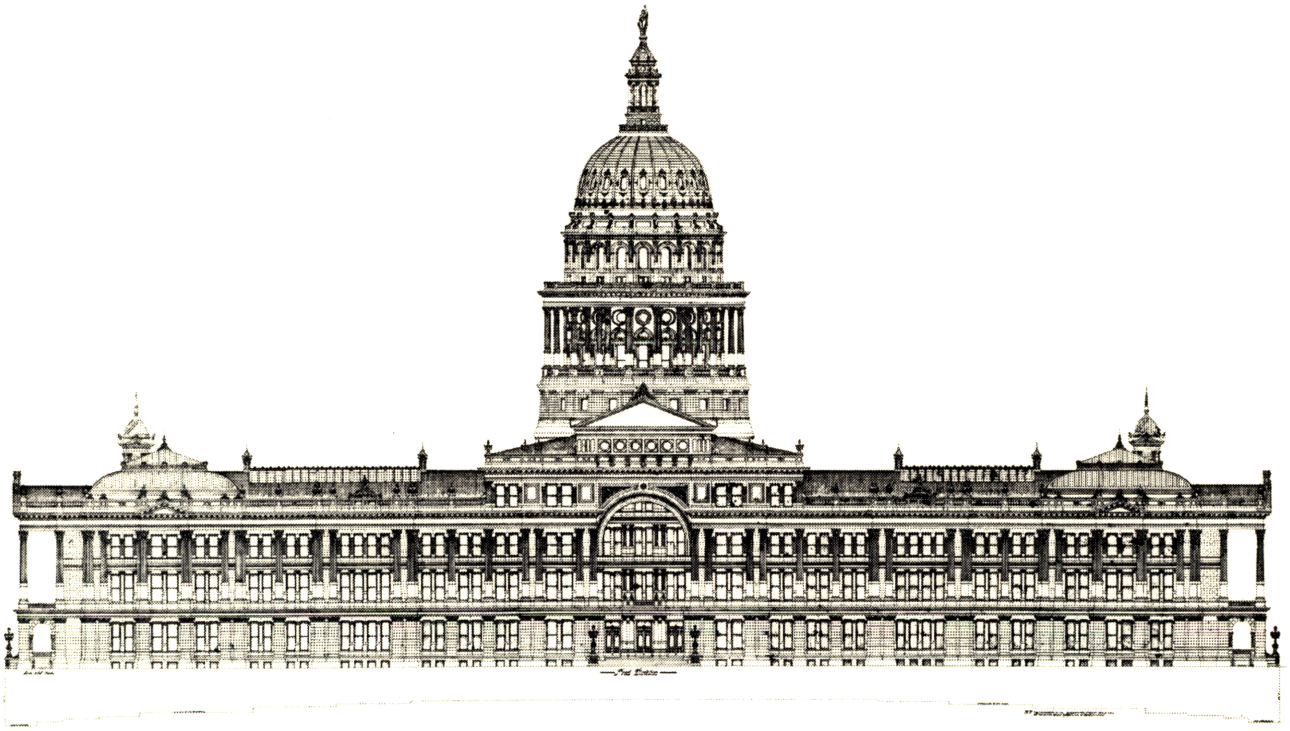
INTERIM REPORT

TO THE
82ND TEXAS LEGISLATURE

House Committee on

BUSINESS & INDUSTRY

December 2010



HOUSE COMMITTEE ON BUSINESS & INDUSTRY
TEXAS HOUSE OF REPRESENTATIVES
INTERIM REPORT DECEMBER 2010

A REPORT TO THE HOUSE OF REPRESENTATIVES
82ND TEXAS LEGISLATURE

JOSEPH "JOE" DESHOTEL
CHAIR

COMMITTEE CLERK
BENJAMIN FITZGIBBONS

Committee On
Business & Industry

12/01/2010

Joseph Deshotel
Chair

P.O. Box 2910
Austin, Texas 78768-2910

The Honorable Joe Straus
Speaker, Texas House of Representatives
Members of the Texas House of Representatives
Texas State Capitol, Rm. 2W.13
Austin, Texas 78701

Dear Mr. Speaker and Fellow Members:

The committee on Business & Industry of the Eighty-first Legislature hereby submits its interim report and included recommendations for consideration by the Eighty-second Legislature.

Respectfully submitted,

Joseph "Joe" Deshotel

Gary Elkins

Helen Giddings

Wayne Christian

James "Jim" Keffer

Kirk England

Sid Miller

Dan Gattis

Rob Orr

Sylvester Turner

Chente Quintanilla

Gary Elkins
Vice-Chairman

Members: Wayne Christian, Kirk England, Dan Gattis, Helen Giddings, Jim Keffer, Sid Miller, Rob Orr, Chente Quintanilla, Sylvester Turner

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INTRODUCTION

At the beginning of the 81st Legislature, the Honorable Joe Straus, Speaker of the Texas House of Representatives, appointed eleven members to the House Committee on Business & Industry. The committee membership was composed of: Representatives Joe Deshotel, Chair; Gary Elkins, Vice-Chair; Wayne Christian; Kirk England; Dan Gattis; Helen Giddings; Jim Keffer; Sid Miller; Rob Orr; Chente Quintanilla; and Sylvester Turner.

During the 81st Legislative Interim, Speaker Straus assigned the committee on Business & Industry the following five charges:

1) Examine Title 11 of the Texas Property Code to determine if the various independent statutes are sufficient to protect the interest of homeowners and homeowners associations. Consider whether Title 11 Should be consolidated with other laws

2) Study and report on third-party liability issues involving workers' compensation, including the frequency and success rates of third-party litigation, the relationship, if any, between third-party litigation and jobsite safety, the adequacy of compensation and reimbursement to workers, and the economic costs of third-party litigation and equitable and contractual subrogation in construction activities.(Joint Interim Charge with the House Committee on Judiciary and Civil Jurisprudence)

3) Review the Unemployment Compensation Fund and its impact on business taxpayers to determine whether changes may be made to stabilize the fund in times of economic contraction without imposing and undue economic burden on businesses. Determine whether modernizations should be implemented to make the fund more efficient and effective. (Joint Interim Charge with the House Committee on Technology, Economic Development, and Workforce)

4) Examine ways to increase the creation of jobs in the Texas manufacturing industry.

5) Monitor the agencies and programs under the committee's jurisdiction.

This report represents the hearing conclusions and recommendations to the 82nd Legislature. The committee would like to express great appreciation to each member for their assistance and efforts throughout the interim. In addition, the committee would like to thank all participants who have provided important testimony and input throughout the process. Finally, the committee would like to thank the leadership and staff of the Texas Workforce Commission, the Texas Department of Insurance, Division of Workers' Compensation, and the staff of the Texas House of Representatives for their time, participation, and efforts on behalf of the committee.

HOUSE COMMITTEE ON BUSINESS & INDUSTRY

INTERIM STUDY CHARGES

CHARGE 1: Examine Title 11 of the Texas Property Code to determine if the various independent statutes are sufficient to protect the interest of homeowners and homeowners associations. Consider whether Title 11 Should be consolidated with other laws

CHARGE 2: Study and report on third-party liability issues involving workers' compensation, including the frequency and success rates of third-party litigation, the relationship, if any, between third-party litigation and jobsite safety, the adequacy of compensation and reimbursement to workers, and the economic costs of third-party litigation and equitable and contractual subrogation in construction activities.(Joint Interim Charge with the House Committee on Judiciary and Civil Jurisprudence)

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CHARGE 4: Examine ways to increase the creation of jobs in the Texas manufacturing industry.

CHARGE 5: Monitor the agencies and programs under the committee's jurisdiction.

CHARGE 1

Examine Title 11 of the Texas Property Code to determine if the various independent statutes are sufficient to protect the interest of homeowners and homeowners associations. Consider whether Title 11 should be consolidated with other laws.

COMMITTEE WORK

The House Committee on Business & Industry held a public hearing on April 19, 2010 to discuss Interim Charge 1.

SCOPE OF REPORT

The committee found that the issues relating to the governance of Home Owner Associations (HOAs) have been reviewed and analyzed thoroughly by the Texas Legislature. Over the past decade and before, these reports have identified problems and issues in the functions and powers of HOAs and have attempted to rectify the issues arising through legislation to the benefit of all parties involved. The committee will not attempt to identify and reiterate the issues already addressed in previous legislative reports. The committee will use these reports, information already gathered, and the information gathered from the outcome of the public hearing that took place on April 19, 2010, to apply the previous conclusions in the context of the charge being addressed. Is Title 11 of the Texas Property Code sufficient to protect the interests of homeowners and HOAs or should Title 11 be consolidated with other laws.

BACKGROUND

Common ownership associations, the predecessor to modern HOAs, were first developed by urban planners in the early 1900's to ensure that high end neighborhoods maintained high property values through the enforcement of land use restrictions.[1] The original purpose, like today, was to ensure that all homeowners within a planned community pay assessments to maintain the neighborhood and to ensure that property values are not affected by the unrestricted actions and behaviors of individual homeowners within them. Today, this concept has evolved into a common practice of developers when creating new neighborhood throughout the country, as well as in Texas. These property owner associations (POAs) are individually and generally defined as condominium associations, cooperative associations or homeowners associations.[2] For the purposes of the charge issued to the committee, Home Owners Associations (HOAs) will be the entities addressed in this report.

Following World War II, the nation experienced rapid growth in municipalities, combined with massive growth in homebuilding, leaving some municipalities unable to afford the provision of basic services to these growing communities. The result was the insistence that basic services like garbage collection and road maintenance be provided by HOAs. Therefore, another aspect of responsibility in modern HOAs is to collect fees, not only for upkeep and maintenance of the neighborhoods to ensure property values are not detrimentally affected, but to also provide certain services to those that live within them.

[1] Interim Report to the 80th Legislature, House Committee on Business & Industry.
[2] Interim Report to the 80th Legislature, House Committee on Business & Industry.

MODERN HOAs

Most modern HOAs are incorporated as non-profit POAs and are designed to ensure the safety and functionality of a neighborhood subdivision , thus preserving the property values of homes within its jurisdiction. In addition to the wealthy creating exclusive enclaves with deed restrictions, it has now become the practice of most developers to created planned, large-scale neighborhoods managed by HOAs. In 2010, an estimated 62 million Americans lived within 309,600 community associations within the country which is an increase of 16.8 million Americans in the past 10 years.[3] HOAs require any person buying a home to contractually accept the requirement of paying dues for services and upkeep, while accepting the use of fines and penalties to ensure all homeowners comply with the goal of maintaining their property. HOAs provide services for a fee and collect assessments, as well as maintaining the ability to levy fines on homeowners. They effectively serve as quasi-governmental entities with the potential for abuse due to a lack in government oversight. Over the years, as a result of specific issues arising in individual HOAs or from a homeowner complaint about abusive practices of a specific HOA, a set of piecemeal laws began evolving to address these issues. However, since each HOA is a separate entity, these laws apply only to those that fall in the specific statute's jurisdictional definition. Therefore modern HOAs are not governed by an encompassing, state-wide set of laws, but are instead loosely governed by 11 different chapters within the Texas Property Code (see Appendix A).

The argument has been made that individual homeowners have a choice in where to live. By choosing to purchase a home in a specific HOA, they not only agree to the payment of dues but also endorse the practices of the HOA. However, modern homebuilder practices have infused HOA restrictive covenants into the deeds of newly built homes, thus ensuring that most buyers of a newer home in a modern subdivision will be subject to an HOA. On the surface, having an HOA to ensure neighbors behaviors or actions do not bring down the property value of such a large investment for most Texans, and paying a share of dues to provide for exclusive use of parks, walkways and pools maintained within the neighborhood may seem like a fair trade. However, the average homeowner is unaware of the authority and power mandatorily handed over to the association to scrutinize individual behavior, and even foreclose and sell the homeowner's property for failure to pay assessments and fines. Many practices of modern HOAs negate the original purpose of agreed arrangements between the homeowner and an HOA, which is to protect the value of such a large, long-term investment.

In the past decade, as HOAs continue to grow in number throughout the state and the nation, examples of certain practices have gained the attention of the Texas Legislature. HOAs are becoming more involved in the day-to-day affairs of the homeowners and their communities. The homeowner does not have any ability to negotiate the terms of HOA behavior toward the homeowner, nor does the homeowner have any ability to question the decisions or authority assumed by HOAs over a homeowner's property. The Legislature has concluded that

[3] See, Community Associations Institute website, Industry Data, at http://www.caionline.org/info/research/Pages/default.aspx

HOAs now exert an encompassing power of authority over individual homeowners that has great potential for abuse, requiring more strenuous regulation by state law.

HOA MANAGEMENT COMPANIES

The need for regulation and oversight stems from what many homeowners believe is abusive and predatory practices toward homeowners by the very associations designed to protect their investments. Since most HOAs are incorporated as non-profit entities, there is little financial incentive to target homeowners unless that homeowner is not paying the agreed upon assessments. While designed to ensure the maintenance of a community, and although the board of directors are voted on by the homeowners, it has become increasingly common for a board of directors to be ignorant regarding the documents governing their associations, and are frequently unwilling to be educated on the issues and procedures effecting homeowners within their association.[4] The more common practice of modern HOAs is to hire HOA management companies to perform these functions. Instead of an agreement between the homeowner and the HOA assigned with caring for the community, associations are now infusing a third, for-profit party that has contractual authority over homeowners in its jurisdiction. HOA management companies often do not own property within the association and do not have personal interests in how homeowners are treated or the effects their actions may have on homeowners. The committee has concluded that when allowing a profit-driven business to have the quasi-governmental authority to collect dues, assign fines and penalties, and ultimately foreclose on a person's home, there is great potential for abuse.

Stories of such practices may be found throughout the state, where homeowners are being preyed upon by HOA management companies through abusive over regulation and draconian enforcement measures that far exceed their original purpose. Therefore, the committee has concluded that HOAs within the state do need statewide oversight for the protection of homeowners from the potential of abuse by HOAs and HOA management companies. The current piecemeal statutes are insufficient to regulate HOAs in the state. A new chapter should be created in the Texas Property Code with statewide application to oversee the creation and governance of HOAs in Texas. All other statutes relating to the governance of HOAs should be consolidated, and conform to the best practices and protections for both homeowners and HOAs determined by the Legislature.

HOMEOWNER PROTECTIONS

There is a great amount of evidence of homeowners paying enormous fines and subsequent legal fees for minor infractions, as well as the disturbing use of fees and fines to foreclose on a homeowner's property and auctioning the property at a fraction of what it is worth. Currently, there are no statewide laws regulating HOA behavior to identify abuses, nor do they have any oversight to halt abusive practices once identified. HOAs do not have adequate regulations in place to ensure the rights and property interests of homeowners are being protected from abuse. When actions are continually in violation of the letter and the spirit of the law regarding HOAs

[4] Interim Report to the 80th Legislature, House Committee on Business & Industry, Page 42.

original duties towards homeowners and their rights, then it should be the responsibility of the government to step in and ensure the protection of homeowners in the state.

Currently, HOAs have unrestrained ability to not just assess and collect dues, but to fine homeowners for non-compliance of deed restrictions. Profit-driven management companies with no vested interest in a neighborhood and/or individual property values are identifying any possible violation deemed worthy of a fine, and sending a letter notifying the homeowner of the fine without allowing the homeowner to correct the issue or dispute the validity of the violation.

To compound the burden on homeowners, HOAs involve attorneys in the resolution of problems and the collection of monies owed to HOAs. This practice routinely leads to the original amount of money owed by the homeowner expanding exponentially into a much larger sum, which the homeowner is required to pay. This practice takes a fine of a few hundred dollars and, through the involvement of attorneys by an HOA, ends up costing the homeowner thousands of dollars. The use of attorneys, especially during an initial period of controversy, is an abusive practice of HOAs. It should be severely limited, and only possible after informal and inexpensive methods of resolution are thoroughly utilized.

The creation of a consolidated set of state-wide statutes to ensure bad actors are not able to abuse homeowners should include an informal resolution process. An informal resolution process will eliminate the abusive practice of HOAs fining homeowners without confirmation that the homeowner is even aware of the violation, as well as eliminate the use of daily compounding of fines without any cap on the violation. An informal resolution process will also eliminate the exorbitant amount in attorney fees that the homeowner is required to pay, which may lead to sums of several thousands of dollars being owed for what was originally a small infraction and related fine. Furthermore, there is no ability for the homeowner to dispute the fines or make an arrangement to pay off these large fines through payments. This leaves the homeowner vulnerable to the foreclosure actions of HOAs and management companies for what were initially small, insignificant infractions and fines. The new law should require HOAs' to provide notification of a deed violation to the homeowner by certified mail, with return receipt requested or similar receipt confirmation service, and require that the HOA indicate the date the violation occurred, the amount of the fine and what the provision within the deed restrictions of which the homeowner was allegedly in violation of. The notice should be handled through informal means, without the inclusion of an attorney or attorney fees, and should allow the homeowner a specified amount of time to correct the violation before fines may be allowed to compound daily. An informal meeting should be required in which an HOA and the homeowner may sit down to informally discuss the matter under contention. This would allow the HOA to identify the violation being addressed, discuss ways to rectify the problem, and provide payment options to resolve the matter. The new laws should ensure that partial payment plans to pay unexpected and unanticipated fines should be implemented to ensure that HOAs get the violation addressed and the collection of monies for the violation without creating an unmanageable financial burden on the homeowner. The fines for deed violations, if rectifiable and addressed by the homeowner, should be reasonable in the context of the nature and frequency of the violation. Finally, the new law should establish a reasonable maximum amount for any one violation. A clear example of abuse by HOAs needing government oversight is the ability to foreclose on a homeowner's

property should the homeowner fall behind in paying HOA fees, even if those fees are for a minimal amount. Even more egregious is the practice of foreclosing on homes due to the lack of payment for HOA fines and related attorney fees. HOAs threaten homeowners with foreclosure unless the fine is paid in full, without any validation for the fine or any provided recourse by the homeowner. This practice by some HOAs, and especially by HOA profit-driven management companies, has vast potential for abuse. This should be addressed in any statute that provides for statewide regulation of HOAs.

