

The 2015 Texas HOA Legislative Update Report

On June 1, the Texas Legislature concluded the 2015 legislative session. Unlike the 2013 legislative session, in which the Texas Legislature enacted legislation that was relatively minor in scope, the 2015 Texas Legislature enacted 39 new HOA-specific laws that apply to Texas Homeowners Associations, including Homeowners Associations that administer condominium developments (generally referred to as “Condominium Associations”) and Homeowners Associations that administer subdivision developments (generally referred to as “Subdivision Associations”). The following is a brief description of such new statutory laws.

Senate Bill 1168 – the “Omnibus Bill” (applies to Condominium Associations and Subdivision Associations)

SB 1168 is the most significant in scope of all of the bills passed by the Texas Legislature in 2015. SB 1168 consists of twenty-three separate subparts or “sections”, which amend several provisions of Chapter 82 (which governs Condominium Associations) and Chapter 209 of the Texas Property Code (which governs Subdivision Associations), as well as adds a new Chapter 213 to the Texas Property Code. One of the stated purposes of SB 1168 is to correct or clarify some of the statutory provisions enacted during the 2011 legislative session. SB 1168 certainly modifies a significant number of the statutes enacted in 2011, but it also adds several new substantive provisions that did not previously exist. Because SB 1168 modifies so many statutory provisions of the Texas Property Code, such legislation is summarized below on a section by section basis.

Section One of SB 1168 modifies the requirements for a Condominium Resale Certificate under Section 82.157(a) of the Texas Property Code. A Condominium Resale Certificate now also requires: (1) the inclusion of the Condominium Association’s current operating budget and balance sheet; and (2) the disclosure of all fees payable to the Condominium Association or its agent that are associated with the transfer of ownership of a unit, including a description of each fee, to whom the fee is paid, and the amount of the fee. The disclosure concerning transfer fees is already required by Subdivision Resale Certificates.

Sections Two and Three of SB 1168 modify Section 207.001 and Section 207.002 of the Texas Property Code for the purpose of making clear that Chapter 207 of the Texas Property Code applies only to Subdivision Associations, and not Condominium Associations. First, Section 207.001 was modified so as to incorporate several definitions from Chapter 209 of the Texas Property Code instead of Chapter 202. By its express terms, Chapter 207 applies only to Subdivision Associations, but the prior incorporated definitions from Chapter 202 referenced both Subdivision Associations and Condominium Associations, which caused some confusion as to whether Chapter 207 actually did apply to Condominium Associations. The modified version of Section 207.001 removes any confusion by incorporating the definitions from Chapter 209, which also applies only to Subdivision Associations. Second, a new provision was added to Section 207.002 that states “[Chapter 207] does not apply to a condominium

council of owners governed by Chapter 81 or a condominium unit owners' association governed by Chapter 82.”

Section Four of SB 1168 modifies the definition of “Development Period” under Section 209.002 of the Texas Property Code. The modified version of such definition makes clear that “Development Period” refers to a period of time during which a declarant reserves the right to either: (1) facilitate the development, construction, and marketing of the subdivision; or (2) direct the size, shape, and composition of the subdivision. The prior version of such definition referred to a period time during which the declarant reserved the right to do both such activities, which caused confusion if a declarant reserved the right to do one of such activities, but not both. *Section Four* of SB 1168 also adds a new definition to Section 209.002 for “Verified Mail,” which is defined as “any method of mailing for which evidence of mailing is provided by the United States Postal Service or a common carrier.”

Section Five of SB 1168 modifies Section 209.003 of the Texas Property Code to make clear that Chapter 209 does not apply to any Condominium Associations, regardless of whether the Condominium Association is governed by Chapter 81 or 82 of the Texas Property Code. The prior version of Section 209.003 only excluded Condominium Associations governed by Chapter 82.

