

(The letter below from the HOA Attorney was sent to the Board and on or about February 14, 2025, the letter was published on the HOA website "TownSquare" as an explanation as to why the actions taken by the "Members" at the Annual Meeting held on January 30, 2025 were deemed invalid. The letter has some yellow highlights that were not part of the initial publication but were added by member(s) posting the letter on this site, to bring to your attention those sentences.)

Dear Copper Lakes Members,

**Background:**

Initially, it is important to note that Copper Lakes Homeowners Association, is not a public entity, it is not a governmental entity or a political subdivision. The Association, like virtually all Texas property owners associations, is a Texas nonprofit corporation, formed pursuant to its Articles of Incorporation which were filed with the Texas Secretary of State on July 26, 1993. As such, the Association is a private legal entity, governed by its Articles of Incorporation, its Bylaws, and its Declaration of Covenants, Conditions and Restrictions. The Association is also governed by Chapter 22 of the Texas Business Organizations Code (the "BOC" which governs nonprofit corporations), and is governed by various Chapters of the Texas Property Code (TPC), including Chapter 209 (governing property owners associations).

It is also essential to understand that Copper Lakes Homeowners Association, like virtually all Texas property owners associations, is a board-managed nonprofit corporation, not a member-managed nonprofit corporation. Article VI of the Articles of Incorporation vests management of the Association's affairs in its Board of Directors. This means that the Board of Directors manages the business and affairs of the Association, not the membership (this is reiterated in Section 4.01(b) of the Bylaws). As it relates to member meetings, the President presides at all meetings of the members (as provided by Section 5.05 of the Bylaws).

Because the Association is a board-managed nonprofit corporation, the board determines the agenda for member meetings, and the President presides over such meetings. The members do have the ability to take action through a vote of the membership, but only for items which the members are authorized to take action on. Since it is the board that makes the business decisions of the Association, the members can only vote on actions which they are empowered to do under applicable law and the Associations governing documents. In addition, such actions must be done through proper procedures as provided by applicable law and the governing documents.

The primary actions that members are authorized to take are electing and removing directors. A vote of the members is required to approve a special assessment, approve an increase in the annual assessment more than 15% of the prior years' assessment (pursuant to the terms of the Declaration). A vote of the membership is also required to amend the Declaration and the Articles of Incorporation (under state law and the terms of those instruments), and the members also have the authority to amend the Bylaws (though the board of directors also has this authority under state law).

**The Annual Meeting:**

With an understanding of the foregoing background information, as well as applicable state law, the actions proposed by one of the members at the recent annual meeting were not valid. None of those actions were properly brought before the membership for a vote, and the membership does not have the authority to take most of the actions that were proposed.

In order for members to vote on a matter at a meeting of members, proper notice of the proposed vote

must be given to the entire membership, under TPC 209.0056(a)(1).

Under the foregoing statute, no vote of the membership can be taken unless all of the owners are given notice of the vote at least 10 days (not more than 60 days) in advance of the vote. None of the actions proposed to be voted on by the members at the recent annual meeting were noticed to the membership as required by 209.0056(a)(1). In fact, only a very small percentage of the membership (around 10%) was even present at the annual meeting. The vast majority of the Association members were not given notice and an opportunity to vote on the proposals as required by the statute. As noted above, the members do not preside over the member meetings. The member making proposals at the annual meeting presumed to apply "Roberts Rules of Order" as a mechanism to gain control over the meeting. However, "Roberts Rules of Order" is not state law, and the Association is not bound by such Rules under any statute or governing document. It is the board, as the managing body for the Association, that determines the agenda and the President that presides over the meeting. The President is an officer position that is elected by the Board pursuant to Section 5.02 of the Bylaws. The members do not determine the officers, the members vote for the directors and the directors appoint the officers.

Also, as noted above, many actions proposed to be taken by the member are not actions the members are authorized to take. The member made various proposals without authority, including the removal of the President as the presiding officer (which only the directors may do under the Bylaws), the suspension of a director (which is not an action that exists), the termination of the management contract (which is Association business only the board can take), and vacating actions of the board relating to Bylaw amendments (which only the board or a court of law can do). As such, the matters proposed by the member at the recent annual meeting are not effective, because they were not properly noticed as required by state law, and were made without authority. None of those actions will be recognized as actions of the Association.

#### **How Members Call for a Member Vote:**

If the members wish to have business placed on the agenda for the member meeting, or otherwise take a vote for action that members are authorized to take, then the members have two options:

1. Members can request that the board place a matter on the agenda, which would be noticed to the membership along with the notice of meeting. However, it is important to reiterate that the membership is limited in what actions it can take. For example, if a member were to request a vote of the membership to terminate the landscaping contract, that vote would not be taken because the membership does not have the authority to terminate Association contracts, only the board can take such action as the governing body of the corporate entity. The board might consider taking such action on its own, but such an action would not be appropriate for a membership vote. It is also important to note that the board is not obligated to accommodate such a request, if the board does not believe it to be in the best interest of the Association. For example, were a member to request a vote of the membership to remove a director, the Board could accommodate such a vote but is not required to do so.