There is a great financial incentive by profit-driven companies to enforce draconian deed violation standards to collect fines for arbitrary violations. Although the original intent of HOAs was to protect homeowner property values, it has become a vehicle used by profit-driven management companies to extort thousands of dollars from homeowners by the use of the threat and/or the act of foreclosure. The need for a statewide law regulating HOAs and HOA management companies is necessary to put an end to this predatory practice. When HOAs were discovered to be using the power of foreclosure in an attempt to collect overdue assessments, fines, penalties and large attorney fees, the Texas Legislature clarified that an HOA or HOA management company cannot foreclose on a lien on property based solely on fines or attorney fees.[5] HOAs are only able to foreclose on a home if the homeowner was delinquent on monthly assessments. This was done to ensure that these entities cannot foreclose based on fines owed due to small violations that grew exponentially based on compounding penalties and attorney fees. Profit-driven management companies could not use the threat of foreclosure to seek out violations and collect fines through arbitrary and draconian enforcement of deed restrictions for the purpose of making a profit. However, to the surprise of the Legislature and to reinforce the notion that state-wide abuse is occurring, HOAs and management companies circumvented the law by simply prioritizing the order in which payments made by the homeowner will be assessed. This decision conscientiously allows HOAs to continue the abusive extortion practice of threatening foreclosure to exact large indisputable fines and fees from homeowners. Placing all monies collected by an HOA from a homeowner in a specified order, allows HOAs to still collect fines and attorney fees by placing that collection priority before allowing anything to go toward dues. This behavior is in direct violation of the law as written and clarified by the Legislature. It is also in violation of the spirit of the law, contradicting the argument raised by HOAs that their performing their functions solely to protect property values.

The deed agreement between a homeowner and an HOA allows for the collection of assessments that are fundamental to providing services, maintaining the neighborhood, and protecting property values.[6] Assessments are calculated to ensure enough funds are collected to maintain HOA upkeep and services. There is no direct financial incentive for a non-profit organization to place such a priority on collecting fines and attorney fees that are unnecessary for the overall maintenance or provision of services. The practice of collecting extra revenue via fines to profit HOA management companies and their respective attorneys, without providing any avenue for the homeowner to dispute the fine, is abusive and should require oversight and regulation by law. It has been proven by the HOA's priority of payment practices that only statewide regulation will end the practice of using forceful fine assessment and payment practices with compounding

[5] Texas Property Code, Chapter 209.009.
[6] Interim Report to the 80th Legislature, House Committee on Business & Industry, Page 46-47.

penalties to collect money under the threat and ability to take away and auction off a homeowner's property.

Any legislation created to regulate HOAs should include an ordered priority of payment for monies received by an HOA from a homeowner. Including specific priority of payment regulation is essential to ending the abusive practice of collecting thousands of dollars from homeowners through fines that do not go toward the original intent of payment for neighborhood upkeep and the provision of services. Payments made by a homeowner should be applied in the following order: toward any delinquent assessment; any current assessment; any attorney's fees incurred by the association in the collection associated solely with assessment or any other charges that could provide the basis for foreclosure; any fines assessed by the association; any other attorney fees not associated with assessments associated with foreclosure; and any other amount owed to the association.

FORECLOSURE BY AN HOA

The Texas Constitution mandates that resident homesteads may be subject to foreclosure only for failure to pay mortgages, taxes, home equity loans and liens for renovation or repairs to the property.[7] HOAs are not prevented from foreclosing on homeowners who fail to pay monthly assessment fees.[8] This ensures that homeowners are in compliance with the original contract of contributing to the maintenance of the neighborhood and services provided by HOAs. The use of foreclosure is generally the only method available to ensure that other homeowners will not be forced to pay more than their fair share or be forced to accept reduced services to the detriment of the neighborhood as a whole. However, some HOAs foreclose on homes for small, overdue assessments. The question of abuse is also raised in this context due to the practice of foreclosing on a home for small overdue assessments based on the amount of equity in the home.

It is the practice of HOAs to identify whether a profit may be made from the foreclosure and auction of a home to collect minimal fees without reaching a significant threshold amount, thus their actions directly contradict the purpose of entering into a contract to protect the homeowners property investment. Additional questions arise as to what other profit-oriented entities benefit from this practice. If an HOA is allowed to foreclose on a home based on late payment of assessment dues, that monetary amount should be required to reach a high threshold amount, and all smaller debts, including assessments, should be settled through an informal, reasonable payment plan decided on by the homeowner and the association.

The ability of HOAs to foreclose on a home for any purpose has been debated thoroughly in the Legislature. HOA's should not have the ability to perform non-judicial foreclosures, in which no judicial review or process is necessary in deciding whether a home can and should be foreclosed upon. Allowing HOA's to have the exclusive determination whether a homeowner is foreclosed upon has the potential for great abuse. There are many news stories regarding homeowners owing small assessments-sometimes less than one $1,000- notified of foreclosure proceedings against them, often resulting in the loss of their home to ensure payment compliance.

[7] Texas Constitution, Article 16, Sec. 50.
[8] Inwood North Homeowners Association, Inc. V. Harris, 736 S. W. 2d 632(Tex. 1987).

Any new laws regulating HOAs throughout the state should prohibit non-judicial foreclosures. If the practice of foreclosure by HOAs is allowed to continue in the state, it should be allowed only though the judicial foreclosure system. All such actions, which have an enormous financial asset involved, should be decided in the court system where due process protections are afforded to both the homeowner and the HOA, ensuring no abuse takes place by one party to the detriment of the other.

RECOMMENDATIONS

1. There is a need for HOAs within the state to be regulated by state-wide general application to address the creation, obligation, governance of HOAs and rights of homeowners.

2. Current provisions in law regarding HOAs should be consolidated and conform to the best practices of HOAs and protections for both homeowners and HOAs, as determined by the Legislature.

2(a). If the extent of laws currently governing HOAs are insufficient after consolidation with other laws, a new chapter of the Texas Property Code should be enacted to ensure HOAs are properly governed within the state.

3. The consolidated laws, or the new chapter created by the Legislature, should include the use of an Informal Resolution Process to ensure non-legal and inexpensive resolutions are thoroughly utilized when resolving a conflict between an HOA and a homeowner.

4. The consolidated laws, or a new chapter created by the Legislature, should include a specified Priority of Payment when a homeowner is making a good faith attempt to pay assessment fees and should prohibit HOAs from applying monthly assessment monies from homeowners toward other debts that homeowner may owe.

5. The consolidated laws, or a new chapter created by the Legislature, should include language to ensure that if an HOA is allowed to foreclose on a home, based on late payment of assessment dues, the monetary amount should be required to reach a high threshold amount determined by the Legislature, and all smaller debts, including assessments, should be settled through an informal, reasonable payment plan negotiated by the homeowner and the association.

6. The consolidated laws, or a new chapter created by the Legislature, should prohibit non-judicial foreclosures, and if the practice of foreclosure by HOAs is allowed to continue in the state, it should be allowed only through the judicial foreclosure system.

CHARGE 2

Study and report on third-party liability issues involving workers' compensation, including the frequency and success rates of third-party litigation and jobsite safety, the adequacy of compensation and reimbursement to workers, and the economic costs of third-party litigation and equitable and contractual subrogation in construction activities. ***(Joint Interim Charge with the House Committee on Judiciary and Civil Jurisprudence)***

COMMITTEE WORK

The House Committee on Business & Industry held a public hearing on July 29, 2010 to discuss Interim Charge 2.

BACKGROUND

Texas businesses have been offering workers' compensation for employees since 1913. In 1917, the U.S. Supreme Court ruled that states could legally require employers to provide compensation to injured workers. While all other states have since made workers' compensation mandatory, Texas is the only state that allows employers to choose not to carry workers' compensation insurance.

When a business buys Texas workers' compensation insurance, it is protected by the exclusive-remedy defense. For those employers who choose to provide workers' compensation, the system provides a historic bargaining agreement between Texas employees and their employers to create a no-fault system. This bargain allows employees injured on the job to be compensated for both medical care and a percentage of income benefits provided to sustain the employee between the time of the injury and the time in which the employee returns to work. Employers within the system do not have the ability to use common law defenses, such as assumption of risk or comparative negligence, against the employee due to the no-fault aspect of the system.

Employers, on the other hand, benefit from this agreement by gaining immunity from lawsuits by injured employees, as well as employees giving up the ability to recover all other common law remedies, including but not limited to compensatory damages, loss of wage earning capacity, and punitive damages due to the exclusive-remedy defense.

Since Texas allows for employers to provide their own health insurance to employees and not participate in the workers' compensation system, the Legislature has provided incentives to Texas employers to join the system. Those who do not provide their employees with workers' compensation are subject to common law remedies brought by an injured employee. However, an employer cannot use common law defenses to avoid responsibility. This relationship between the two parties - the employer and the employee - is the basis for workers' compensation in Texas.

THIRD PARTY LIABILITY

Historically, the workers' compensation insurance coverage was believed to be limited to the bargaining agreement between the employer and the injured employee. A third-party premises owner was not believed to be included in the protections provided by the Texas workers' compensation system. If a premises owner, through litigation, is found to be liable for the employee's injury or death by providing an unsafe workplace due to dangerous conditions on the premises, the employee may be granted monetary compensation from the premises owner through the court system. The practice of determining liability for premises owners was to prove

whether the owner had knowledge of the defect which caused the harm, and whether the owner was in control of the worksite. If both conclusions are yes, then liability falls on the third-party premises owner.[9] This remedy provides a great incentive for premises owners to ensure a safe workplace for employees, as well as proactive maintenance and upkeep on their premises to lessen the risk of workplace accidents in which a negligent premises owner may be sued. This remedy also allows catastrophically injured employees to recover adequate compensation to provide lost future income resulting from the loss of ability to perform similar job functions, as well as assistance in covering medical care from the incident.

IMPROVEMENTS TO THE SYSTEM

In 1989, the Texas Legislature began an overhaul of the Texas workers' compensation system to address system-wide issues that many saw as being out of control and ineffective. Workers' compensation rates promulgated by the State Board of Insurance had increased dramatically since 1983. The costs to employers were too high, while the benefits to the employee were inadequate and some of the lowest in the nation. Additionally, the system was found to be poorly organized, too complex in its function, and not performing its duty of returning injured employees to work in a timely manner and at a low cost. Insurance carriers within the system were losing money and the cumbersome nature of the system did not provide for efficient service to injured employees. The result was a major overhaul of the system to rein in costs and better serve the injured employees to ensure that the system did not continue to have a detrimental effect on economic development for the state.[10]

In 2005, the Texas Legislature again undertook the challenge to overhaul the workers' compensation system. The 2005 overhaul stemmed from flaws in the basic regulatory structure for workers' compensation in Texas. The system also had not proven effective for injured workers or efficient for employers and insurance carriers providing services to Texas businesses. The workers' compensation system was producing rapidly rising medical costs that were higher than the national average, slow and expensive health-care services, and a lack of success in returning injured workers to gainful employment. As a result, workers' compensation costs as a whole continued to rise. The state's businesses were at a competitive disadvantage and created an environment of fear that system participants would either be forced to leave the state or be forced to opt-out of the system.[11] As a result, the Legislature abolished the Texas Workers' Compensation Commission, transferred its functions to other agencies, and streamlined the workers' compensation system.

Due to significant transition resulting from multiple overhauls to improve the system, and thanks to aggressive monitoring by the Legislature, the Sunset Advisory Commission reviewed the system again during the 81th Legislative Interim. The review focused on the changes made to the system, and whether it was proving to have the desired effects. The findings are preliminary

[9] Submitted Testimony from Lee A. Woods representing the Texas Trial Lawyers Association, Business & Industry public hearing, July 29, 2010
[10] Bill Analysis, C.S.S.B. 1 by Frasier, 2nd Called Session, 71st Legislature.
[11] Sunset Advisory Commission, TWCC Staff Report, April 2004

estimations, given the relatively short time the new system had to develop and the small amount of data generated on which system analysts used to base an assessment. However, the Sunset Advisory Commission, while acknowledging the enormous transition being undertaken by the system as a whole, identified that by and large the system appeared to be healthier as evidenced by stabilizing costs, filing of fewer claims, fewer disputes on those claims, lower insurance rates, less days lost from work and better return to work outcomes.[12] Therefore, the transition of the division has been deemed preliminarily successful, since many aspects of the reforms are still in the implementation phase.

The following graphs identify the positive trend of improvement within the system and its outcomes:

Non-Fatal Occupational Injury and Illness Rate Per 100 Full-Time Employees	2004	2005	2006	2007	2008
Texas	3.7	3.6	3.7	3.4	3.1
U.S.	4.8	4.6	4.4	4.2	3.8

Source: Texas Department of Insurance, Division of Workers' Compensation and U.S. Department of Labor, Bureau of Labor Statistics, Annual Survey of Occupational Injuries and Illnesses, 2009.

Return-to-Work Indicators	Injury Year 2003	Injury Year 2004	Injury Year 2005	Injury Year 2006	Injury Year 2007	Injury Year 2008
% of TIBs Recipients Back to Work Within 6 Months	72%	74%	75%	75%	76%	80%

Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2009.

	Injury Year 2006	Injury Year 2007	Injury Year 2008	Injury Year 2009 *Prelim
#of WC Claims Reported to the Division of Workers' Compensation	116,735	111,907	107,241	95,005
% of Reported Claims with Income Benefits	50%	53%	55%	54%
% of All Reported Claims without a Benefit Dispute	90%	90%	90%	93%
% of All Reported Claims without a Compensability Dispute	95%	95%	96%	97%

Source: Texas Department of Insurance, Division of Workers' Compensation, 2010.

# of WC Claims Receiving Each Type of Income Benefit	Injury Year 2006	Injury Year 2007	Injury Year 2008	Injury Year 2009 *Prelim
Temporary Income Benefits (TIBs)	52,134	52,558	53,304	46,958
Impairment Income Benefits (IIBs)	26,200	25,699	25,024	15,764*
Supplemental Income Benefits (SIBs)	187*	N/A*	N/A*	N/A*
Lifetime Income Benefits (LIBs)	149	128	109	68*
Death Benefits (DBs)	177	198	221	140*

Source: Texas Department of Insurance, Division of Workers' Compensation, 2010.
Note: Numbers labeled with a * should be viewed with caution since they are preliminary and subject to change as data matures.

[12] Sunset Advisory Committee Report, Commission Decisions, Division of Workers' Compensation, Texas Department of Insurance, July 2010.

Average Duration of Income Benefits Per Claim (in weeks)	Injury Year 2006	Injury Year 2007	Injury Year 2008	Injury Year 2009
Temporary Income Benefits (TIBs)	36	31	24	14*
Impairment Income Benefits (IIBs)	16	15	13	10*
Supplemental Income Benefits (SIBs)	22*	N/A*	N/A*	N/A*
Lifetime Income Benefits (LIBs)	125*	81*	44*	14*
Death Benefits (DBs)	48	59	50	N/A*

Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2010.
Note: Numbers labeled with a * should be viewed with caution since they are preliminary and subject to change as data matures.

Average Weekly Income Benefit Payment Per Claim	Injury Year 2006		Injury Year 2007		Injury Year 2008		Injury Year 2009	
	Max	Avg. Benefit Amount	Max	Avg. Benefit Amount	Max	Avg. Benefit Amount	Max	Avg. Benefit Amount
Temporary Income Benefits (TIBs)	$540	$459	$674	$429	$712	$547	$750	$590*
Impairment Income Benefits (IIBs)	$378	$371	$472	$394	$498	$453	$525	$425*
Supplemental Income Benefits (SIBs)	$378	$311	$472	N/A*	$498	N/A*	$525	N/A*
Lifetime Income Benefits (LIBs)	$540	$514	$674	$483	$712	$440	$750	$616*
Death Benefits (DBs)	$540	$433	$674	$492	$712	$529	$750	$536*

Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2010.
Note: Numbers labeled with a * should be viewed with caution since they are preliminary and subject to change as data matures.

% of Claims Capped by Maximum Weekly Benefit Payment	Injury Year 2005	Injury Year 2006	Injury Year 2007	Injury Year 2008
Temporary Income Benefits (TIBs)	20%	23%	16%	14%
Impairment Income Benefits (IIBs)	43%	46%	39%	38%
Supplemental Income Benefits (SIBs)	30%	39%	N/A*	N/A*
Lifetime Income Benefits (LIBs)	15%	16%	14%	10%
Death Benefits (DBs)	37%	49%	36%	35%

Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2010.
Note: Numbers labeled with a * should be viewed with caution since they are preliminary and subject to change as data matures.

ENTERGY DECISION

In 2007, litigation in the case of *John Summers versus Entergy Gulf States* for injuries he sustained while working on a premises owned by Entergy was passed up to the Supreme Court of Texas. The Texas Supreme Court concluded that based on changes in the definitions of "general contractor" and "subcontractor" that occurred within the Labor Code in 1989, certain premises owners can and do qualify as a general contractor in certain circumstances, and are therefore entitled to the exclusive remedy defense under the workers' compensation system. The ruling had a significant impact on the dynamic of the workers' compensation system, since all interested parties were not aware that the law allowed for premises owners to be covered by workers' compensation. The court's dissenters argued that the Legislature never intended to include "premises owners" as part of the workers' compensation protections when it rewrote the law. Based on the contradiction of the ruling, many participants including legislators provided

amicus briefs to the court expressing the fact that the Legislature itself believed that workers' compensation coverage does not apply to premises owners by identifying past legislative attempts to provide premises owners immunity, and by providing examples of successful litigation against negligent premises owners. Legislators concluded that the court had taken an activist stance and created law, instead of accurately interpreting the law.

In 2009, the Texas Supreme Court took the unusual and rare step of reviewing the original ruling of *Summers v. Entergy.* In April 2009, the court upheld its original ruling by reframing the argument and concluding that the law has effectually been granting premises owners exclusive remedy coverage under workers' compensation since 1917.[13] The ruling states that when a premises owner extends coverage to a contractor's employees, it gains the protections of a general contractor under the workers' compensation system.

EFFECTS ON THE SYSTEM

The *Entergy* decision changes the dynamic of the workers' compensation system. If a negligent premises owner caused harm to an employee, that party was historically responsible to bear the expense of the harm caused.[14] The changes made to the system over the past 20 years were made under the presumed understanding that if a third-party premises owner was negligent and liable for a catastrophic workplace injury, that premises owner was subject to litigation to pay for the injuries, as well as pay the monetary compensation for missed and future wages of that employee, and the medical costs associated with the accident. The Workers' Compensation system was never intended to provide coverage to premises owners who do not provide a safe work environment.

The Supreme Court decision has the potential to raise workers' compensation costs dramatically across the system, while benefitting bad actors and passing increased costs onto all businesses that pay into the system. For example, if an employee sustained a life-long catastrophic injury on a worksite due to a negligent premises owner, the employee had the ability to use the courts to receive a monetary settlement to compensate for the financial burden that was bestowed upon the employee, due to the employee's inability to return to work. Meanwhile, all monies paid to the injured employee by the workers' compensation system is recouped and returned to the fund, before any money goes to the injured employee. The loss of the ability to recoup the funds will ultimately fall onto the system to cover. Without the ability to use subrogation to recover workers' compensation funds paid, the system must now absorb millions more in costs for which the system did not account.[15] Subsequently, insurance carriers exclusively handling workers' compensation cases will see upward pressure on their rates due to increased claims falling on the system, resulting from a lack of safe work environments.

