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OPINION COMMITTEE

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State of Texas
House of Representatives



Linda Harper-Brown
DISTRICT 105

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OPEN RECORDS DIVISION

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October 28, 2013

FILE # ML-47438-13
I.D. # 47438

Office of the Attorney General
Attention: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

RQ-1161-GA

Dear General Abbott:

I have received inquiries regarding Property Owners Association (POA) covenants and how legislation passed interacts with existing POA covenants. For example, in the 82nd legislative session H.B. 362 was passed to prohibit a property owners' association from including or enforcing a provision in a dedicatory instrument that prohibits or restricts a property owner from installing a solar energy device and makes void a provision violating this prohibition. Questions have been raised regarding what effect legislation like this has on existing POA covenants that may contain a provision that is in conflict with the legislation.

Pursuant to Tex. Gov't Code §402.043, I respectfully request that you provide this office with a formal written opinion regarding the following questions:

1. It has been argued that a POA covenant is a legally binding, private party contract (see *Tien Tao Ass'n v. Kingsbridge Park Cmty. Ass'n*, 953 S.W. 2D 525, 533) and would necessarily receive protection under various portions of both state and federal constitutions in such areas as impairment of contractual obligations, due process, liberty and privacy interest, etc. ***Is this affirmed and if so, must the Texas Legislature afford POAs the same or greater protection than is given to these fundamental civil rights by the U.S. Supreme Court?***
2. There are several sections of the Texas Property Code that seem to intentionally provide legislative punishment by pain or penalty, without benefit of judicial oversight, and are thus by U.S. Supreme Court case law, classic unconstitutional bills of attainder prohibited under both state and federal constitutions. Of particular note is section 202.006, which declares any portion of a POA covenant not recorded with the County Clerk to be void until filed. Because POAs receive their contractual authority from their documents, the failure to file said documents can be highly problematic for a POA. ***Is Texas Property Code 202.006 a bill of attainder?***

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3. Article 1, Section 29 of the Texas Constitution states, "...everything in this "Bill of Rights" is excepted out of the general police powers of government,...". It has been argued that these "general police powers of government" that are commonly referred to as the "general" powers used to pass legislation for the health, safety and welfare of the public are constitutionally denied to the Legislature by Section 29 when crossing over into areas that are protected by the Bill of Rights, specifically in reference to any legislation that may interfere with Article 1, Section 16. ***Does the Legislature need to give special deference to issues when they involve fundamental rights protected by the Bill of Rights, or can it, without coming into conflict with Article 1, Section 29, continue to consider them in the same "general" way that it now does?***

Thank you for your assistance in this matter. Please feel free to contact my office should you have any additional questions.

Very Truly Yours,

A handwritten signature in cursive script that reads "Linda Harper-Brown". The signature is written in black ink and is positioned above the printed name.

Linda Harper-Brown