2. Members can petition the board to call a special meeting of the members to call for a vote. The most common vote under which this mechanism would be used is for the removal of a director. The members can require that such a vote take place, however, proper procedure must be followed. **Section 3.02 of the Bylaws** provides that special meetings of the members may be called by the President, the board, or not less than one-third of the members. **However, under Section 22.155 of the BOC (which was effective January 1, 2006)**, a special meeting of the members may be called by members having not less than one-

tenth of the votes entitled to be cast at the meeting. So, under state law it only requires 10% of the members to call for a special meeting of the members.

The mechanism for members to call such a special meeting, is for the requisite number of members to sign a petition to call the special meeting of members for a specific purpose (to remove a director, for example). Upon receipt, the board would verify that the required number of record members is met, and the board would then cause the special meeting to be properly noticed, would hold the meeting and take the vote. It is important to note that under Section 4.09 of the Bylaws, a director may be removed by "...a majority vote of the Members holding not less than two-thirds (2/3) of the votes of the Association at a meeting of the Members duly called for that purpose." This means that at the special meeting, 2/3rds of the entire membership must vote (in person or by proxy) and of those votes a majority must vote in favor of the removal. Removal cannot take place without proper notice and without the required number of members voting.

### **Board Authority to Amend Bylaws:**

One question that arose at the meeting of members relates to the authority of the Board to amend the Bylaws. Article XIII of the Bylaws provides that the Bylaws may be amended by a vote of a majority of the members present at an annual or special meeting of the members called for that purpose. This provision authorizes the members to amend the Bylaws, keeping in mind that proper notice must be provided as required by the statute referenced above. However, state law, which is separate legal authority, empowers the board to amend the Bylaws as well. Specifically, BOC Section 22.102(c) authorizes the board to amend the Bylaws unless certain conditions exist, and none of those conditions exist for Copper Lakes. The statute reads as follows (with analysis):

(c) The board of directors may amend or repeal the bylaws, or adopt new bylaws, unless:

- (1) this chapter or the corporation's certificate of formation wholly or partly reserves the power exclusively to the corporation's members;
- (2) the management of the corporation is vested in the corporation's members; or
- (3) in amending, repealing, or adopting a bylaw, the members expressly provide that the board of directors may not amend or repeal the bylaw.

With respect to (1): Chapter 22 of the BOC does not reserve the power to amend bylaws to the members of a board-managed nonprofit corporation (so this condition does not apply); the Association's "certificate of formation" also does not reserve the power to amend bylaws to the members. "Certificate of formation" is a term adopted by the BOC in 2006 to refer to the document that forms the entity, which was called "Articles of Incorporation" until 2006 when the BOC was adopted; this is further iterated by BOC Section 1.006(1), which makes the term "Articles of Incorporation" synonymous with "Certificate of Formation." In reviewing Copper Lakes Articles of Incorporation, there is provision that reserves the power to amend the bylaws to the members; Article VII of the instrument requires that members must vote to amend the Articles of Incorporation, but not the bylaws.

With respect to (2): The management of the corporation is not vested in the members as discussed above.

With respect to (3): the members have never amended the bylaws to provide that the board may not amend the bylaws.

Accordingly, Copper Lakes' board of directors is authorized to amend the bylaws pursuant to BOC Section 22.102(c) which is independent state law authority. This authority is utilized by countless other property owners associations to enable boards to amend the bylaws. Further it is altogether common for boards of nonprofit corporations to amend bylaws, particularly considering that the bylaws are initially adopted by the initial board, and considering that there is no other statutory authority for members to amend the bylaws in a board-managed nonprofit corporation, which is the reason why the right to do so is granted to the members in the bylaws themselves.

As such, the bylaw amendments adopted by the board in March and November of 2024 were adopted with authority and are effective.

The bylaw amendment of November 2024 was approved by a majority of the board at a special board meeting. The special board meeting was properly noticed as required by TPC 209.0051(e)(2). Under that statute, the notice was posted on the Association's internet website available to the members AND emailed to owners who have registered an email address with the Association, and that notice was provided 72 hours in advance of the special meeting. The statute (with applicable portions highlighted) states as follows:

(e) Members shall be given notice of the date, hour, place, and general subject of a regular or special board meeting, including a general description of any matter to be brought up for deliberation in executive session. The notice shall be:

- (1) mailed to each property owner not later than the 10th day or earlier than the 60th day before the date of the meeting; or
- (2) provided at least 144 hours before the start of a regular board meeting and at least 72 hours before the start of a special board meeting by:

(A) posting the notice in a conspicuous manner reasonably designed to provide notice to property owners' association members:

- (i) in a place located on the association's common property or, with the property owner's consent, on other conspicuously located privately owned property within the subdivision; or
- (ii) on any Internet website available to association members that is maintained by the association or by a management company on behalf of the association; and

(B) sending the notice by e-mail to each owner who has registered an e-mail address with the association.