[13] Written Testimony of Lee A. Woods, Texas Trial Lawyer Association, Business & Industry Committee Joint hearing with Judiciary and Civil Jurisprudence Committee, July 29, 2010.
[14] Public Testimony of Rene Lara, Texas AFL-CIO, Business & Industry Committee Joint hearing with Judiciary and Civil Jurisprudence Committee, July 29, 2010.
[15] Written Testimony of Rene Lara, Texas AFL-CIO, Business & Industry Committee Joint hearing with Judiciary and Civil Jurisprudence Committee, July 29, 2010.

Since a negligent third-party premises owner is no longer subject to litigation, and severely injured workers have no other recourse, more severely-injured workers must be cared for by the system. This may significantly increase the number of employees qualifying for lifelong benefits, as well as reaching their maximum allowable benefits under the system.

The system is not designed to provide life-long compensation. Benefits within the system that provide for life-long payments to severely-injured workers are very difficult to acquire, based on a stringent set of injury requirements. While medical benefits within the system are not capped, most monetary benefits within the system are. Once the workers' compensation system has met its statutory obligation, the employee, who can no longer work, has very limited options. The potential to rely solely on public assistance is great. This further burdens the taxpayers by externalizing the risky behavior of premises owners onto all Texas taxpayers. The State of Texas should not be paying for the negligent practices of premises owners who have a social responsibility to provide a safe working environment, thus ensuring that every worker in the state gets to come home at the end of the workday.

ADEQUACY OF BENEFITS

One of the questions arising after the *Entergy* decision was that of the adequacy of benefits provided by the workers' compensation system, and whether the benefits should be increased to fill the void left by granting negligent premises owners immunity from an employee lawsuit that would provide the financial means for the employee to continue to live without employment as well as provide for the medical expenses associated with catastrophically injured employees.

Many interested parties point out that, without the ability for employees to sue negligent premise owners as a remedy available to compensate for a long-term injury, the workers' compensation system itself is inadequate. The system was never designed to exclusively provide for life-long, catastrophic injuries, nor were such costs taken into account when upgrading the system. Now, an added burden to the system has been placed by the Supreme Court by not only eliminating the ability to go after a negligent premises owner, but providing blanket immunity and thrusting the responsibilities of caring for a catastrophically-injured employee on to the system, on top of no longer providing monetary compensation.

However, the review of benefit adequacy in the workers' compensation system should not be done in this context. By reviewing the adequacy of benefits based on the new dynamic forced onto the system, adequacy, in this context, is an issue evolving directly from the Supreme Court decision. To review the level of compensation and enhance benefits would be an acceptance of the Supreme Court's activist decision to change the system as a whole. The enormous amount of time and effort applied to improve and evolve the workers' compensation system over the years, which has proven to be beneficial to employees and economically feasible to employers cannot simply be changed and remodeled around a new, incompatible dynamic forced upon the system by the Supreme Court. The outcome would be, at best, unpredictable, and the system will no longer possess the structure on which the Legislature worked so hard to ensure the system is beneficial to all participants. The committee is therefore reluctant to recommend a compromise and allow the Supreme Court to infuse an unanticipated dynamic into the workers' compensation

system. Since the Legislature made decisions to improve the workers' compensation system through perceptions of law contrary to that of Supreme Court decision, the only option to maintain a functional system is to reverse the court decision through legislation to disallow protection of third-party premises owners by workers compensation. Regarding the adequacy of benefits, if the decision is not overturned, the resulting system will not be adequate to absorb the growth in claims and the loss of subrogation funds. Adequacy of benefits must be reviewed to account for life-long, catastrophic injuries that occur at dangerous work sites. This shift will take the system back to being overly expensive to employers, inadequate to protect and compensate injured employees, and again raise the cost of workers' compensation premiums to those carriers providing insurance to the system. Once the system has met its obligation of payment, the financial burden will be passed on to the taxpayers in the form of social services. Currently, the state is not in a position to perpetually provide these social services to injured workers due to the current recession, which has already placed a $21 billion budget deficit going into the 82nd Legislature.

However, outside the context of the *Entergy Decision,* there is some question regarding whether the amount of benefits provided within the system are adequate. The benefits within the system have been deemed too low to adequately provide the assistance most injured workers need once the predictable funds of a paycheck is no longer available. The lack of adequate benefits in the system can have a detrimental effect on the recovery and potential for an injured employee to return to work quickly. Benefit levels should be increased to all injured workers in the system to ensure that an injured worker is not hindered in his or her ability to recover and effectively return to work.

THIRD PARTY LIABILITY & JOB SITE SAFETY

Before the controversial ruling that changed the dynamic of the workers' compensation system, possible litigation was a powerful incentive for certain premises owners to provide a safe workplace. Those who did not provide a safe work environment through negligence were taken to court and obligated to pay compensation for their negligence. Although increasing the adequacy of benefits is suggested to cover catastrophically-injured employees, it does not address the loss of the financial incentives certain premises owners have to provide a safe workplace for Texas employees. The issue of benefit adequacy does not address or fix the problem. It just attempts to provide compensation for it.

The overall goal should be to keep Texas employees safe and working. Texas premises owners have some of the most dangerous worksites in the state. When an employee walks onto a premises for work, that employee does not have any information as to how dangerous the site may be, or whether it has been properly maintained to provide a safe work environment. The knowledge of workplace safety procedures and overall safety of the site is known exclusively by the premises owner. Therefore, the employee's life is solely in the hands of the premises owner. Numerous past examples of litigation show that investing in safety has been outweighed time and again, and superseded by companies more interested in profits.

The workers' compensation system was designed to provide income and medical benefits to injured employees as they recover from injury and return to work. The system was not designed

to handle lifelong injuries caused by unsafe and exceptionally dangerous work environments. Texas does not want a system in place that allowably puts a low priority on keeping employees safe and working. Even with an increase in benefits, the system cannot sustainably provide for the loss of income beyond existing caps. However, this debate does not account for the long-term suffering or the inability to provide for one's self and/or a family. Adequacy of benefits does not take suffering into account or quantify the detrimental effect such an injury will have on the quality of life for that individual or for their family.

The overall goal is to ensure premises owners are provided an incentive to maintain a safe work environment. Texas has an obligation to ensure that its citizens safety is not compromised in an effort to increase a company's profit margins. The *Entergy* decision allows for certain premises owners - who may have catastrophically injured an employee through their negligence - immunity from litigation, eliminating any incentive to maintain a safe workplace. Companies may now calculate Texas employee injuries as a predictable, quantifiable cost of doing business.

Before the Supreme Court decision, scrutinizing premises owners' actions and inactions regarding safety, via litigation, identified bad companies actively neglecting the importance of providing a safe work environment. Due to the litigation process, the state has the ability to review such actions to identify bad actors. Additionally, the state was able to use those examples and lessons to improve safe operating procedures for other companies within the industry by identifying unacceptable business practices that place a low priority on employee safety. In the wake of the *Entergy* decision, these companies are granted complete immunity and thus their internal procedures cannot be reviewed or scrutinized. One purpose for litigation is to create oversight, and provide evidence of occurring violations on a job site that compromise the safety of workers. Since they are now incorporated into a no-fault system, these premises owners are actually provided with a disincentive to ensure that the safety of workers on their site is paramount.

It is not in the best interest of Texas to be a safe haven for companies known to sacrifice safe working environments for Texas workers, due to immunity from scrutiny and litigation. This immunity will lead to increased workplace injuries in the state, which will subsequently add to the number of claims filed, the duration of benefits being provided, and the uncompensated services provided by the taxpayer once obligations are met by the system. Most importantly, it further diminishes the safety of already dangerous workplaces to the sole detriment of Texas workers, while providing immunity to those entities willing to compromise the lives of hard-working Texans for profits.

RECOMMENDATIONS

1. Legislation should be passed to change the definition of "general contractor" in the Texas Labor Code to ensure that certain third-party premises owners cannot be a general contractor and therefore will not be eligible to purchase Workers' Compensation Insurance and qualify for the exclusive remedy defense.

2. Allow an injured employee the ability to pursue litigation toward an employer covered by workers' compensation, if that employer was shown to be grossly negligent in the cause of any injury to the employee, not just death.

3. The stringent requirements of the type and extent of injury that an employee must incur to qualify for lifetime benefits should be adjusted to allow for an enhanced number of severely injured workers to qualify who are covered solely by workers' compensation.

4. Require all premises owners to provide information to subcontractors working on a site, before work begins, of the Occupational Safety and Health Administration (OSHA) safety requirements and standards. Also provide the contact information and procedures for a worker to file a complaint to have OSHA inspect the work premises if the worker believes that the premises owner is not following OSHA standards of providing a safe workplace that is free of serious hazards and other dangers.

5. Formulate a tiered system of premiums required to pay to workers' compensation insurance carriers. Base the payment tiers on the workplace safety record of businesses under workers' compensation. Those entities with a much larger percentage of claims being filed or with a higher average of serious injury claims should pay a much larger percentage of insurance premiums into the system to compensate for the larger impact poor safety practices have on the system.

6. Collect data from hospitals and other health care providers to document the number of uncompensated medical care patients hurt at work and no longer receiving monetary or medical benefits from workers' compensation, to identify the direct costs associated with externalizing the responsibilities of negligent premises owners to the public.

CHARGE 3

Review the Unemployment Compensation Fund and its impact on business taxpayers to determine whether changes may be made to stabilize the fund in times of economic contraction without imposing and undue economic burden on businesses. Determine whether modernizations should be implemented to make the fund more efficient and effective. *(joint interim charge with the House Committee on Technology, Economic Development, and Workforce)*

COMMITTEE WORK

The House Committee on Business & Industry held a public hearing jointly with the House Committee on Technology, Economic Development and Workforce on May 17, 2010 to discuss Interim Charge 3.

THE TEXAS UNEMPLOYMENT TRUST FUND

Any debate regarding changes to Texas law on unemployment insurance (UI) must be viewed through the prism of the current economic situation and the declining balance in the Texas Unemployment Trust Fund (Trust Fund). While Texas is currently borrowing interest free funds from the federal government, within the next year, Texas will have to issue interest paying bonds to repay those loans.

As of July 2010, the balance in the Trust Fund was $0 and Texas had already borrowed $1.45 billion from the federal government to pay UI benefits.[16] Additionally, the statutory floor on the Trust Fund is one percent of the wage base, or approximately $814.6 million.[17] As of April 7, 2010, the Texas Workforce Commission (TWC) estimated that Texas would need a total loan of $2.5 billion to reach the statutory floor as of October 1, 2010.[18] However, the unemployment situation has continued to deteriorate and that estimate may be several hundred million dollars too low. Most UI taxes are paid at the end of the first quarter of the year, so if the payout rate ($268 million per month) continues, payouts will exceed tax revenue by at least a billion dollars in the second half of 2010 and Texas will have to borrow that money from the federal government, raising the total borrowing to over $3 billion before the end of 2010 to comply with the statutory floor.

To prevent the immediate recoupment of over $3 billion from Texas businesses in 2011, the TWC is likely to issue $2 billion in bonds in late 2010. The TWC hopes to fund the bonds at a 3% interest rate. Additionally, the TWC already had to increase the minimum UI tax per employee from $23.40 in 2009 to $64.80 in 2010. That number may go higher in 2011.

Eventually, all of the borrowed money will be repaid by Texas businesses in unemployment taxes. Any stimulus money received from the federal government would immediately reduce the deficit in the Trust Fund and, correspondingly, reduce the expected interest expense from bonding and the amount of Texas business taxes.

[16] http://www.twc.state.tx.us/svcs/commrs/051710chr.pdf
[17] Id.
[18] http://www.recovery.gov/About/Pages/The_Act.aspx

THE AMERICAN RECOVERY AND REINVESTMENT ACT

The American Recovery and Reinvestment Act of 2009 (Stimulus) was signed into law on February 17, 2009.[19] The included $7 billion in potential incentive payments to states that "modernize" their state unemployment insurance programs by including certain eligibility provisions.[20] The $7 billion is allocated on a state-by-state basis proportionate to the state's FUTA taxable wages.[21] Each state's share of the incentive funding is currently reserved in the Federal Unemployment Account.[22] Reserved funds will become available for general federal share of the incentive payment.[23] Texas' share is approximately $555 million.

The apportioned federal money is available to all states, including Texas, in tranches. One-third of the funding, $185 million for Texas, becomes available when a state adopts the method of determining unemployment eligibility know as the "alternate base period"(ABP). If ABP is not adopted, the state is ineligible for any federal funds, regardless of the adoption of any other changes to the unemployment insurance system.

If a state adopts ABP, it can also apply for the other two-thirds of the federal funding, $370 million for Texas. However, to do so, the state must also adopt two out of a possible four "modernizations" suggested by the federal statute. Each "modernization" would increase the number of persons eligible for UI coverage in Texas. The four options include providing coverage for (1) part-time workers; (2) people who quit work for a "compelling family reason;" (3) people in TWC approved training programs; or (4) providing a weekly allowance for dependents of the unemployed person.

All statutory changes necessary to receive the federal funding must be permanent in nature; that is, they cannot be subject to sunset or other conditions that would result in automatic future discontinuation. [NOTE: "Applications should only be made under provision of state laws that are currently in effect *as permanent law* and not subject to discontinuation. This means that the provision is not subject to any condition - such as an expiration date, the balance in the state's unemployment fund, or a legislative appropriation - that might prevent the provision from becoming effective, or that might suspend, discontinue, or nullify it."].[24] However, a future Texas Legislature could vote to rescind the changes in law at a later date.

[19] http://www.doleta.gov/recovery/
[20] http://wdr.doleta.gov/directives/atach/UIPL/UIPL14-09a.pdf
[21] Id.
[22] Id.
[23] Id.
[24] Dept. of Labor, Unemployment Insurance program Letter No. 14-09, http://wdr.doleta.gov/directives/attach/UIPL/UIPL14-09b.pdf

ONE-THIRD OF STIMULUS FUNDING: ALTERNATE BASE PERIOD

Currently, an unemployed person is eligible to receive benefits under Texas law if that person has earned wages in two of the four quarters in the "base period." The "base period" consists of "four of the last five competed calendar quarters." The current quarter and the most recently completed quarter do not count in the base period. Therefore, the chart below illustrates a person's base period if they are laid-off on the date of this report, December 2010.

2009		2010			
3rd Q	4th Q	1sr Q	2nd Q	3rd Q	4th Q
**********Current Base Period**********					**today**

For illustrative purposes, consider the following two examples. Tom entered the workforce in 2009, but was unable to find a job until April 1, 2010. He was employed full-time from April 1, 2010 until December 31, 2010, when he was laid off, through no fault of his own. The chart below illustrates Tom's wage credits:

	2009		2010			
	3rs Q	4th Q	1st Q	2nd Q	3rd Q	4th Q
Tom's Wages				***	***	***
	**********Current Base Period**********					**today**

Tom has wage credits in only one quarter of his base period - the second quarter of 2010. He receives no credits for his work from July 2010 through December 31, 2010. Based on current Texas law, Tom is ineligible for unemployment benefits even though he worked for nearly nine months in 2010.

In contrast, Bill has been in and out of the workforce for years. He worked for a covered employer for five days from September 28, 2009 through October 3, 2009. Then he was out of work until December 15, 2010. He was laid off on December 31, 2010. The chart below illustrates Bill's wage credits:

	2009		2010			
	3rd Q	4th Q	1st Q	2nd Q	3rd Q	4th Q
Bill's Wages	***	***				***
	**********Current Base Period**********					***today***

Bill has wage credits in two of the quarters in his base period - the third and fourth quarters of 2009. Even though Bill was employed less than a month in the last year and a half, he is eligible for benefit (albeit a low level of benefits) under Texas Law.

Why does Texas have a statutory scheme whereby a person with sporadic work history from more than a year ago is eligible for unemployment benefits, while a person with a solid work

history for the last nine months is ineligible? The answer is found in the history of Texas' unemployment statutes. Texas passed its version of the Unemployment Compensation Act in 1936. At that time, employers had to submit quarterly wage data by mail thirty days after the end of each quarter. Then the TWC had to input all of the data into its computer systems. The administrative burden was high and the time-lag of up to six months between when a person worked and when their work history made it into the Agency's system was unavoidable. Thus, the statute created a base period that gave the Agency time to collect the data it needed to process claims.

However, data collection and conversion methods have improved tremendously in the more than seventy years since 1936. Now, the majority of employers transmit data electronically to the TWC and employment data is immediately available. The TWC has the ability to process the data more quickly and implement ABP. Significantly, the federal statute does not require Texas to implement ABP for all UI applicants - only those who do not qualify under the standard base period. Accordingly, the administrative cost of implementing ABP can be minimized because it would only apply to a fraction of UI applicants. The TWC estimates the cost of ABP (including administrative costs and benefit payments) at approximately $41.4 million annually over the next five years.

Under ABP, the TWC would also consider the most recently completed calendar quarter instead of the same quarter from a year earlier:

2009		2010			
3rd Q	4th Q	1st Q	2nd Q	3rd Q	4th Q
**********Current Base Period**********					***today***
	**********Alternate Base Period**********				***today***

A UI applicant would thus qualify for benefits if he had wages in two quarters of either the existing base period or the alternate base period. In the first example, Tom would be eligible for benefits under ABP because he had wages in two of the quarters that form that alternate base period:

	2009		2010			
	3rd Q	4th Q	1st Q	2nd Q	3rd Q	4th Q
Tom's Wages				***	***	***
		**********Alternate Base Period**********				***today***

Bill would still qualify under the regular base period. Some people advocate disregarding the current bas period in its entirety and replacing it with the alternate base period for all applicants. Such a change would keep people like Bill, who have not been in the workforce consistently over the past year, form qualifying for benefits. While this is permissible under federal law, it would be significantly more expensive from an administrative perspective and the administrative costs could even exceed any savings in benefits.[25]

[25] Tex. Lab. Code Sec. 207.021

From a purely equitable perspective, Texas should pass ABP. There is no rational basis for including a person's past work history for eighteen to twenty-four months before the date of their layoff, while disregarding their more recent employment during the three to six months before their layoff. The more recent data provides a more accurate picture of whether or not the applicant was an active part of the Texas workforce and how much they were paid. However, the equitable relief must be balanced with the economic cost. If Texas passes ABP, it will receive $185 million in federal funding at an annual cost of $41.4 million. Factoring the time value of money, the UI Trust Fund will receive an economic benefit from passing ABP for a little more than five years. After that point, the UI Trust Fund will have to absorb a loss. Each Legislature must weigh the equitable and economic factor individually. However, if the Legislature is going to pass ABP at any point in the next ten to twenty years, it should do so in the next Legislative Session in order to access the federal stimulus money. [NOTE: In addition to the equitable and economic factors involved in the unemployment insurance debates, legislators must also consider the potential precedential effect of changing Texas substantive law in response to a federal mandate. There is some debate over whether or not the federal government can constitutionally make UI funding contingent on changes to state substantive law. However, that topic is beyond the scope of this report.

