion of any rental payment paid in advance by the tenant; the tenant’s actual damages, including moving costs, utility connection fees, storage fees, and lost wages; and court costs and attorney’s fees.

Ad Valorem Taxes – Electronic Delivery of Bills

House Bill 843 amends Tax Code Section 1.07(a) to require the tax assessor to deliver a tax bill by electronic means, if the tax assessor has entered into a written agreement for electronic delivery with the person entitled to receive such tax bill.

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