The bylaw amendment was required to be approved in an open board meeting under TPC 209.0051(h)(10), because the bylaws are a "dedicatory instrument" (see statute below). However, the statute permits the action to take place at a regular or special board meeting (see subsection (e) above). Regular board meetings are those which occur periodically on a regular schedule determined in advance. A special board meeting can be called by the President or any 2 Directors to take actions in between regular board meetings.

(h) Except as provided by this subsection, a board may take action outside of a meeting, including voting by electronic or telephonic means, without prior notice to owners under Subsection (e), if each board member is given a reasonable opportunity to express the board member's opinion to all other board members and to vote. Any action taken without notice to owners under Subsection (e) must be

summarized orally, including an explanation of any known actual or estimated expenditures approved at the meeting, and documented in the minutes of the next regular or special board meeting. The board may not, unless done in an open meeting for which prior notice was given to owners under Subsection (e), consider or vote on:

- (1) fines;
- (2) damage assessments;
- (3) initiation of foreclosure actions;
- (4) initiation of enforcement actions, excluding temporary restraining orders or violations involving a threat to health or safety;
- (5) increases in assessments;
- (6) levying of special assessments;
- (7) appeals from a denial of architectural control approval;
- (8) a suspension of a right of a particular owner before the owner has an opportunity to attend a board meeting to present the owner's position, including any defense, on the issue;
- (9) lending or borrowing money;
- (10) the adoption or amendment of a dedicatory instrument;
- (11) the approval of an annual budget or the approval of an amendment of an annual budget;
- (12) the sale or purchase of real property;
- (13) the filling of a vacancy on the board;
- (14) the construction of capital improvements other than the repair, replacement, or enhancement of existing capital improvements; or
- (15) the election of an officer.

A director was recently removed by the Board pursuant to Section 4.09 of the Bylaws as amended. A majority of the board determined in good faith that the director who was removed was not acting in the Association's best interest or had otherwise breached their duty to the Association. The board called a special board meeting to remove the director, and gave proper notice of the special board meeting as required by TPC 209.0051(e)(2), as referenced above. The removal of a director is not one of the 15 items listed above, however, filling a vacancy on the board is; accordingly, the meeting at which the removal and replacement took place was noticed as required by TPC 209.0051(e)(2). Both the bylaw amendment and removal/replacement of the director was done in accordance with the requirements of the Texas Property Code governing those actions, as referenced above, and they are valid.

**Fence Replacement:**

Another question that arose at the meeting relates to the board's decision to replace a damaged fence owned by the Association and covered by its insurance. The fence was replaced using an upgraded material (TREX fencing). Some members have questioned the authority of the board take these actions. At least one member has accused a director of having engaged in wrongdoing by replacing the fence with an upgraded material because insurance funds were involved and because a portion of the damaged fence happened to be adjacent to the director's lot. The director at issue denies any wrongdoing and is committed to a transparent review of the matter. Accordingly, the managing agent has already submitted a request for a review to the Association's insurance carrier for an opinion and evaluation regarding the insurance claim, in order to establish that there was no wrongdoing. The insurance company's response will be made available to the membership once received. In the meantime, it is noted here that the board's vote to file an insurance claim and to replace the fence with a different material was properly done. The decision to replace the Association-owned fence

was made via email and approved by a majority of the directors, with all directors being included on the email chain and having an opportunity to vote. This vote took place June 26, 2024, the decision was properly made in between board meetings. The board is authorized to take action outside of a meeting by electronic means TPC Section 209.0051(h), as long as the action does not relate to one of the fifteen items listed in Section 209.0051(h)(1)-(15), and as long as the action is summarized and documented in the minutes of the next board meeting. Here, the decision to replace the fence is not one of the 15 items listed in the statute, and the decision was noted in the minutes of the next board meeting in the "ratification" section of the minutes for the June 27, 2024 board meeting.

Please note that under TPC 209.0051(h)(14), the requirement that such an action take place in an open board meeting does not apply to the repair, replacement, or enhancement of an existing capital improvement. The fence at issue was damaged and was replaced with an enhanced fence, and therefore the decision to replace the fence was not required to be taken in an open board meeting. Further, the decision to file an insurance claim is an action that can be taken by the board, because the board is the body that manages the affairs of the Association and conducts its business, as discussed above. In addition, the filing of an insurance claim is not one of the 15 items referenced in the statute.

**Conclusion:**

It is worth noting that advice of counsel is frequently obtained prior to the board taking actions such as those referenced above, to ensure it complies with applicable law and proper procedure. While this correspondence is lengthy, the board believes it necessary to address the matters brought up by some members at the annual meeting and to provide clarification to the members on the relevant authority and proper procedure for corporate governance. The board also believes that this correspondence demonstrates that the board performs its due diligence by working with its corporate counsel to ensure it is operating in compliance with applicable law and its governing documents. The board hopes that this correspondence is helpful and informative for the members who were present at the annual meeting, so that future meetings can operate in a more orderly manner. Thank you,

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