TWO-THIRDS STIMULUS FUNDING

Adoption of ABP is a hurdle that each state must meet before it can access the other two-thirds of allocated unemployment stimulus funding. If, and only if, Texas adopts ABP it has the ability to access the $370 million remaining in its stimulus UI allocation. To receive the $370 million, Texas must also adopt two of the following four options: provide coverage for (1) part-time workers; (2) people who quit work for a "compelling family reason"; (3) people in TWC approved training programs; or (4) provide a weekly allowance for dependents of the unemployed person.

COVERAGE FOR PART-TIME WORKERS

Under current Texas law, a person must be "able to work" and "available for work" to be eligible for UI benefits.[26] The TWC has consistently interpreted "available for work" as "available to work on a full-time basis".[27] According to the TWC, full-time employment is 30 hours or more per week.

However, it is a common misconception that a laid-off part-time worker is ineligible for UI benefits in Texas. In fact, as long as a person is currently seeking and available for full-time work, that person is eligible for benefits, regardless of whether or not that person's work history consists of full or part-time employment. In contrast, a person with previous full-time work experience who is now seeking part-time employment is ineligible for benefits. The change in law commonly referred to as the "part time worker" provision refers not to a person's work

[26] http://www.twc.state.tx.us./ui/bnfts/claimant1.html#qualify
[27] Dept. of Labor, Unemployment Insurance program Letter No. 14-09, http://wdr.doleta.gov/directives/attach/UIPL/UIPL14-09b.pdf

history, but to the type of work a person is seeking. This distinction is significant. Consider the following examples:

April worked full-time (fifty hours a week) for the last eight years. Her employer paid unemployment taxes on her behalf into the Texas Unemployment Trust Fund. She loses her job through no fault of her own. April decides to take care of her children part-time and look for a part-time job of fifteen hours a week. Under current Texas law, April is ineligible for benefits.

John worked part-time (twenty-five hours a week) for the last year. His employer paid unemployment taxes on his behalf into the Texas Unemployment Trust Fund. He loses his job through no fault of his own. He is looking for a new part-time job. Under current Texas law, John is ineligible for benefits.

Cindy worked part-time (ten hours a week) for the last year, her employer paid unemployment taxes on her behalf into the Texas Unemployment Trust Fund. She loses her job through no fault of her own. She decides to look for a full-time job (or at least tells the TWC that she is looking for a full-time job.) Under current Texas law, Cindy is eligible for benefits.

The following chart summarizes April, Jon, and Cindy's work history and current situation:

	Work History: Weekly Hours	Employer Paid UI Taxes	Seeking Work: Weekly Hours	Eligible for Benefits
April	50	Yes	15	No
John	25	Yes	25	No
Cindy	10	Yes	40	Yes

Paradoxically, Cindy, the person who has worked the least, is the only one of the three who is eligible for benefits under current Texas law.

The "part-time worker" change would allow a person seeking part-time work to receive UI benefits. If the Legislature makes such a change, both April and John would become eligible. However, the Legislature has some flexibility to make policy determinations to tighten eligibility. For instance, the Legislature could legally mandate that a person seeking part-time work must seek at least as many hours of work as they averaged in their base period.[28] In such a scenario, John would be eligible for benefits, but April would not because she was seeking a reduction in her hours of employment. The Legislature could also mandate that a person must be seeking at least twenty hours of employment. Such a provision would also allow John to receive coverage while continuing to exclude April. According to the Department of Labor (DOL), Texas could also use a combination of limitations. "[f]or example, a state may define part-time work as work having comparable hours to the individual's work in the base period, except that an individual must be available for at least 20 hours of work per week.[29]

[28] Dept. of Labor, Unemployment Insurance program Letter No. 14-9, http://wdr.doleta.gov/directives/atach/UIPL/UIPL14-09b.pdf

[29] http://wdr.doleta.gov/directives/atach/UIPL/UIPL14-09a.pdf

The TWC has estimated that providing UI coverage for persons seeking part-time work will cost an average of approximately $27.5 million per year for the next five years, including benefits and administrative costs. For Texas to receive its $370 million allocation, the state must pass another provision along with part-time workers.

COMPELLING FAMILY REASON

Providing benefits to people that leave their jobs for a "compelling family reason" is a second option that would count toward the $370 million. According to the statute, compelling family reasons include, leaving a job due to (1) domestic violence; (2) the illness or disability of an immediate family member; and (3) to move with a spouse. Texas already provides a measure of coverage for people who leave their job for a compelling family reason, but several revisions would be necessary to comply with the federal requirement for UI funding. According to the TWC, the total annual cost of making the changes necessary to comply with the "compelling family reasons" provision, including administrative expenses and benefits, is approximately $5 million annually.

DOMESTIC VIOLENCE

Currently, Texas provides UI benefits to a person who leaves a job because of domestic violence against the employee. The coverage would have to be expanded to anyone who leaves their job because of domestic violence against any of their immediate family members. This provision is unlikely to affect a large number of Texas residents.

ILLNESS OR DISABILITY OF AN IMMEDIATE FAMILY MEMBER

Currently, Texas provides UI benefits to a person who leaves a job because of their own illness or disability, their child's illness or disability, or if their spouse is terminally ill. Texas would have to extend coverage to the illness or disability of any member of an employee's immediate family. This provision is potentially expensive because the illness or disability of an employee's parents must be covered. As the state's population ages, there may be more people who stop working to care for an aging parent. The Legislature must decide whether or not a decision to quit work to provide this type of care should be covered by unemployment insurance.

TO MOVE WITH A SPOUSE

Currently, Texas provides UI benefits to a person who leaves a job to move with a spouse who is in the military. Texas also provides coverage to everyone who moves with a spouse after a six week waiting period. The rationale appears to be that six weeks is a reasonable time for a person to look for a job in a new city. If they are unable to find a job after that time, then unemployment benefits begin. The six-week waiting period would have to be eliminated to comply with the federal statute.

TWC APPROVED TRAINING PROGRAM

Providing benefits to people while enrolled in TWC approved training programs is a third option that would count toward the $370 million. The TWC has certain training programs for unemployed persons to help them become prepared for a new job. Currently, people in such programs are eligible for UI benefits under Texas law. However, for this option to count toward the $370 million, Texas must be willing to extend their benefits for up to an additional twenty-six (26) weeks while they are in the training program. However, the continuation of benefits only lasts as long as the training course. The TWC estimates that this option would cost $32.4 million annually.

While encouraging people to get additional job training is a laudable goal, the problem with this option is the potential for abuse. Potentially, the inclusion of additional benefits for training could have the paradoxical effect of discouraging people form enrolling in a training program when they first became unemployed. Instead, people have an incentive to exhaust their full allocation of UI benefits, and then enroll in a training program to gain the additional twenty-six weeks of benefits if they are unable to find a job. This option would be more attractive if Texas could mandate early enrollment in the training programs to earn the additional benefits. Unfortunately, the DOL has provided guidance that Texas cannot so-mandate.

WEEKLY ALLOWANCE TO DEPENDENTS

Providing a weekly allowance to dependents of unemployed persons is the final option toward receiving the $370 million. Under this option, Texas would provide each person receiving UI benefits with an additional $15 per week per dependent. This option is prohibitively expensive at $ 85 million annually according to the TWC, so it did not merit substantive debate during session.

THE APPLICATION PROCESS

If Texas passes ABP (and any of the other required modernizations), it must apply for its incentive payment and receive approval from the DOL.[30] All applications must be received by the DOL no later than August 22, 2011. The DOL has thirty (30) days to accept to reject and application. However, a state may delay the effective date of a statute for up to twelve months due to "implementation requirements." the latest possible effective date is September 21, 2012.[31]

Once approved, Texas may use its incentive payment to pay unemployment benefits and administrative expenses. Significantly, all incentive payments must be exhausted before a state will be eligible for federal unemployment advances under Section XII of the Social Security Act.[32] Given the current deficit in the Texas Unemployment Trust Fund, Texas is currently receiving regular advances from the federal government to cover wage claims. Such advances

[30] http://wdr.doleta.gov/directives/atach/UIPL/UIPL14-09a.pdf
[31] Id.
[32] http://www.doleta.gov/recovery/

would stop until Texas exhausted its stimulus payments; the payments could not be used to build up a reserve while receiving federal advances.

To date, twenty-nine (29) states have been certified to receive their entire incentive payments.[33] Another seven (7) states, the Virgin Islands, and the District of Columbia have adopted an "alternate base period" method of calculating benefit eligibility, allowing them to receive one-third of their eligibly funding. In total, thirty-six (36) states, the Virgin Islands, and the District of Columbia have been certified to receive at least a portion of the incentive payments.[34]

OTHER POTENTIAL CHANGES TO UNEMPLOYMENT INSURANCE

In addition to the potential changes in Texas law necessary to ensure the delivery of federal stimulus dollars, there are several other ways that Texas could modernize its unemployment compensation system.

ELIMINATE THE "SHAM EMPLOYER LOOPHOLE"

Under current law, an employee is not eligible for UI benefits if they are terminated for cause. However, if they are hired for a new job after the termination, then get laid-off from the second job, they become eligible for benefits. The problem arises when the second job is not a legitimate employment opportunity. For instance, after Joe is fired for theft, his brother-in-law, Mark, could "employ" him to mow his yard once a week. Then he could "lay him off" a few weeks later. Under current law, Joe would become eligible for benefits after Mark "laid him off," despite his prior termination for cause.

Texas could dramatically reduce the incidence of "sham employer" by requiring that a person demonstrate employment of at least twenty (20) to thirty (30) hours in a single week with an employer who pays into the unemployment insurance system (a "covered employer".) Such a change would prevent situations like the example involving Mark and Joe. First, Mark is probably not a covered employer. Second, Joe is not working enough hours per week to qualify. The TWC estimates that such a change would save $16.5 million per year.

ELIMINATE THE "SEVERANCE LOOPHOLE"

Under current law, a person can receive both severance benefits and unemployment benefits at the same time. Therefore, someone who is laid off and receives three months of salary as severance is also entitled to immediately collect unemployment. Paradoxically, the unemployed person will make more money for the next three months than they did while working.

A potential fix would involve delaying the start of a person's unemployment benefits until they exhaust their severance package. So, if a person receives one month's severance, they must wait one month before receiving unemployment. If they receive six weeks of severance pay, they must wait six weeks before receiving unemployment, and so on. The unemployed person would

[33] http://www.doleta.gov/recovery/
[34] Id.

remain eligible for all of their UI benefits; they would just be delayed to prevent situations where unemployed people get paid more than they did while they were working. The TWC estimates that this change would save $23.4 million per year.

RAISING THE CEILING OF THE TEXAS UNEMPLOYMENT TRUST FUND

The Texas Trust Fund has a statutory ceiling set at 2% of the taxable wage base. That statutory ceiling is one of the reasons for the high negative balance in the Trust Fund in 2010. In 2008 (and for several years prior), receipts from UI taxes exceeded payouts such that the Trust Fund exceeded the statutory ceiling and money needed to be returned to businesses. If that money had remained in the Trust Fund, the need to raise taxes during recession would have been reduced.

Part of the problem with the ceiling is that it is based on the wage base, a metric that is not directly related to the actual exposure of the Trust Fund in the form of UI benefit payouts. The wage base includes the first $9,000 paid to an employee in a calendar year. That number is fixed in statute and has not changed for many years. However, UI benefits are based on the entirety of wages received by an employee. As average wages rose over the last decade, the potential exposure to the Trust Fund increased. However, the Trust Fund ceiling did not rise with the potential exposure. As a result, the ceiling proved far too low to absorb the Trust Fund losses during this recessionary period. While an overly high ceiling negatively impacts the economy by taking money out of the hands of business owners and putting it in a government trust, an inadequate ceiling compounds the pain of a recession by forcing large tax increases on struggling businesses.

Future recessionary taxes could be mitigated by tying the ceiling of the Trust Fund to average actual wages, as opposed to the wage base. Accordingly, as wages and, therefore, Trust Fund exposure, rise, the ceiling would also rise. A possible starting point of .5% of the average annual wages would have a small impact on the ceiling now, but would allow it to increase over time, preventing a repeat of the 2008 scenario when tax money was returned even though forecasts predicted an need for it within a year or two.

RECOMMENDATIONS

1. If the Legislature decides to adopt the "alternate base period" as the method to determine unemployment eligibility, it should do so in the next Legislative Session in order to access $185 million in federal stimulus money.

2. Eliminate the "sham employer loophole" by requiring that a person demonstrate employment of at least twenty (20) to thirty (30) hours in a single week with an employer who pays into the unemployment insurance system.

3. Eliminate the "severance loophole" by classifying employees who received severance pay and for how long, and delay the payment of unemployment benefits until they exhaust their severance package.

4. The Legislature should raise the statutory ceiling of the Texas Unemployment Fund to reduce the pain of a recession by forcing large tax increases on struggling businesses.

5. Tie the statutory ceiling of the Trust Fund to average actual wages, as opposed to the wage base, to mitigate future recessionary taxes by having more funds within the trust. This would prevent a scenario where tax money is returned to businesses even though forecast predicts a need for it within a year or two.

6. The committee recommends that the Texas Workforce Commission increase vigilance and expand the penalties toward employers who cheat the unemployment insurance system by improperly classifying employees as independent contractors to avoid paying into the unemployment insurance fund.

CHARGE 4

Examine ways to increase the creation of jobs in the Texas Manufacturing Industry.

COMMITTEE WORK

The House Committee on Business & Industry held a public hearing on March 25, 2010 to discuss Interim Charge 4.

MANUFACTURING IN TEXAS

Manufacturing entities in Texas are those establishments engaged in the mechanical, physical or chemical transformation of materials, substances or components into new products.[35] Any industry that takes raw materials for the fabrication or assembly of components into a finished product falls within the sector of manufacturing.

The manufacturing sector in Texas employs almost 1 million Texans, which represents 8.2 percent of all employment within the state, and an annual average of 881,634 payroll workers for 2009. There were approximately 20,225 Texas manufacturing business units, which represent over 23,314 establishments, and contributed more than $13.5 billion in quarterly payroll wages to the Texas economy for 2009.[36] Compared to the most current January 2010 (seasonally adjusted) employment figures for the sector, the total number of payroll workers declined to 814,900. Even though the figures from the month of December 2009 to the month of January 2010 showed an increase of 2,400 jobs - the first over-the-month increase in 19 consecutive months for the sector - the total number of jobs lost in manufacturing from January 2009 to January 2010 was 78,200.[37]

The current state of manufacturing jobs in Texas is on the decline. Although the current economic downturn has further eroded the employment base within the manufacturing industry, the industry as a whole has not grown in decades. In 1990, jobs within the manufacturing sector provided 13 percent of the state's employment. By 2009, that percentage dropped to 8.2 percent of the workforce. Furthermore, there were roughly 60,000 fewer manufacturing jobs in 2009 than in 2003.[38]

Although global competition for manufacturing plants and jobs has negatively impacted Texans working in the manufacturing sector, this alone cannot account for the overall loss in manufacturing jobs within the state. From 1997 to 2003, the dollar value of manufacturing output remained relatively unchanged. In fact, although the number of manufacturing establishments in Texas remained stable between 2003 and 2008 and even into 2009 - (2009, 1st Qtr. 23, 551), the gross output from manufacturers in Texas increased by 71 percent to $159 billion.[39]

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[35] Testimony of Mark Hughes, Texas Workforce Commission, to the Business & Industry Committee, March 25, 2010.

[36] Testimony of Mark Hughes, Texas Workforce Commission, to the Business & Industry Committee, March 25, 2010.

[37] Written Testimony of Mark Hughes, Texas Workforce Commission, to the Business & Industry Committee, March 25, 2010.

[38] Written Testimony of Mark Hughes, Texas Workforce Commission, to the Business & Industry Committee, March 25, 2010.

[39] Testimony of Cindy Geisman, Texas Workforce Commission, to the Business & Industry Committee, March 25, 2010.

CHANGES IN MANUFACTURING

The manufacturing sector has historically been a primary source of middle class jobs within the state, especially for non-college educated workers, as well as a large number of highly educated workers in engineering, chemistry, aerospace and high technology fields.[40] The increase in manufacturing resulted from evolving technology and advanced production processes within the sector with employers finding efficiencies to increase output and overall sales volume without proportionately expanding their employment base.[41]

Due to the evolving efficiencies and automated production processes that changed the necessary job skills, many manufacturing employees in the past were high school graduates with unspecialized skill sets. New manufacturing jobs require more educated and specialized employees to perform the job functions. This change within the industry resulted in a loss of available manufacturing jobs in the state, as well as changed the skill requirements that left a significant number of Texas manufacturing workers with skills no longer applicable to the needs of Texas manufacturers. Therefore, the need to stay competitive in a global environment is a catalyst for the changing job skills necessary for modern manufacturing jobs. In order to maintain a healthy manufacturing industry within the state, Texas workers need a more advanced and specialized skill set.

LOSS OF MANUFACTURING IN TEXAS

Although the committee charge is to identify ways to increase manufacturing jobs within the state, one reason for the loss of jobs is the loss of manufacturers already established within Texas. It is the practice of the Legislature to incentivize new businesses to come to the state and bring employment opportunities. However, no program is currently in place to retain manufacturing companies which may be struggling to stay afloat in the state. The loss of manufacturers that may have needed a small loan or other type of assistance to continue to employ and pay a significant amount of high paying manufacturing positions, which in turn provide for further economic development, should be reviewed. A program should be initiated to determine whether certain manufacturing companies that have the potential to succeed may qualify for temporary government assistance in times of recession or unforeseen circumstance to maintain its large employee base, attempt to restructure, and continue to be productive and successful in the state. The program could be similar in effect to the Governor's Economic Development Fund by setting aside funds, and allowing struggling manufacturers the ability to apply for financial aid. If the practices of the company are sound, and it is determined that the company does have the potential to be profitable while providing a significant number of high

paying jobs to remain in the state, the program could provide financial assistance in the form of no interest loans or grants to ensure long-term viability, thus providing existing manufacturing jobs to current and future employees.