Section Six of SB 1168 modifies Section 209.0041 of the Texas Property Code, which establishes procedures for a Subdivision Association to amend a Declaration. The prior version of Section 209.0041 allowed all property owners in a Subdivision Association to vote on an amendment to a Declaration, even if some of the property owners were not subject to such Declaration and/or were not entitled to vote on amendments to such Declaration under its express terms. The modified version of Section 209.0041 now allows only property owners entitled to vote on the Declaration to actually vote on an amendment to such Declaration under the procedures established by Section 209.0041. The modified version of Section 209.0041 also provides that if the Declaration does not specify who is entitled to vote on amendments to such document, then only property owners who are subject to such Declaration may vote on the amendment.

Section Seven of SB 1168 adds a new Section 209.0042 to Chapter 209 of the Texas Property Code. The new Section 209.0042 authorizes a Subdivision Association to adopt an alternative method for providing notices to its property owners that is different from a method required by Texas law, but the Subdivision Association may only use such alternative method for providing notice to property owners who have affirmatively opted to allow the Subdivision Association to use such alternative method for providing such notice. Section 209.0042 further provides that a Subdivision Association may not require its property owners to allow the Subdivision Association to provide notice under the alternative method for which another method is required by Texas law.

Section Eight of SB 1168 modifies Section 209.0051 of the Texas Property Code, which establishes the procedures for calling and conducting a meeting of a Subdivision Association’s Board of Directors. The modified version of Section 209.0051 clarifies the procedures for conducting a board meeting by electronic or telephonic means and the circumstances under which a Subdivision Association’s Board of Directors may take action by unanimous written consent. In addition, the modified version of Section

209.0051 adds seven new topics that a Board of Directors is precluded from taking action on by unanimous written consent, which includes: (1) lending or borrowing money; (2) the adoption or amendment of a dedicatory instrument; (3) the approval of an annual budget or the approval of an amendment of an annual budget that increases the budget by more than 10 percent; (4) the sale or purchase of real property; (5) the filling of a vacancy on the Board of Directors; (6) the construction of capital improvements other than the repair, replacement, or enhancement of existing capital improvements; or (7) the election of an officer.

Section Nine of SB 1168 modifies Section 209.0056 of the Texas Property Code, which establishes procedures for providing notice of an election or vote to a Subdivision Association's property owners. The modified version of Section 209.0056 now provides for an alternative notice period when an election or vote of a Subdivision Association's property owners is conducted without calling a meeting (ie., by electronic or absentee ballots only). Under such circumstances, notice of the election or vote must be given to property owners no later than the 20th day before the latest date on which a ballot may be submitted to the Subdivision Association to be counted.

Section Ten of SB 1168 modifies Section 209.0057 of the Texas Property Code, which establishes procedures for requesting and conducting a ballot recount. Under the modified version of Section 209.0057, the deadline to request a recount is now 15 days from the date of the announcement of the results of the election or vote, if the results were not announced at the meeting. In addition, a demand for a recount must now be submitted by a property owner to the Subdivision Association by "verified mail" instead of by certified mail, return receipt requested. Finally, before a Subdivision Association is required to conduct a recount, it must now estimate the cost of conducting the recount and send an invoice for such estimated cost to the requesting property owner, who must pay such invoice within 30 days from the date the invoice is sent to him or her. If the requesting property owner fails to timely pay the invoice, the recount is considered withdrawn and is no longer required to be performed by the Subdivision Association. The modified version of Section 209.0057 also establishes procedures for resolving issues if the actual cost of the recount is more or less than the estimated amount paid by the requesting property owner.

