

# Legislative Update for Solar Market 82(R) Legislative Session

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## H.B. NO. 362 (Solomons | Workman)

- Amends Chapter 202 of the Texas Property Code by adding Sections 202.010 and 202.011.
- Applies to a dedicatory instrument without regard to whether the dedicatory instrument takes effect or is renewed before, on, or after the effective date of the Act. (Retroactive Effect).
- Effective Immediately

## Summary of Section 202.010:

The underlying purpose of HB 362 is to prevent Homeowner's Associations from withholding approval of a homeowner's request to install solar energy devices by voiding any provision in a dedicatory instrument that "prohibits or restricts a property owner from installing a solar energy device." To comply with the new law, a homeowner must still follow the normal procedures for seeking improvements, including submitting a written request or application to an appointed Architecture Review Committee or similar council.

## Exceptions:

A. Under the law, HOAs can enforce a provision in the dedicatory instrument and deny a request if:

- 1) A Court rules the device is a threat to the public health or safety or violation of law;
- 2) The device is located in a location other than (i) the roof of the home or another permitted/approved structure or (ii) in a fenced yard or patio owned and maintained by the owner;

- 3) The device is mounted on the roof of the home and (i) extends higher than or beyond the roofline; (ii) does not conform to the slope of the roof and has a top edge that is not parallel to the roofline; (iii) has a frame, a support bracket, or visible piping or wiring that is not in a silver, bronze, or black tone commonly available in the marketplace; or (iv) is in a location not designated/approved by the Association, unless the owner's requested location increases the estimated annual energy production of the device, as determined by using a publicly available modeling tool provided by the National Renewable Energy Laboratory, by more than 10 percent above the energy production of the device if located in the area designated by the Association;
- 4) The device is located in a fenced yard or patio and is taller than the fence line;
- 5) The device, as installed, voids material warranties; and
- 6) The device was installed without prior approval by the Association.

B. In addition to these exceptions, an HOA can still deny a request if "it determines in writing that placement of the device as proposed by the property owner constitutes a condition that substantially interferes with use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities." Written approval, however, by the adjoining property owners constitutes *prima facie* evidence that such a condition does not exist.

C. Finally, HB 362 does not apply to a developer during the "development period."

### **Subsection (f)**

*"During the development period, the declarant may prohibit or restrict a property owner from installing a solar energy device."*

### **Section 202.010(1)**

*"Development period" means a period stated in a declaration during which a declarant reserves:*

*(A) a right to facilitate the development, construction, and marketing of the subdivision; and*

*(B) a right to direct the size, shape, and composition of the subdivision."*

### **Analysis**

The enumerated exceptions in A. above are fairly straightforward. There is one issue, however, that we have already seen arising from the exceptions. We have seen a couple HOAs deny requests because the proposed location was on the front of the house facing the street. Most HOAs in Texas previously allowed a homeowner to place solar panels on their roof as long as the panels did not face the street. They are still sticking to this rule. Under the new law, however, homeowners should be able to place the panels on the street facing side but they will need to work with their installer to show the alternate location proposed by the HOA will decrease efficiency by 10% in order to comply with the new law. In regards to B. relating to veto power by the HOA, the legislature set a very high burden by requiring "substantial interference." This will be very tough for an HOA to prove in court. On the other hand, if the homeowner does not have the money to pay his or her attorney fees to challenge the decision then it does not matter how high the burden is as the homeowner will not be able to seek court intervention.

Another issue we have seen since the passing of the law is the HOA requesting that the homeowner submit with their applications signatures showing approval from the adjacent neighbors. This is not a requirement of the law and something that should be challenged by the Homeowner. Signatures would only be necessary if the HOA denied the request in writing and the homeowner wanted to challenge the HOA in court. The signatures then would be *prima facie* evidence that the HOA has not met its burden of proof necessary to deny the request.

In regards to C. relating to the development period, this exception has caused the most concern by solar advocates because of how broad the language in the exception was written. I have seen a number of comments on the web that Subsection (f) is a major loophole. These commentators reason that under the current language the development period could go on indefinitely.