[40] Texas Association of manufacturers' website, TAM principles. http://manufacturetexas.org/TAM_principles

[41] Testimony of Mark Hughes, Texas Workforce Commission, to the Business & Industry Committee, March 25, 2010.

RE-EDUCATING THE CURRENT MANUFACTURING WORKFORCE

In order to find ways to increase manufacturing jobs within the state, the Legislature must first look at the reasons manufacturing jobs are declining, and identify ways to stop the loss of jobs already here. The need for more advanced training for existing manufacturing employees, as well as the recent economic downturn have left many employees looking for new skill sets to maintain or regain employment within the changing manufacturing economy. The Legislature has identified this as a viable avenue in reversing the trend of declining manufacturing jobs in Texas. The Texas Workforce Commission's (TWC) Workforce Development Division has begun identifying the gap in the education of our current workforce, and determining the training needed to ensure employees are skilled enough to either acquire these positions through specialized training or maintaining manufacturing positions due to continuing education.

TWC's WORKFORCE DEVELOPMENT DIVISION PROGRAMS

One primary tool developed by the TWC to support the changing manufacturing industry is the Skills Development Program. In 2009 alone, the Skills Development program served 170 Texas businesses, created 3,567 new jobs, and retrained 15,949 current Texas workers. Although the program applies to all businesses within the state, the Skills Development program has historically created more jobs, and has trained more workers in the manufacturing industry than any other industry in Texas. Almost half of all skills trainees each year come from the manufacturing industry.[42] In 2010, TWC has several Skills Development projects taking place throughout the state, which focus specifically on manufacturing. The projects will create approximately 1,000 new manufacturing jobs in the state, which is vital to increasing the amount of manufacturing jobs. It will also provide new training to upgrade the skills of 2,500 manufacturing employees so that they remain competitive in the changing industry, and potentially move into higher-level positions. There is great importance in keeping the incumbent manufacturing employees educated and competitive to ensure that the state does not replace manufacturing employees that may be given enhanced education with other employees that are given the same education, but may not yet be in the industry. By eliminating one employee who may be trained to perform advanced job duties with another who has received the education, there is no overall net increase in manufacturing jobs in Texas. Before developing a new and evolving skilled manufacturing workforce for the future, efforts need to focus on maintaining the workforce currently in existence.

TWC SKILLS DEVELOPMENT PROGRAM MANUFACTURING TRAINING GRANTS

TWC has been active in creating training programs for the manufacturing industry to ensure that Texans stay competitive globally, and that Texas employees are skilled enough to secure higher paying positions and benefits provided by most manufacturing jobs. One example of training

[42] Testimony of Cindy Geisman, Texas Workforce Commission, to the Business & Industry Committee, March 25, 2010.

provided is taking place at several community colleges designed to help the petrochemical manufacturing industry. The training is creating specifically skilled employees to meet specified position requirements in core and advanced skills in instrumentation, electrical, process operations, system and equipment maintenance, troubleshooting computer operations, and applied instrumentations that will provide hands-on training and aligns with national skills standards. Another example of creating specially-trained employees to fill specified positions is in Amarillo, where TWC has coordinated with Bell Helicopter on a manufacturing project to train employees to fill an urgent need for assemblers with skills in new technology and specialized systems.[43]

However, these are specific training courses identified through the coordination of manufacturers in the state, TWC and educational institutions to provide skills to Texas workers to fill specified manufacturing positions. This is effective in putting Texans to work, and providing the skills to maintain and perform manufacturing jobs already available in the state. In order to keep future jobs from leaving the state, TWC has been active in providing opportunities for advanced training in manufacturing and pushing prospective employees toward nationally-recognized credentials.

TWC has also invested federal Workforce Investment Act (WIA) funds to enhance the support of manufacturing in Texas. Grants have recently been provided to increase Texans skills in manufacturing through supporting the Manufacturing Skill Standards Council (MSSC), as well as the National Institute of Metalworking Skills (NIMS) certification training and testing. One example is within the Alamo colleges, which are taking steps to incorporate the MSSC, the NIMS and the American Welding Society (ASW) certification training and testing system into the college credit and non-credit curriculum. This project was developed in collaboration with the National Manufacturing Institute (NAM) and the San Antonio Manufacturers Association.[44] Through such collaboration with manufacturers in the state, learning institutions proactively identify the necessary skill sets, as well as what may be needed in the future to properly train our workforce to maintain and create manufacturing jobs in Texas.

FUTURE MANUFACTURING WORKFORCE

The collaboration between TWC, manufacturers in the state, and institutions of higher learning is a big step toward increasing the amount of Texans qualified to fill the positions of more technologically-advanced manufacturing jobs, and enticing employers to move to the state to take advantage of the availability of a specifically-skilled manufacturing workforce. In order to not only maintain current manufacturing jobs, but continue to create new jobs, the state must proactively identify what advancements will take place within the industry in the foreseeable future and identify what the evolving future skill sets for these positions will be. Training a workforce to fill these future positions should begin at the high school level, and continue to be at the forefront for new manufacturing job training.

[43] Testimony of Cindy Geisman, Texas Workforce Commission, to the Business & Industry Committee, March 25, 2010.

[44] Testimony of Cindy Geisman, Texas Workforce Commission, to the Business & Industry Committee, March 25, 2010.

To ensure that the next generation of manufacturing employees in Texas are prepared to enter an evolving and more complex manufacturing industry, the necessary skill sets to fill those positions will require programs developed in collaboration with high schools, community colleges and TWC-sponsored summer programs offering hands-on educational opportunities and specified training for students not attending a four year institution of higher learning. By identifying candidates for high school training courses specific to manufacturing, and creating a system of accreditation, the state can actively prepare high school students to be successful in an advanced manufacturing economy.

Over the last five years, TWC has been actively preparing the workforce of tomorrow by preparing Texas' high school, college and university students with advanced skills training that will be in demand in the foreseeable future. TWC has committed over $10 million to promote Science, Technology, Engineering and Math (STEM), which include summer camps, internships and STEM-related competitions. These projects will provide the specific skills necessary to compete in a new manufacturing economy. Some examples are: learning how to forecast and measure wind; learning the basics of turbine design and building, and testing their own wind turbines; designing and creating complex robots; holistic manufacturing courses involving concepts of mechanical design, manufacturing management and automation; an introduction to digital circuits, electrical motors, sensors, microcontrollers, programming, behavior-based robotics, simulation and graphics to enable students to understand and practice career-related technical concepts; and an introduction to nuclear physics concepts and how they apply to impurity detection in manufacturing integrated circuits.[45] By instilling a strong understanding of these core concepts, future Texas high school graduates are provided with an advantage over other states in new manufacturing techniques and technologies.

A prime example of the need for preparation of students today for emerging manufacturing jobs is the lead taken by Texas in renewable energy and energy efficiency fields. One of the largest grants in this field is headed by Austin Community College, and includes Alamo Colleges, Central Texas College, Dallas County Community College District and Texas State Technical College.[46] The project's goal is to integrate renewable energy and energy efficiency content matter into current courses, and develop new courses as needed to keep up with a rapidly growing industry.

As new manufacturing entities develop, the identification of these entities, the necessary requirements for their creation and maintenance, and the appropriate skills training necessary are vital to maintaining a healthy manufacturing sector, as well as necessary for providing a viable workforce to perform the job functions. Therefore, the industry itself must be proactive in providing interested parties within the state the necessary tools for the future. A strong collaboration must exist between lawmakers, educational institutions and manufacturers in Texas to continually coordinate in an evolving industry.

[45] Testimony of Cindy Geisman, Texas Workforce Commission, to the Business & Industry Committee, March 25, 2010.

[46]Testimony of Cindy Geisman, Texas Workforce Commission, to the Business & Industry Committee, March 25, 2010.

RECOMMENDATIONS

1. Identify what training and education will be necessary in future manufacturing and create programs to ensure workers stay competitive in a global, evolving industry.

3. Proactively identify manufacturers in the state and collaborate with them to identify what skills are needed to ensure the next generation of Texas employees receives specialized training to fill those specific positions.

4. Develop programs in collaboration with high schools, community colleges and TWC summer programs to provide hands-on educational training for students that do not plan to attend four-year institutions of higher learning.

5. Continue to proactively identify future manufacturing skills that rely on science and math and create programs to develop a strong understanding of core concepts to provide Texas high school graduates the skills necessary to work and continue to be educated in an ever-advancing industry.

6. Through a resolution, the Legislature should establish a "manufacturers' day at the capitol" during the 82nd Legislative Session to maintain communication and collaboration between lawmakers, educational institutions, TWC program developers, and manufacturers to continue to proactively coordinate what skills will be necessary in the near future in the manufacturing sector.

7. Establish a safety-net fund program for large manufacturers in the state that may need temporary financial assistance to maintain its large manufacturing workforce within the state.

8. Identify manufacturers in the state currently investing in clean energy products and create an incentive program to ensure continued growth and investment in clean energy products throughout Texas.

9. Texas should give preferred consideration to Texas manufacturers and American manufacturers when making purchase decisions on behalf of the state.

CHARGE 5

Monitor the agencies and programs under the committee's jurisdiction.
The committee met to review the Medical Quality Review Process (MQRP) within the Texas Workers' Compensation Division, Texas Department of Insurance. Identify whether the process is consistent and transparent while ensuring that doctors in the workers' compensation system are providing quality medical care to the benefit and welfare of injured workers in Texas.

COMMITTEE WORK

The House Committee on Business & Industry held a public hearing on September 13, 2010 to discuss Interim Charge.

PURPOSE OF REVIEW

In July of 2010, newspaper articles brought to light the actions of the Commissioner (Commissioner) of the Workers' Compensation Division (Division), Texas Department of Insurance. The Commissioner shut down the Random-Audit review process and dismissed 15 cases being reviewed by the division for overutilization, 8 cases already in enforcement. The issue was addressed briefly in a Sunset Advisory Commission hearing reviewing the division and questions were raised. The Committee on Business and Industry has jurisdiction pertaining to the Division of Workers' Compensation within the Department of Insurance. A public hearing was called to provide a more detailed review of the Medical Quality Review Process (MQRP) in order to ensure that doctors providing care to injured workers are not abusing the system or providing unnecessary medical care.

MQRP AUDIT PROCESS

In the Division's efforts to ensure injured employees have access to high quality medical care, the Texas Legislature requires the division to review the quality of health care provided within the system. The Labor Code directs the division to actively monitor health care providers who deliver services and take disciplinary action against providers if they are not providing quality medical care or if they are providing unnecessary medical care. To accomplish this goal, the Division has the MQRP process headed by the Medical Advisor, who provides expertise in regulatory matters. The Medical Advisor appoints a medical quality review panel composed of qualified healthcare professionals who provide expert opinions when conducting medical quality case reviews and identify whether violations of the Texas Workers Compensation Act are taking place.[47] The division has two different ways to initiate a medical quality review. The first is a complaint- based review which can be initiated by a variety of different sources. The Medical Advisor reviews all complaint based cases and determines whether further review by the MQRP is warranted, or if the complaint is egregious enough, it can be referred directly to enforcement.[48] The second medical quality review process is a random audit-based review. The audit-based review is selected and implemented by the division as part of a broad, system monitoring action based on an analysis of the medical billing and payment data collected by the Division from claims filed by providers. The Commissioner has the ability to create an internal policy regarding what selection criteria and procedures are utilized for audit-based reviews. For the purpose of this review, only issues arising from the shutdown of the Audit-based review will be addressed in this report.

[47] Sunset Advisory Commission Staff Report, Division of Workers' Compensation-Texas Department of Insurance, April 2010.
[48] Sunset Advisory Commission Staff Report, Division of Workers' Compensation-Texas Department of Insurance, April 2010

AUDIT-BASED REVIEW

The audit-based review formula is decided by the Commissioner to randomly select doctors within three categories identified by the Medical Advisor as being prone to overutilization. In September 2008 the Commissioner approved of specific criteria and procedures to perform audit-based reviews. The categories identified were pain management, spinal surgery, and physical medicine. The policy then required the random pull of 12 providers from each category from the billing data. The 12 would consist of 4 low utilizing providers, 4 average utilizing providers, and 4 high utilizing providers within the system for each category prone to overutilization for a total of 36 providers being randomly audited for overutilization.

In February 2010, the Commissioner shut down the audit-process and dismissed 15 cases being investigated, with 8 of those cases already in the enforcement stage, after internally reviewing the random audit selection procedures of the Medical Advisor. The explanation provided for the complete halt of the process was that providers were being specifically targeted by the Medical Advisor. The argument raised by the Commissioner to justify dismissing the 15 cases is that the system was designed to be random in an effort to be blind and transparent to avoid allegations by providers of specific targeting or vendettas, which may make it difficult to succeed in courtroom litigation based on due process issues.[49]

COMMITTEE FINDINGS

The committee found that the random audit-process is a poor internal policy that does not identify and discipline overutilizing providers. The purpose of the audit is to identify overutilization within the system. The process in place is contrary to that purpose by including average utilizing providers and low utilizing providers in the review process which is a poor use of resources since those providers were not identified as driving the costs up in the system and did not raise any flags that such providers were providing unnecessary medical care. Therefore, there is no reason to include average or low utilization providers. Approximately 640 high utilization providers were pulled from the three categories identified as historically prone to overutilization, yet only 12 within that group are being reviewed. The committee has concluded that if any provider falls into the high utilization category, then short of division resources, all of those providers should be reviewed before any average or low utilization provider is reviewed. The argument was raised that high utilization providers do not directly equate to overbilling or the provision of unnecessary medical care. If a provider does get pulled from billing data and categorized as a high utilization provider, then from a due process standpoint they should be reviewed once identified in that target group. The purpose for the review is not a direct assumption of guilt, but to ensure overbilling or the provision of unnecessary medical care, is not taking place through an audit process.

The argument made that unfair or inappropriate targeting leads to lawsuits and failure to prosecute has no merit. The Commissioner, who developed the process, testified that the division

[49] Oral Testimony of Texas Workers Compensation Division Commissioner Rod Bordelon, Business & Industry public hearing, September 13, 2010.

was legally able to prosecute the 15 cases that were dismissed when the audit process was shut down. There is also no example of precedents that providers have successfully used, or even attempted to use this defense during litigation. Contrarily, testimony provided during the hearing indicated that there has been very little to no enforcement or discipline of doctors within the system since 2005 to test the theory of due process and selective targeting defense.[50]

CONCLUSIONS

The committee has concluded that the auditing of high utilization providers within the workers' compensation System does not have to be blind or random and the Commissioner should not have shut down the audit process and dismissed the 15 cases being reviewed. The purpose of the review is to identify providers who are providing unnecessary medical care to injured workers and to take action to eliminate those abusive providers from the system. The protections are in place and designed to benefit the injured worker, not the provider. If a provider wishes to participate in the system, then a review of practices should be welcomed through an audit process. Furthermore, the committee finds the lack of any attempt to prosecute overutilizing providers in the system, and lack of any successful disciplinary enforcement since 2005, as evidence that the random selection process avoids going after bad providers and directly contradicts the purpose and intent of the process, which is to protect workers from poor and/or unnecessary medical care.

[50] Oral testimony of Don Walker, Business & Industry public hearing, September 13, 2010.

RECOMMENDATIONS

1. The committee recommends changes be made to the audit based review process to target high utilizing providers specifically.

2. The committee recommends the MQRP process be evaluated to identify why very few audit based and complaint-based reviews make it to SOAH for enforcement.

3. The committee recommends that the Commissioner should not have the authority to shut down any enforcement process without approval by the Commissioner of Insurance.

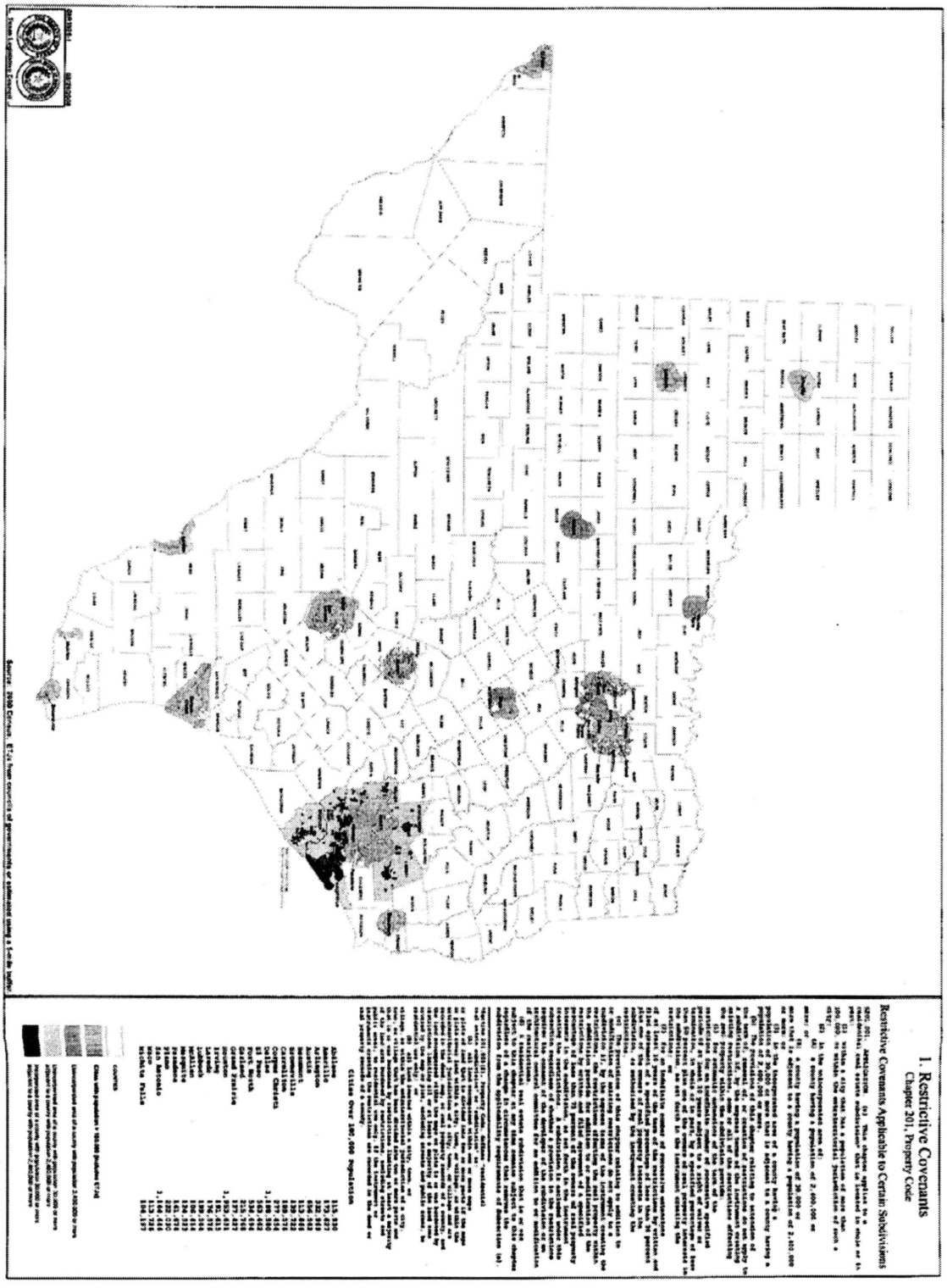
4. The committee supports the Sunset Commission decisions regarding the MQRP and recommends the Legislature adopt the recommendations. (See appendix B)

5. The committee recommends that the Legislature monitor the implementation of Sunset Commission decisions to ensure that any new internal policies effectively target overutilization within the system and actively discipline providers abusing the system.