Section Eleven of SB 1168 modifies Section 209.0058 of the Texas Property Code, which establishes certain requirements for ballots cast by a Subdivision Association's property owners in an election or vote. Under the prior version of Section 209.0058, all ballots (except electronic ballots) had to be in writing and signed by the property owner. The modified version of Section 209.0058 now only requires ballots to be in writing and signed by the property owner if the vote is cast: (1) outside of a meeting; (2) in an election to fill a position on the Board of Directors; (3) on a proposed adoption or amendment of a dedicatory instrument; (4) on a proposed increase in the amount of a regular assessment or the proposed adoption of a special assessment; or (5) on the proposed removal of a Director. If a Subdivision Association elects to use a ballot for a vote on any other matters, it may allow the property owners to vote by secret ballot, provided the Subdivision Association has adopted rules for voting by secret ballot. In addition, Subdivision Associations are now required to take measures to reasonably ensure that: (1) a property owner cannot cast more votes than he or she is eligible to cast; (2) the Subdivision Association counts each vote cast by a property owner that such property owner is eligible

to cast; and (3) if the vote is an election for the Board of Directors, that each candidate may name one person to observe the counting of ballots. The modified version of Section 209.0058 also provides that a designated observer may observe the counting of ballots, but he or she is not entitled to see the name of the person who cast any ballot, and a designated observer may be removed if he or she is disruptive.

Section Twelve of SB 1168 modifies Section 209.0059 of the Texas Property Code. The prior version of Section 209.0059 rendered any provision in a dedicatory instrument that would disqualify a property owner from voting in an election or vote void. The modified version of Section of 209.0059 makes an exception for residential subdivision developments consisting of 10 or fewer lots for which the governing Declaration was recorded prior to January 1, 2015. In such a residential subdivision development, a person may not vote in a Subdivision Association election unless such person is subject to a dedicatory instrument governing such Subdivision Association through which it exercises its authority.

Section Thirteen of SB 1168 adds a new provision to Section 209.00591 of the Texas Property Code, which governs membership on a Subdivision Association's Board of Directors. The new provision of Section 209.00591 now authorizes a Subdivision Association's Bylaws to require one or more, but not all, of the Directors serving on the Board of Directors to reside in the Subdivision Development.

Section Fourteen of SB 1168 modifies Section 209.00592 of the Texas Property Code, which authorizes a property owner to vote by absentee and electronic ballots, in addition to voting in person or by proxy at a meeting. The modified version of 209.00592 makes clear that, unless otherwise required by its dedicatory instrument, a Subdivision Association is not required to provide a property owner more than one method of voting, but at a minimum, a property owner must be allowed to vote by absentee ballot or proxy. The modified version of 209.00592 also makes clear that a nomination taken from the floor in a Board of Directors election is not considered an amendment that would invalidate an absentee ballot that omits such nominee's name.

Section Fifteen of SB 1168 modifies Section 209.00593 of the Texas Property Code, which governs the appointment and election of members to a Subdivision Association's Board of Directors. The modified version of Section 209.00593 now requires a Subdivision Association consisting of more than 100 lots that wants to use an absentee ballot for a Director election to solicit candidates for election to the Board of Directors and list all interested candidates on the absentee ballot. The new procedure requires an applicable Subdivision Association to provide notice to its property owners that solicits interested candidates for election to the Board of Directors and requires the Subdivision Association to list each person who expresses an interest on the absentee ballots used for such election.

Section Sixteen of SB 1168 modifies Section 209.00594 of the Texas Property Code, which governs the tabulation of and access to ballots cast in an election or vote. The modified version of Section 209.00594 clarifies that a person who tabulates votes *or performs a recount of votes* is precluded from disclosing to any other person how an individual voted. The prior version of 209.00594 did not expressly preclude a person who performs a recount of votes from disclosing how an individual voted, which caused some confusion as to whether such a person was subject to the same non-disclosure restriction.