In trying to obtain a better understanding of subsection (f), a little history is important. This provision was not part of the original bill. In fact, it was not added until the last moment--after the bill had been through both the house and senate committees. I sent an e-mail to Burt Solomons, the original author of the bill, inquiring on why the developer amendment was accepted and this was the response that I received from his Chief of Staff:

*"The amendment was suggested by a member of the Texas Association of Home Builders who felt that a home builder had more interest in keeping control of the overall appearance of a subdivision while still trying to sell lots during the development period of a subdivision. It was accepted to dilute opposition from other members of the Legislature."*

Getting back to the development period, pragmatically speaking, the development period is when the developer is still selling houses. The development period is sometimes defined in the Declaration of Covenants,

Conditions, and Restrictions and it is typically is the earlier of the sale of X% of lots or a date certain. If control of the Association has transitioned to the owners, there is a good chance that the development period is over or nearly over.

A big concern of solar advocates is an HOA may file an amendment to the declaratory instrument to extend the development period. Indeed, the association could file an amendment, but that would require a minimum of 67% owner consent (unless the Declaration has a lower threshold). Would an Association try to extend the development period, even when the developer is sold out and gone, just to be able to place more stringent controls on solar panels than is allowed by statute? It seems pretty far-fetched to me because there may be undesirable consequences from extending the period.

### Summary of Section 202.011:

202.011 relates to roof shingles and does not have the numerous exceptions that are contained in 202.010.

Under 202.011, an HOA cannot restrict a property owner from installing shingles that:

(1) are designed primarily to be wind and hail resistant or provide heating and cooling efficiencies greater than those provided by customary composite shingles; or

(2) are designed primarily to provide solar generation capabilities and when installed resemble the shingles used or otherwise authorized for use on property in the subdivision and are as durable and match the aesthetics of the property surrounding the owner's property.

### S.B. NO. 981 (Carona)

- Amends Section 39.916 of the Utilities Code by amending the definition of "Distributed renewable generation owner" and adds subsection (k)
- Does not apply in to non-competitive areas
- Takes effect September 1, 2011

### Summary

For a while Texas has been lagging behind in removing the primary legislative barrier to third-party PPA models. Before SB 981 third party owners were still considered generators under the existing Utility Code definition which created a substantial time and financial investment by a developer if it wanted to move forward on a project because it was required to register as a utility with the PUC. Since 2001 many State legislatures or State Utility Commissions have amended the definition of a generator to exclude solar developers.

SB 981 does two things. First, it amends the definition of a "distributed renewable generation owner." By amending the definition the legislature broadened the scope of who qualifies as an owner to include (1) the retail electric customer regardless if they are the owner and (2) "a person who by contract is assigned ownership rights to energy produced from distributed renewable generation at the premises of the customer on the customer's side of the meter."

Second, it adds a provision to 39.916 of the Utilities Code which essentially states an owner of distributed renewable generation is not required to register with or be certified by the commission so long as the electricity being generated is "less than or equal to the retail electric customer's estimated annual electricity consumption."

A third party owner will have to take the necessary precautions when siting. If you are a third party owner and are contributing back into the grid you will still have to register as a utility with the commission. There is no leeway. Although revising the definition to amend the definition is a major step in the right direction, allowing net metering up to a certain point such as many other States have done would have been preferable. By disallowing net metering the State is removing a considerable incentive for the private developer. (To read more on this topic see *Solar PV Project Financing: Regulatory and Legislative Challenges for Third-Party PPA System Owners*, NREL/TP-6A2-46723.)

On the other hand, an amendment was proposed which would have placed a cap of 2 MW on those who are excluded from registration requirements. Meaning any developer working on a project of 2 MW or greater would have had to still register. Fortunately for solar development advocates the proposed amendment was voted down. One note of caution. There is no language setting forth restrictions on what a third party can charge a retail electric consumer. In the

beginning this will be a self-regulated market but expect future consumer protection legislation in the future as the third party PPA model grows more popular in Texas.

As previously stated, this legislation does not apply to "home-rule" cities (including areas serviced by Austin Energy and CPS) as Section 39.105 of the code still governs. Section 39.105 states: "A person **or** retail electric utility may not provide, furnish, or make available electric service at retail within the certificated service area of a municipally owned utility that has not adopted customer choice." Other creative means will have to be implemented if the third party model is to be used in these areas such as selling directly to the utility and the having the utility bill the customer.

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