6. The committee recommends that an 82nd Legislative Interim Charge to the committee should be to review the MQRP functions and processes, and identify whether it should remain within the Workers' Compensation Division, or be moved to the Texas Board of Medical Examiners.

APPENDIX A

Texas Property Code Regulating Home Owners Associations.



Map-1, Chapter 201, Property Code

1. Restrictive Covenants Map-1

Chapter 201, Property Code

Restrictive Covenants Applicable to Certain Subdivisions

§201.001. APPLICATION. **(a) This chapter applies to a residential real estate subdivision* that is located in whole or in part:**
(1) within a city that has a population of more than 100,000, or within the extraterritorial jurisdiction of such a city;
(2) in the unincorporated area of: (A) a county having a population of 2,400,000 or more; or
(B) a county having a population of 30,000 or more that is adjacent to a county having a population of 2,400,000
or more; or
(3) in the incorporated area of a county having a population of 30,000 or more that is adjacent to a county having a population of 2,400,000 or more.
(b) The provisions of this chapter relating to extension of the term of, renewal of, or creation of restrictions do not apply to
a subdivision if, by the express terms of the instrument creating existing restrictions, some or all of the restrictions affecting the real property within the subdivision provide:
(1) for automatic extensions of the term of the restrictions for an indefinite number of successive specified periods of at least 10 years subject to a right of waiver or termination, in whole or in part, by a specified percentage of less than 50 percent plus one of the owners of real property interests in the subdivision, as set forth in the instrument creating the restrictions; or
(2) for an indefinite number of successive extensions of at least 10 years of the term of the restrictions by written and filed agreement of a specified percentage of less than 50 percent plus one of the owners of real property interests in the subdivision, as authorized by the instrument creating the restrictions.
(c) The provisions of this chapter relating to addition to or modification of existing restrictions do not apply to a subdivision if, by the express terms of the instrument creating the restrictions, the restrictions affecting the real property within the subdivision provide for addition to or modification of the restrictions by written and filed agreement of a specified percentage of less than 75 percent of the owners of real property interests in the subdivision, as set forth in the instrument
creating the restrictions. A subdivision is excluded under this subsection regardless of whether a provision in the restrictions
requires the consent of the developer of the subdivision or an architectural control committee for an addition to or modification of the restrictions.
(d) A residential real estate subdivision that is or was subject to this chapter at any time remains subject to this chapter regardless of a change in circumstances that removes the subdivision from the applicability requirements of Subsection (a).
*Section 201.003(2), Property Code, defines "residential real estate subdivision" or "subdivision" as:
(A) all land encompassed within one or more maps or plats of land that is divided into two or more parts if the maps or plats cover land within a city, town, or village, or within the extraterritorial jurisdiction of a city, town, or village and are recorded in the deed, map, or real property records of a county, and the land encompassed within the maps or plats is or was burdened by restrictions limiting all or at least a majority of the land area covered by the map or plat, excluding streets and public areas, to residential use only; or
(B) all land located within a city, town, or
village, or within the extraterritorial jurisdiction of a city, town, or village that has been divided into two or more parts and that is or was burdened by restrictions limiting at least a majority of the land area burdened by restrictions, excluding streets and public areas, to residential use only, if the instrument or instruments creating the restrictions are recorded in the deed or real property records of a county.

Cities Over 100,000 Population

Abilene 115,930
Amarillo 173,627
Arlington 332,969
Austin 656,562
Beaumont 113,866
Brownsville 139,722
Carrollton 109,576
Corpus Christi 277,454
Dallas 1,188,580
El Paso 563,662
Fort Worth 534,694
Garland 215,768
Grand Prairie 127,427
Houston 1,953,631
Irving 191,615
Laredo 176,576
Lubbock 199,564
McAllen 106,414
Mesquite 124,523
Pasadena 141,674
Plano 222,030
San Antonio 1,144,646
Waco 113,726
Wichita Falls 104,197

Map-1A, Chapter 201, Property Code

1. Restrictive Covenants, Map-1A

Chapter 201, Property Code

Restrictive Covenants Applicable to Certain Subdivisions
Supplemental Map--Houston-Galveston Vicinity

§201.001. APPLICATION. (a) This chapter applies to a residential real estate subdivision* that is located in whole or in part:
(1) within a city that has a population of more than 100,000, or within the extraterritorial jurisdiction of such a city;
(2) in the unincorporated area of:
(A) a county having a population of 2,400,000 or more; or
(B) a county having a population of 30,000 or more that is adjacent to a county having a population of 2,400,000 or more; or
(3) in the incorporated area of a county having a population of 30,000 or more that is adjacent to a county having a population of 2,400,000 or more.
(b) The provisions of this chapter relating to extension of the term of, renewal of, or creation of restrictions do not apply to a subdivision if, by the express terms of the instrument creating existing restrictions, some or all of the restrictions affecting the real property within the subdivision provide:
(1) for automatic extensions of the term of the restrictions for an indefinite number of successive specified periods of at least 10 years subject to a right of waiver or termination, in whole or in part, by a specified percentage of less than 50 percent plus one of the owners of real property interests in the subdivision, as set forth in the instrument creating the restrictions; or
(2) for an indefinite number of successive extensions of at least 10 years of the term of the restrictions by written and filed agreement of a specified percentage of less than 50 percent plus one of the owners of real property interests in the subdivision, as authorized by the instrument creating the restrictions.
(c) The provisions of this chapter relating to addition to or modification of existing restrictions do not apply to a subdivision if, by the express terms of the instrument creating the restrictions, the restrictions affecting the real property within the subdivision provide for addition to or modification of the restrictions by written and filed agreement of a specified percentage of less than 75 percent of the owners of real property interests in the subdivision, as set forth in the instrument creating the restrictions. A subdivision is excluded under this subsection regardless of whether a provision in the restrictions requires the consent of the developer of the subdivision or an architectural control committee for an addition to or modification of the restrictions.
(d) A residential real estate subdivision that is or was subject to this chapter at any time remains subject to this chapter regardless of a change in circumstances that removes the subdivision from the applicability requirements of Subsection (a).

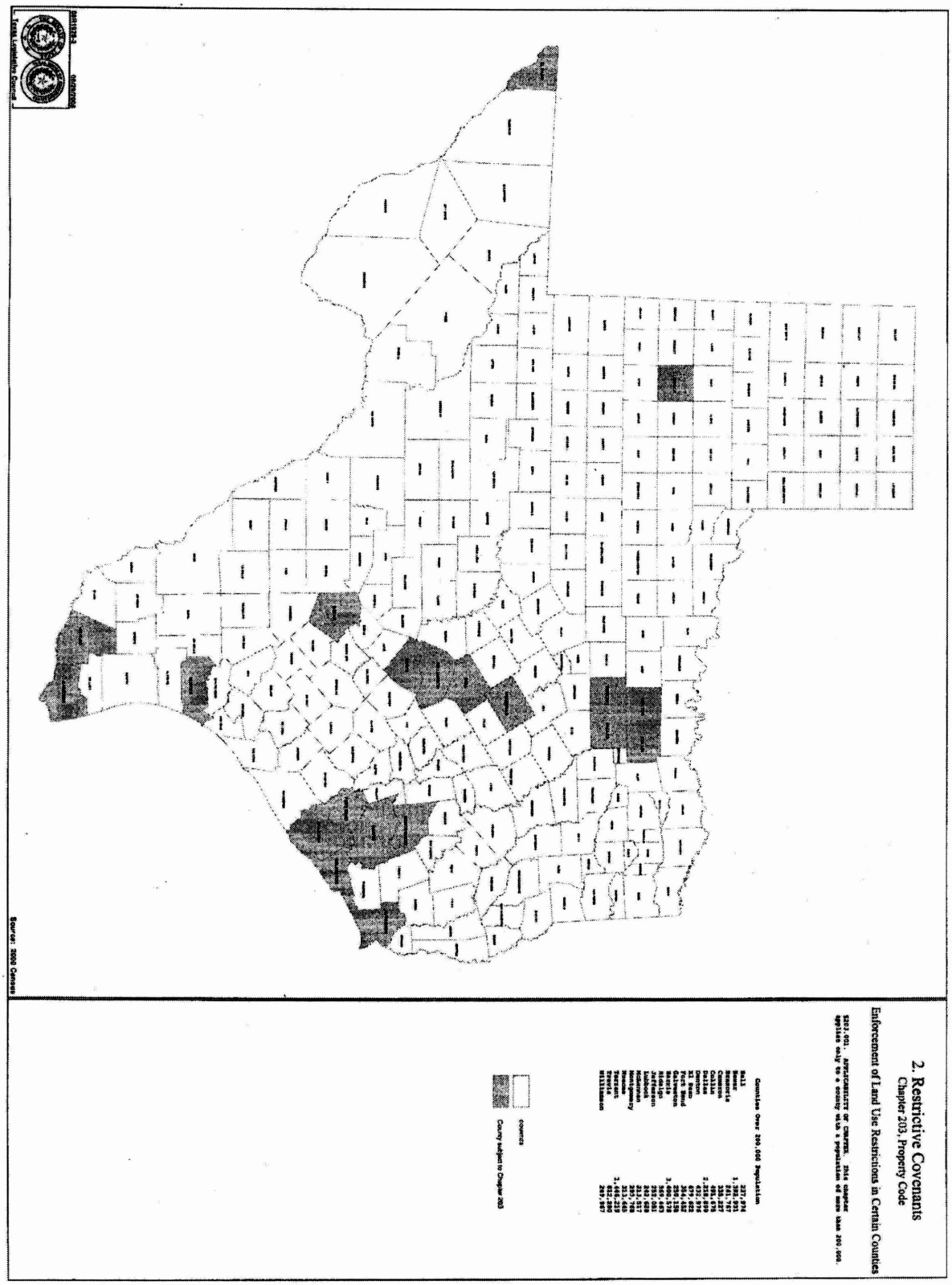
*Section 201.003(2), Property Code, defines "residential real estate subdivision" or "subdivision" as:
(A) all land encompassed within one or more maps or plats of land that is divided into two or more parts if the maps or plats cover land within a city, town, or village, or within the extraterritorial jurisdiction of a city, town, or village and are recorded in the deed, map, or real property records of a county, and the land encompassed within the maps or plats is or was burdened by restrictions limiting all or at least a majority of the land area covered by the map or plat, excluding streets and public areas, to residential use only; or
(B) all land located within a city, town, or village, or within the extraterritorial jurisdiction of a city, town, or village that has been divided into two or more parts and that is or was burdened by restrictions limiting at least a majority of the land area burdened by restrictions, excluding streets and public areas, to residential use only, if the instrument or instruments creating the restrictions are recorded in the deed or real property records of a county.

Cities Over 100,000 Population in County of 2,400,000 or More

Houston 1,953,631
Pasadena 141,674

County Population

Brazoria 241,767
Chambers 26,031
Fort Bend 354,452
Galveston 250,158
Harris 3,400,578
Liberty 70,154
Montgomery 293,768
Waller 32,663



Map-2, Chapter 203, Property Code.

2. Restrictive Covenants Map-2

Chapter 203, Property Code

Enforcement of Land Use Restrictions in Certain Counties

203.001. APPLICABILITY OF CHAPTER. This chapter applies only to a county with a population of more than 200,000.

Counties Over 200,000 Population

Bell 237,974
Bexar 1,392,931
Brazoria 241,767
Cameron 335,227
Collin 491,675
Dallas 2,218,899
Denton 432,976
El Paso 679,622
Fort Bend 354,452
Galveston 250,158
Harris 3,400,578
Hidalgo 569,463
Jefferson 252,051
Lubbock 242,628
McLennan 213,517
Montgomery 293,768
Nueces 313,645
Tarrant 1,446,219
Travis 812,280
Williamson 249,967

Map-3, Chapter 204, Property Code.

3. Restrictive Covenants Map-3

Chapter 204, Property Code

Powers of Property Owners' Association Relating to Restrictive Covenants in Certain Subdivisions

§204.002. APPLICATION. (a) This chapter applies only to a residential real estate subdivision,* excluding a condominium development governed by Title 7, Property Code, that is located in whole or in part:

(1) in a county with a population of 2.8 million or more;

(2) in a county with a population of 250,000 or more that is adjacent to the Gulf of Mexico and that is adjacent to a county having a population of 2.8 million or more; or

(3) in a county with a population of 275,000 or more

that:

(A) is adjacent to a county with a population of 3.3 million or more; and

(B) contains part of a national forest.

(b) This chapter applies to a restriction regardless of its effective date.

(c) This chapter does not apply to portions of a subdivision that are zoned for or that contain a commercial structure, an industrial structure, an apartment complex, or a condominium development governed by Title 7, Property Code. For purposes of this subsection, "apartment complex" means two or more dwellings in one or more buildings that are owned by the same owner, located on the same lot or tract, and managed by the same owner, agent, or management company.

*Section 204.001(1), Property Code, provides that "residential real estate subdivision" or "subdivision" has the meaning assigned by Section 201.003(2), Property Code, as follows:

(A) all land encompassed within one or more maps or plats of land that is divided into two or more parts if the maps or plats cover land within a city, town, or village, or within the extraterritorial jurisdiction of a city, town, or village and are recorded in the deed, map, or real property records of a county, and the land encompassed within the maps or plats is or was burdened by restrictions limiting all or at least a majority of the land area covered by the map or plat, excluding streets and public areas, to residential use only; or

(B) all land located within a city, town, or

village, or within the extraterritorial jurisdiction of a city, town, or village that has been divided into two or more parts and that is or was burdened by restrictions limiting at least a majority of the land area burdened by restrictions, excluding streets and public areas, to residential use only, if the instrument or instruments creating the restrictions are recorded in the deed or real property records of a county.

Total Population by County

Galveston 250,158
Harris 3,400,578
Montgomery 293,768

Map-4, Chapter 205, Property Code.

4. Restrictive Covenants Map-4

Chapter 205, Property Code

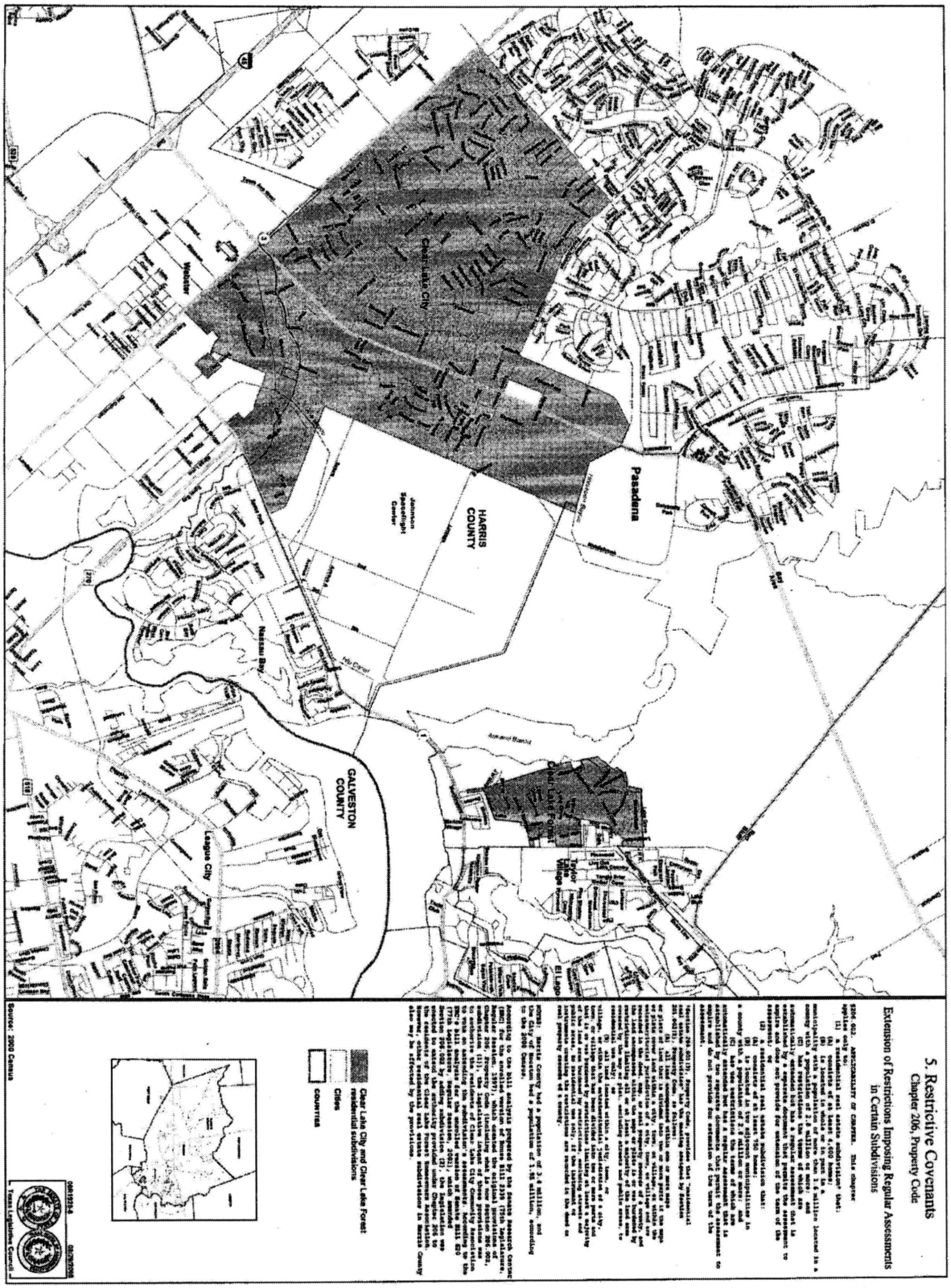
Restrictive Covenants Applicable to Revised Subdivisions*
in Certain Counties

§205.002. APPLICABILITY. This chapter applies only to a county with a population of 65,000 or more.

*Section 205.001(1), Property Code, provides that "subdivision" has the meaning assigned by Section 201.003(2), Property Code, as follows:
(A) all land encompassed within one or more maps or plats of land that is divided into two or more parts if the maps or plats cover land within a city, town, or village, or within the extraterritorial jurisdiction of a city, town, or village and are recorded in the deed, map, or real property records of a county, and the land encompassed within the maps or plats is or was burdened by restrictions limiting all or at least a majority of the land area covered by the map or plat, excluding streets and public areas, to residential use only; or
(B) all land located within a city, town, or village, or within the extraterritorial jurisdiction of a city, town, or village that has been divided into two or more parts and that is or was burdened by restrictions limiting at least a majority of the land area burdened by restrictions, excluding streets and public areas, to residential use only, if the instrument or instruments creating the restrictions are recorded in the deed or real property records of a county.
Section 205.003, Property Code, provides the following restrictions for subdivisions covered by Chapter 205:
(a) If all or part of a subdivision plat is revised to provide for another subdivision of land within all or part of the earlier subdivision, the restrictions that apply to the subdivision before the revision apply to the newly created subdivision.
(b) The property owners of the newly created subdivision must comply with the petition procedures prescribed by Chapter 204 to modify the restrictions.

Counties of 65,000 or more

Angelina 80,130
Bell 237,974
Bexar 1,392,931
Bowie 89,306
Brazoria 241,767
Brazos 152,415
Cameron 335,227
Collin 491,675
Comal 78,021
Coryell 74,978
Dallas 2,218,899
Denton 432,976
Ector 121,123
Ellis 111,360
El Paso 679,622
Fort Bend 354,452
Galveston 250,158
Grayson 110,595
Gregg 111,379
Guadalupe 89,023
Harris 3,400,578
Hays 97,589
Henderson 73,277
Hidalgo 569,463
Hunt 76,596
Jefferson 252,051
Johnson 126,811
Kaufman 71,313
Liberty 70,154
Lubbock 242,628
McLennan 213,517
Midland 116,009
Montgomery 293,768
Nueces 313,645
Orange 84,966
Parker 88,495
Potter 113,546
Randall 104,312
San Patricio 67,138
Smith 174,706
Tarrant 1,446,219
Taylor 126,555
Tom Green 104,010
Travis 812,280
Victoria 84,088
Webb 193,117
Wichita 131,664
Williamson 249,967



Map-6, Chapter 206, Property Code.

5.Restrictive Covenants Map-6

Chapter 206, Property Code

Extension of Restrictions Imposing Regular Assessments in Certain Subdivisions

§ 206.002. APPLICABILITY OF CHAPTER. This chapter applies only to:

(1) a residential real estate subdivision* that:

(A) consists of at least 4,600 homes;

(B) is located in whole or in part in a

municipality with a population of more than 1.6 million located in a county with a population of 2.8 million or more; and

(C) has restrictions the terms of which are automatically extended but has a regular assessment that is established by a separate document that permits the assessment to expire and does not provide for extension of the term of the assessment; or

(2) a residential real estate subdivision that:

(A) consists of at least 750 homes;

(B) is located in two adjacent municipalities in a county with a population of 2.8 million or more; and

(C) has use restrictions the terms of which are automatically extended but has a regular assessment that is established by two separate documents that permit the assessment to expire and do not provide for extension of the term of the assessment.

*Section 206.001(3), Property code, provides that "residential real estate subdivision" has the meaning assigned bu Section 201.003(2), Property code, as follows:

(A) all land encompassed within one or more maps or plats of land that is divided into two or more parts if the maps or plats cover land within a city, town, or village, or within the extraterritorial jurisdiction of a city, town, or village and are recorded in the deed, map, or real property records of a county, and the land encompassed within the maps or plats is or was burdened by restrictions limiting all or at least a majority of the land area covered by the map or plat, excluding streets and public areas to residential use only; or

(B) all land located within a city, town, or village, or within the extraterrestrial jurisdiction of a city, town, or village that has been divided into two or more parts and that is or was burdened by restrictions limiting at least a majority of the land area burdened by restrictions, excluding streets and public areas, to residential use only, if the instrument or instruments creating the restrictions are recorded in the deed or real property records of a county.

Notes: Harris County had a population of 3.4 million, and the City of Houston had a population of 1.95 million, according to the 2000 Census.

According to the bill analysis prepared by the Senate Research Center (SRC) for the enrolled version of House Bill 2339(75th Legislature, Regular Session, 1997), which created the original provisions of Chapter 206, Property Code (including what is now Section 206.002, subdivision (1)), the legislative intent of those provisions was to authorized the residents of Clear Lake City Community Association to vote on extending the subdivision's assessments. According to the SRC's Bill Analysis for the enrolled version of SB 620 (77th Legislature, Regular Session, 2001) which amended section 206.002 by adding subdivision (2), the legislation was enacted to extend the authority provided under Chapter 206 to the residents of the Clear Lake Forest Homeowners Association. However, other residential real estate subdivisions in Harris County also may be affected by the provisions.

Map-6A, Chapter 208, Property Code.

6. Restrictive Covenants Map-6A
Chapter 208, Property Code

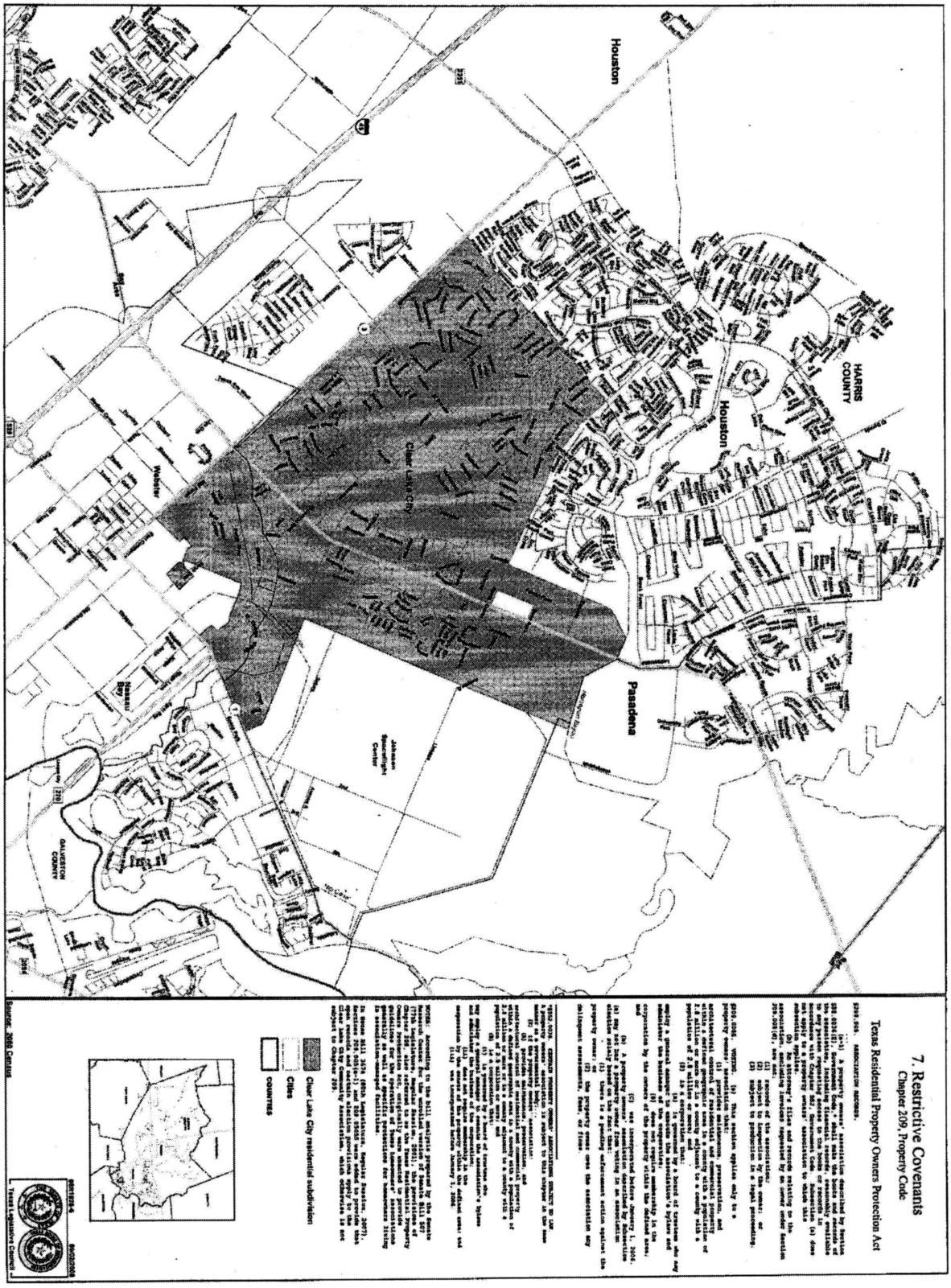
Amendment and Termination of Restrictive Covenants in Historic Neighborhoods

§208.002. APPLICABILITY. (a) This chapter applies only to a historic neighborhood* that is located in whole or in part in a municipality with a population of 1.6 million or more located in a county with a population of 2.8 million or more.
(b) This chapter applies to a restrictive covenant regardless of the date on which it was created.
(c) This chapter applies to property in the area of a historic neighborhood that is zoned for or that contains a commercial structure, an industrial structure, an apartment complex, or a condominium development covered by Title 7 only if the owner of the property signed a restrictive covenant that includes
the property in a common scheme for preservation of historic
property as described by Section 208.004.

*Section 208.001(5), Property Code, defines "historic neighborhood" as
(A) an area incorporated as a separate
municipality before 1900 and subsequently annexed into another municipality;
(B) an area described by a municipal map or subdivision plat filed in real property records of the county in which the area is located before 1900; or
(C) an area designated as a historic district or similar designation by the municipality in which the area is located, the Texas Historical Commission, or the National Register of Historic Places.

NOTES: Harris County had a population of 3.4 million, and the City of Houston had a population of 1.95 million, according to the 2000 Census.

According to the bill analysis for House Bill 1956 (76th Legislature, Regular Session, 1999), which created the provisions of Chapter 208, the legislative intent of those provisions was to authorize the amendment or termination of restrictive covenants affecting real property in the historic neighborhood of Houston Heights; however, other historic neighborhoods of Houston also may be affected by the provisions.



Map-6B, Chapter 209, Property Code.

7. Restrictive Covenants Map-6B

Chapter 209, Property Code

Texas Residential Property Owners Protection Act

§209.005. ASSOCIATION RECORDS.

...

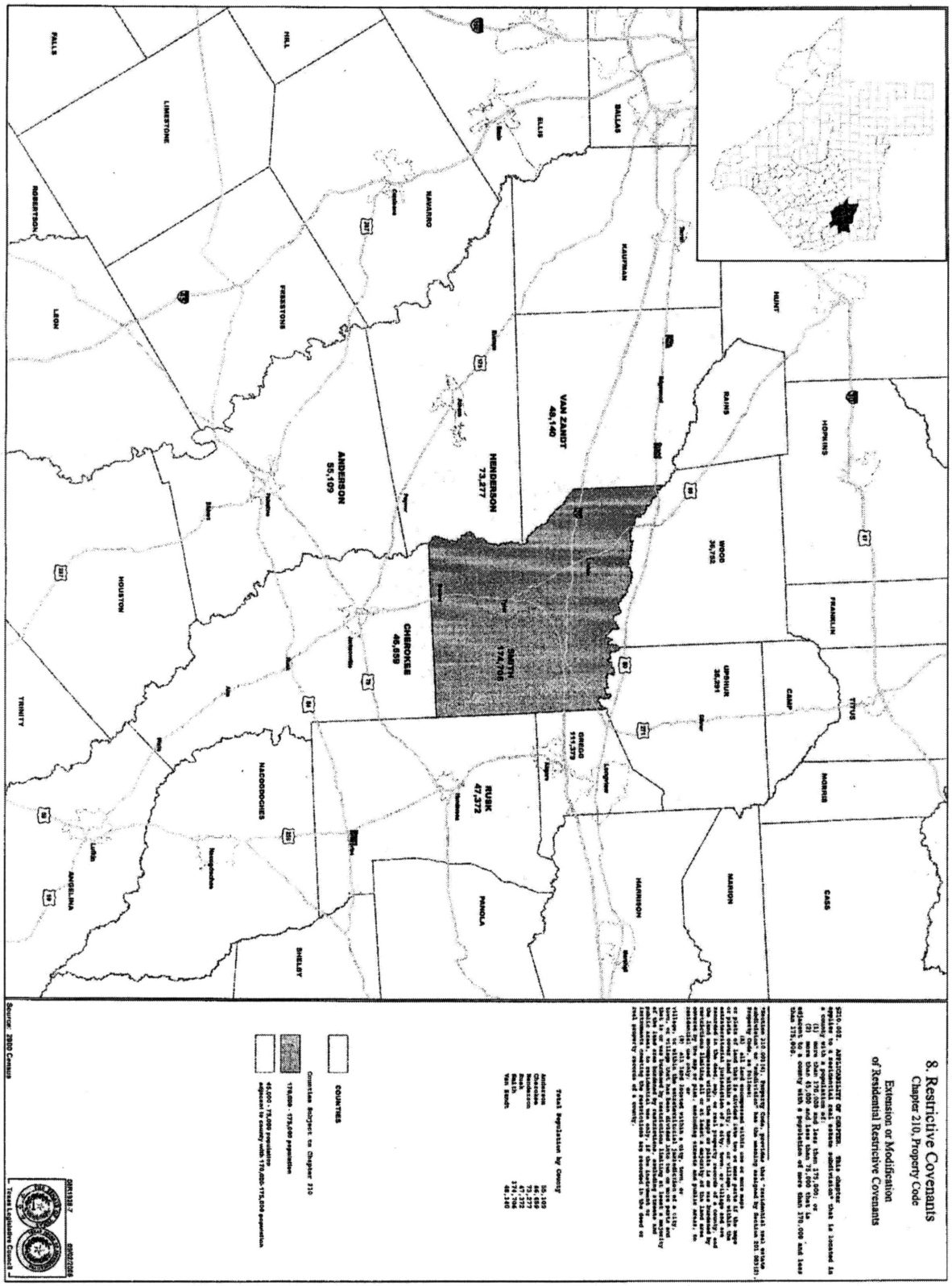
(A-1) A property owners' association described by Section 552.0036(2), Government Code, *shall make the books and records of the association, including financial records, reasonably available to any person requesting access to the books or records in accordance with Chapter 552, Government Code. Subsection (a) does not apply to a property owners' association to which this subsection applies.
(b) An attorney's files and records relating to the association excluding invoices requested by an owner under Section209.008 (d) are not:
(1) records of the association;
(2) Subject to inspection by the owner; or
(3) subject to production in a legal proceeding.

§209.0055. VOTING. (a) This section applies only to a property owners' association that:
(1) provides maintenance, preservation, and architectural control of residential and commercial property within a defined geographic area in a county with a population of 2.8 million or more or in a county adjacent to a county with a population of 2.8 million or more; and
(2) is a corporation that:
(A) is governed by a board of trustees who may employ a general manager to execute the association's by-laws and administer the business of the corporation;
(B) does not require membership in the corporation by the owners of the property within the defined area;
(C) was incorporated before January 1, 2006.
(b) A property owners' association described by Subsection (a) may not bar a property owner from voting in an association election solely based on the fact that:
(1) there is a pending enforcement action against the property owner; or
(2) the property owner owes the association any delinquent assessments, fees, or fines.

§552.0036. CERTAIN PROPERTY OWNERS' ASSOCIATIONS SUBJECT TO LAW.
A property owners' association is subject to this chapter in the same manner as a governmental body:...
(2) if the property owners; association:
(A) provides maintenance preservation, and architectural control of residential and commercial property within a defined geographic area in a county with a population with a population of 2.8 million or more or in a county adjacent to a county with a population of 2.8 million or more; and
(B) is a corporation that:
(i) is governed by a board of trustees who may employ a general manager to execute the association's bylaws and administer the business of the corporation.
(ii) does not require membership in the corporation by the owners of the property within the defined area; and
(iii) was incorporated before January 1, 2006.

NOTES: According to the bill analysis prepared by the Senate Research Center for the enrolled version of Senate Bill 507 (77th Legislature, Regular Session, 2001), the provisions of Chapter 209, also referred to as the Texas Residential Property Owners Protection Act, originally were enacted to provide guidelines for the operation of Texas homeowners' associations generally as well as specific protections for homeowners living in association-managed facilities.

In House Bill 3674 (80th Legislature, Regular Session, 2007) Sections 209.005(a-1)and 209.05055 were added to provide that open records and certain election provisions apply to the Clear Lake city Community Association, which otherwise is not subject to chapter 209.



Map-7, Chapter 210, Property Code.

8. Restrictive Covenants Map-7

Chapter 210, Property Code

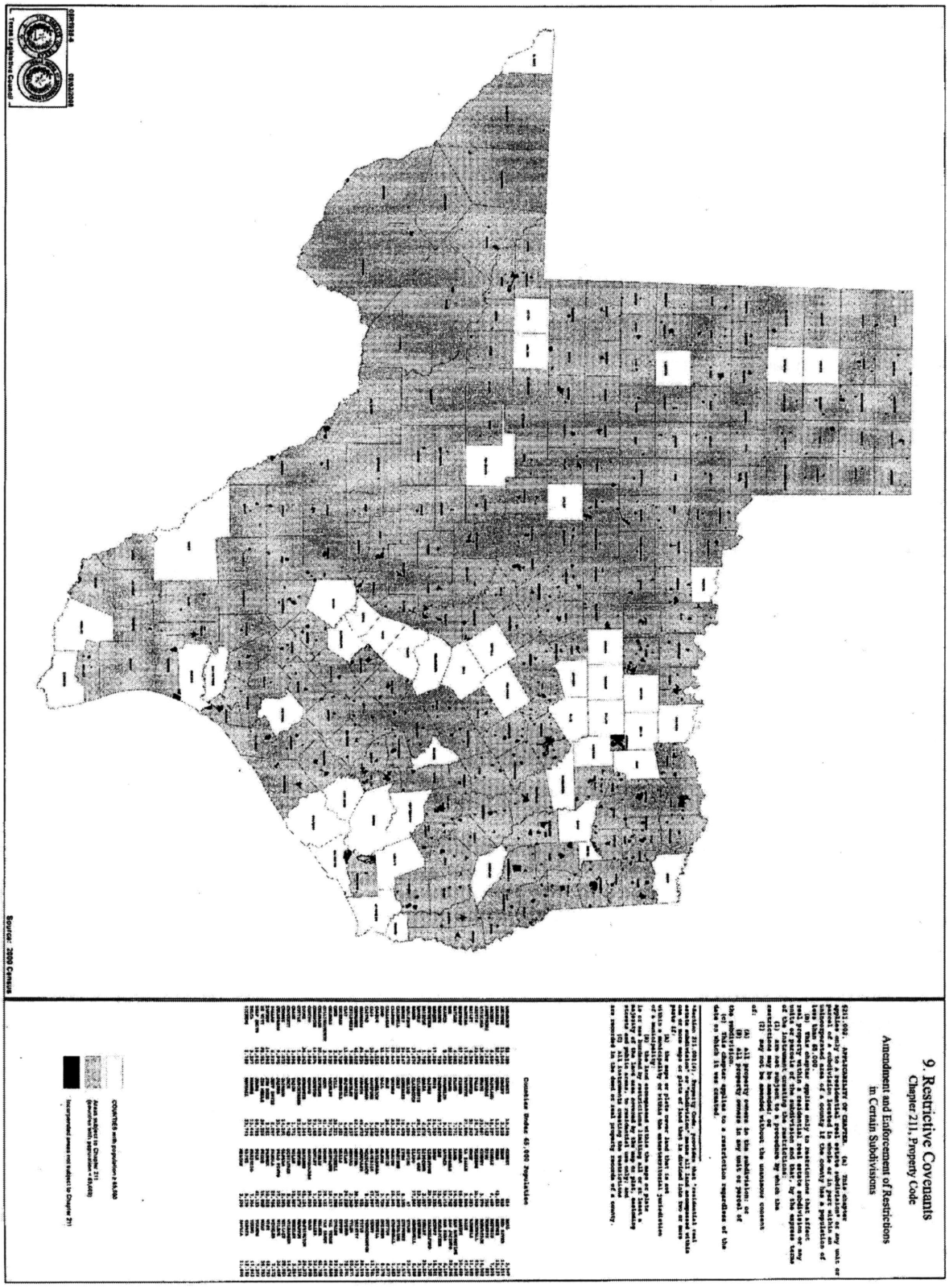
Extension or Modification of Residential Restrictive Covenants

§210.002. APPLICABILITY OF CHAPTER. This chapter applies to a residential real estate subdivision* that is located in a county with a population of:
(1) more than 170,000 and less than 175,000; or
(2) more than 45,000 and less than 75,000 that is adjacent to a county with a population of more than 170,000 and less than 175,000.

*Section 210.001(4), Property Code, provides that "residential real estate subdivision" or "subdivision" has the meaning assigned by Section 201.003(2), Property Code, as follows:
(A) all land encompassed within one or more maps or plats of land that is divided into two or more parts if the maps or plats cover land within a city, town, or village, or within the extraterritorial jurisdiction of a city, town, or village and are recorded in the deed, map, or real property records of a county, and the land encompassed within the maps or plats is or was burdened by restrictions limiting all or at least a majority of the land area covered by the map or plat, excluding streets and public areas, to residential use only; or
(B) all land located within a city, town, or
village, or within the extraterritorial jurisdiction of a city, town, or village that has been divided into two or more parts and that is or was burdened by restrictions limiting at least a majority of the land area burdened by restrictions, excluding streets and public areas, to residential use only, if the instrument or instruments creating the restrictions are recorded in the deed or real property records of a county.

Total Population by County

Anderson 55,109
Cherokee 46,659
Henderson 73,277
Rusk 47,372
Smith 174,706
Van Zandt 48,140



Map-8, Chapter 211, Property Code.

9. Restrictive Covenants Map-8

Chapter 211, Property Code

Amendment and Enforcement of Restrictions
in Certain Subdivisions

§211.002. APPLICABILITY OF CHAPTER. (a) This chapter applies only to a residential real estate subdivision* or any unit or parcel of a subdivision located in whole or in part within an unincorporated area of a county if the county has a population of less than 65,000.

(b) This chapter applies only to restrictions that affect real property within a residential real estate subdivision or any units or parcels of the subdivision and that, by the express terms of the instrument creating the restrictions:

(1) are not subject to a procedure by which the restrictions may be amended; or

(2) may not be amended without the unanimous consent of:

(A) all property owners in the subdivision; or

(B) all property owners in any unit or parcel of the subdivision.

(c) This chapter applies to a restriction regardless of the date on which it was created.

*Section 211.001(4), Property Code, provides that "residential real estate subdivision" or "subdivision" means all land encompassed within one or more maps or plats of land that is divided into two or more parts if:

(A) the maps or plats cover land that is not within a municipality or within the extraterritorial jurisdiction of a municipality;

(B) the land encompassed within the maps or plats is or was burdened by restrictions limiting all or at least a majority of the land area covered by the map or plat, excluding streets and public areas, to residential use only; and

(C) all instruments creating the restrictions are recorded in the deed or real property records of a county.

Counties Under 65,000 Population:

ANDERSON 55,109
ANDREWS 13,004
ARANSAS 22,497
ARCHER 8,854
ARMSTRONG 2,148
ATASCOSA 38,628
AUSTIN 23,590
BAILEY 6,594
BANDERA 17,645
BASTROP 57,733
BAYLOR 4,093
BEE 32,359
BLANCO 8,418
BORDEN 729
BOSQUE 17,204
BREWSTER 8,866
BRISCOE 1,790
BROOKS 7,976
BROWN 37,674
BURLESON 16,470
BURNET 34,147
CALDWELL 32,194
CALHOUN 20,647
CALLAHAN 12,905
CAMP 11,549
CARSON 6,516
CASS 30,438
CASTRO 8,285
COLEMAN 9,235
COLLINGSWORTH 3,206
COLORADO 20,390
COMANCHE 14,026
CONCHO 3,966
COOKE 36,363
CHAMBERS 26,031
CHEROKEE 46,659
CHILDRESS 7,688
CLAY 11,006
COCHRAN 3,730
COKE 3,864
COTTLE 1,904
CRANE 3,996
CROCKETT 4,099
CROSBY 7,072
CULBERSON 2,975
DALLAM 6,222
DAWSON 14,985
DE WITT 20,013
DEAF SMITH 18,561
DELTA 5,327
DICKENS 2,762
DIMMIT 10,248
DONLEY 3,828
DUVAL 13,120
EASTLAND 18,297
EDWARDS 2,162
ERATH 33,001
FALLS 18,576
FANNIN 31,242
FAYETTE 21,804
FISHER 4,344
FLOYD 7,771
FOARD 1,622
FRANKLIN 9,458
FREESTONE 17,867
FRIO 16,252
GAINES 14,467
GARZA 4,872
GILLESPIE 20,814
GLASSCOCK 1,406
GOLIAD 6,928
GONZALES 18,628
GRAY 22,744
GRIMES 23,552
HALE 36,602
HALL 3,782
HAMILTON 8,229
HANSFORD 5,369
HARDEMAN 4,724
HARDIN 48,073
HARRISON 62,110
HARTLEY 5,537
HASKELL 6,093
HEMPHILL 3,351

Counties Under 65,000 Population Continued:

HILL 32,321
HOCKLEY 22,716
HOOD 41,100
HOPKINS 31,960
HOUSTON 23,185
HOWARD 33,627
HUDSPETH 3,344
HUTCHINSON 23,857
IRION 1,771
JACK 8,763
JACKSON 14,391
JASPER 35,604
JEFF DAVIS 2,207
JIM HOGG 5,281
JIM WELLS 39,326
JONES 20,785
KARNES 15,446
KENDALL 23,743
KENEDY 414
KENT 859
KERR 43,653
KIMBLE 4,468
KING 356
KINNEY 3,379
KLEBERG 31,549
KNOX 4,253
LA SALLE 5,866
LAMAR 48,499
LAMB 14,709
LAMPASAS 17,762
LAVACA 19,210
LEE 15,657
LEON 15,335
LIMESTONE 22,051
LIPSCOMB 3,057
LIVE OAK 12,309
LLANO 17,044
LOVING 67
LYNN 6,550
MADISON 12,940
MARION 10,941
MARTIN 4,746
MASON 3,738
MATAGORDA 37,957
MAVERICK 47,297
MCCULLOCH 8,205
MCMULLEN 851
MEDINA 39,304
MENARD 2,360
MILAM 24,238
MILLS 5,151
MITCHELL 9,698
MONTAGUE 19,117
MOORE 20,121
MORRIS 13,048
MOTLEY 1,426
NACOGDOCHES 59,203
NAVARRO 45,124
NEWTON 15,072
NOLAN 15,802
OCHILTREE 9,006
OLDHAM 2,185
PALO PINTO 27,026
PANOLA 22,756
PARMER 10,016
PECOS 16,809
POLK 41,133
PRESIDIO 7,304
RAINS 9,139
REAGAN 3,326
REAL 3,047
RED RIVER 14,314
REEVES 13,137
REFUGIO 7,828
ROBERTS 887
ROBERTSON 16,000
ROCKWALL 43,080
RUNNELS 11,495
RUSK 47,372
SABINE 10,469
SAN AUGUSTINE 8,946
SAN JACINTO 22,246
SAN SABA 6,186
SCHLEICHER 2,935
SCURRY 16,361
SHACKELFORD 3,302
SHELBY 25,224
SHERMAN 3,186
SOMERVELL 6,809
STARR 53,597
STEPHENS 9,674
STERLING 1,393
STONEWALL 1,693
SUTTON 4,077
SWISHER 8,378
TERRELL 1,081
TERRY 12,761
THROCKMORTON 1,850
TITUS 28,118
TRINITY 13,779
TYLER 20,871
UPSHUR 35,291
UPTON 3,404
UVALDE 25,926
VAL VERDE 44,856
VAN ZANDT 48,140
WALKER 61,758
WALLER 32,663
WARD 10,909
WASHINGTON 30,373
WHARTON 41,188
WHEELER 5,284
WILBARGER 14,676
WILLACY 20,082
WILSON 32,408
WINKLER 7,173
WISE 48,793
WOOD 36,752
YOAKUM 7,322
YOUNG 17,943
ZAPATA 12,182
ZAVALA 11,600

APPENDIX B

Sunset Advisory Commission Decisions for the MQRP within the Texas Workers' Compensation Division Decisions, July 2010.

Commission Decision

The following provisions were adopted by the Sunset Commission to replace the Sunset staff recommendations contained in Issue 2.

Change in Statute

2.1 Require the Division to develop guidelines to strengthen the medical quality review process.

Require the Division to develop criteria, subject to the Commissioner's approval, to further improve the medical quality review process. In developing such guidelines, require the Division required to consult with the Medical Advisor and consider input from key stakeholders. The Division should also define, at a minimum, a fair and transparent process for the:

- handling of complaint-based cases; and
- selection of health care providers and other entities for review.

Require the Division to make the adopted process for conducting both complaint-based and audit-based reviews available to stakeholders on its website.

Change in Statute

2.2 Establish the Quality Assurance Panel in statute.

This recommendation would establish the Quality Assurance Panel (QAP) in statute and require the Division to hold QAP meetings as a means to assist the Medical Advisor and the Medical Quality Review Panel, while providing a second level evaluation of all reviews.

Management Action

2.3 Improve the medical quality review process by clarifying the Quality Assurance Panel's involvement.

In conjunction with Recommendation 2.2, but as a management action, the Commissioner should adopt procedures, subject to input from the Medical Advisor, to further define the QAP's role in the medical quality review process and establish the frequency of QAP meetings. At a minimum, such procedures should include:

- a process for selecting QAP members from the pool of appointed MQRP members, including health care professionals from diverse health care specialty backgrounds and individuals with expertise in utilization review and quality assurance;

- a policy outlining the length of time a member may serve on the QAP;
- procedures to ensure QAP members are kept informed of enforcement outcomes of cases under review; and
- procedures to clarify the roles and responsibilities of QAP members and Division staff at QAP meetings.

This recommendation would ensure that the QAP is properly structured and managed to maximize its value in the review process. This recommendation would also ensure that all participants in QAP meetings are aware of their required tasks and do not compromise the decision-making process for reviews that become active investigations in the enforcement process.

Change in Statute

2.4 Require the Division to develop additional qualification and training requirements for Medical Quality Review Panel members.

Require the Commissioner, subject to input from the Medical Advisor, to adopt rules outlining clear prerequisites to serve as a MQRP expert reviewer, including necessary qualifications and training requirements. In developing these policies, the Division could use the Texas Medical Board's expert reviewer process as a guide. At a minimum, rules on qualifications should include:

- a policy outlining the composition of expert reviewers serving on MQRP, including the number of reviewers and all health care specialties represented;
- a policy outlining the length of time a member may serve on MQRP;
- procedures defining areas of potential conflicts of interest between MQRP members and subjects under review and the avoidance of such conflicts; and
- procedures governing the process and grounds for removal from the Panel, including instances when members are repeatedly delinquent in completing case reviews or submitting review recommendations to the Division.

As part of this recommendation, the Division would also develop rules on training. Under this recommendation, MQRP members would be required to fulfill training requirements to ensure panel members are fully aware of the goals of the Division's medical quality review process and the Texas Workers' Compensation Act. Training topics should include, at a minimum, the following areas:

- administrative violations affecting the delivery of appropriate medical care;
- confidentiality of the review process and the qualified immunity from suit granted to MQRP members under the Labor Code; and
- medical quality review process guidelines adopted under Recommendation 2.1.

The Division would also be authorized to include training on other topic areas such as the Division's adopted treatment and return-to-work guidelines, other evidence-based medicine resources, and the impairment rating process.

The Division would also be required to better educate Panel members about the status and enforcement outcomes of cases resulting from the medical quality review process.

Change in Statute

2.5 Require the Division to work with health licensing boards to expand the pool of Medical Quality Review Panel members.

Under this recommendation, the Division, in consultation with the Medical Advisor, would be required to work with health licensing boards, beyond just the Texas Medical Board and the Texas Board of Chiropractic Examiners, as necessary, to expand the pool of health care providers available as expert reviewers. The Division should also work with the Texas Medical Board to increase the pool of specialists available, as necessary, enabling the Division to better match an MQRP member's expertise to the specialty of a physician under review.

As part of this recommendation, when selecting the composition of expert reviewers serving on MQRP, the Medical Advisor should advise the Division by identifying areas of medical expertise that may not require ongoing representation on the MQRP. In such circumstances, the Division should develop a method to partner with these other agencies to access outside expertise on an as-needed basis.

APPENDIX C

Attached statements

REPRESENTATIVE GARY ELKINS

COMMITTEES
BUSINESS & INDUSTRY, VICE-CHAIR
HUMAN SERVICES

TEXAS HOUSE OF REPRESENTATIVES

December 7, 2010

The Honorable Joe Straus
Speaker, Texas House of Representatives
Texas State Capitol
P.O. Box 2910
Austin, TX 78768-2910

Dear Speaker Straus:

As Vice-Chairman of the House Committee on Business & Industry, I commend Chairman Deshotel, his staff and the committee members for all the hard work that has been put forth to complete this interim report. For this reason I have signed the report, however it contains recommendations that I cannot completely support for Interim Charge 2 regarding third-party liability issues involving workers' compensation.

Sincerely,

Gary Elkins
Vice-Chairman
House Committee on Business & Industry

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ROB ORR
HOUSE OF REPRESENTATIVES
DISTRICT 58

CAPITOL OFFICE
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PHONE: 512-463-0538
FAX: 512-463-0897

December 8, 2010

The Honorable Joe Deshotel
Chairman, House Committee on Business & Industry
P.O. Box 2910
Austin, Texas 78768

Dear Chairman Deshotel:

Thank you for the opportunity to review the Business & Industry Committee Interim Report prior to signing it. I know the amount of work and effort it took to create the report was immense and appreciate all that you have done with the committee during the biennium.

I agree wholeheartedly with most of the report and recommendations. However, I disagree with some of the writing on Charge 2 dealing with worker's compensation issues. Specifically, I have concerns with recommendations 1 and 2 under that charge's section of the interim report. While there is no need to again debate the issues surrounding third-party liability vis-à-vis the workers comp system, at this time I do not agree with such an explicit recommendation as is stated in the recommendation. Also, regarding recommendation 2, I do not yet support allowing further litigation opportunities for gross negligence.

Therefore, I gladly sign onto the report for Charges 1, 3, 4, & 5, but respectfully must decline to sign onto the report regarding parts of Charge 2.

Sincerely,

Representative Rob Orr

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TEXAS HOUSE OF REPRESENTATIVES

WAYNE CHRISTIAN

STATE REPRESENTATIVE
DISTRICT 9

December 9, 2010

The Honorable Joe Straus
Speaker, Texas House of Representatives
Texas CAP Room 2W.13
P.O. Box 2910
Austin, Texas 79768

Dear Speaker Straus,

As a member of the House Committee on Business and Industry, I would like to commend Chairman Deshotel, his staff and the entire committee who all have diligently worked to complete this 81st legislative session interim charge report. It is a great honor as a member of this committee to sign this report, however it contains one recommendation that I cannot support.

With Chairman Deshotel's understanding I object to the Interim Report's recommendation on the matter of third-party liability issues involving workers' compensation, third-party litigation and job safety, the adequacy of compensation, and the economic costs of third-party litigation. Since Texas companies who are participants in workers' compensation and are in compliance with Texas law, they are protected from contractor suits. I respectfully confer that recommendations for charge two of the Interim Report would damage the Texas business environment and encourage companies from purchasing into the workers' compensation program.

Sincerely,

Wayne Christian
State Representative
Member
House Committee on Business and Industry

James L. Keffer

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District 60
House of Representatives

COMMITTEES:
CHAIRMAN - ENERGY RESOURCES
BUSINESS & INDUSTRY
CALENDARS
REDISTRICTING

ATTACHED STATEMENT

Statement from Rep. Jim Keffer

December 10, 2010

Speaker Joe Straus
C/O House Committee on Business and Industry
P.O. Box 2910
Austin TX 78768-2910

RE: House Committee on Business and Industry's Interim Report

Dear Speaker Straus,

I want to thank Chairman Deshotel for his leadership, and commend the committee members and staff for their hard work in completing the hearings and interim report for the House Committee on Business and Industry. For their efforts, I have signed the report, though it contains recommendations that I cannot support. I respectfully disagree with the conclusions and recommendations of Interim Charge # 2 (Study and report on third-party liability issues involving workers' compensation...). I offer my signature for approval of the report, with this exception, and ask that a copy of this objection be placed along with the report.

Sincerely,

Jim Keffer
State Representative