Section Seventeen of SB 1168 modifies Section 209.006 of the Texas Property Code, which requires a Texas Subdivision Association to provide certain written notices to a property owner before it may suspend a property owner's right to use common area, file a lawsuit, or assess a fine for violation of a restrictive covenant. The modified version of Section 209.006 now requires the written notice to be sent to the property owner by certified mail only, instead of certified mail, return receipt requested, and changes the commencement of the 30-day period to request a hearing in front of the Board of Directors from the date the property owner receives the written notice to the date the Subdivision Association sends the notice. In addition, the modified version of Section 209.006 now only requires a Subdivision Association to inform the property owner of a right to a reasonable period to cure the violation if the violation is of a "curable nature" and does not pose a threat to public health or safety. In the event the violation is of a curable nature and not a threat to public health or safety, the modified version of Section 209.006 now requires the written notice to specify the date by which the property owner must cure the violation and it prohibits a Subdivision Association from assessing a fine if the property owner cures the violation before the expiration of the cure date specified in the written notice. The modified version of Section 209.006 also defines what types of violations are considered curable, uncurable and a threat to public health or safety.

Section Eighteen of SB 1168 modifies Section 209.0062 of the Texas Property Code, which requires Subdivision Associations consisting of 15 or more lots to adopt a payment plan guidelines policy that allows property owners to pay amounts owed to the Subdivision Association under an installment payment plan. The modified version of Section 209.0062 now provides that a Subdivision Association may, but is not required to, allow a payment plan that extends more than 18 months. Under the prior version of Section 209.0062, a Subdivision Association could not allow a payment plan that extends more than 18 months. In addition, the modified version of Section 209.0062 now provides that a Subdivision Association is not required to offer a payment plan to a property owner after expiration of the 30-day cure period required under Section 209.0064 and a Subdivision Association is not required to allow an owner to enter into a payment plan more than once in any 12-month period.

Section Nineteen of SB 1168 modifies Section 209.0064 of the Texas Property Code, which requires a Subdivision Association to provide certain written notice to a property owner before the property owner may be held liable for attorneys fees incurred by the Subdivision Association to collect unpaid assessments. The modified version of Section 209.0064 now requires the written notice to be sent to the property owner by certified mail only, instead of certified mail, return receipt requested. The modified version of Section 209.0064 now requires that the notice describe the availability of a payment plan option only if the Subdivision Association is subject to Section 209.0062 (ie., it consists of at least 15 lots) or its dedicatory instruments contain a requirement to offer a payment plan.

Section Twenty of SB 1168 modifies Section 209.009 of the Texas Property Code, which precludes a Subdivision Association from foreclosing its assessment lien if the debt secured by the lien consists of certain types of debt (ie., fines, attorneys fees associated with fines, unpaid costs associated with the production of records under Section 209.005). The list of precluded debt types under the modified version of Section 209.009 now also includes unreimbursed cost of conducting a vote recount that exceeded the estimated cost invoiced to the property owner who requested the vote recount.

Section Twenty-One of SB 1168 modifies Section 209.0091 of the Texas Property Code, which requires a Subdivision Association to send a written notice to junior deed of trust lienholders before it may foreclose its assessment lien. The modified version of Section 209.0091 makes clear that a Subdivision Association must provide the notice required under such statute to junior deed of trust lienholders before it can file an expedited judicial foreclosure proceeding (as described by Section 209.0092) or file a judicial foreclosure lawsuit. In addition, the modified version of Section 209.0091 changes the commencement of the 60-day cure period for a junior deed of trust lienholder, from the date the lienholder receives the requisite notice to the date the Subdivision Association mails the requisite notice to the lienholder. The modified version of Section 209.0091 also changes the method of delivery of the requisite notice to certified mail only, instead of certified mail, return receipt requested.

Section Twenty-Two of SB 1168 modifies Section 209.0092 of the Texas Property Code, which requires a Subdivision Association to obtain a court order through an expedited judicial proceeding before it may foreclose its assessment lien through non-judicial foreclosure procedures. The modified version of Section 209.0092 now provides for a power of sale in favor of any Subdivision Association whose dedicatory instruments grant it a right of foreclosure. In addition, the modified version of Section 209.0092 makes clear that a Subdivision Association may still elect to judicially foreclose its assessment lien (ie., by judicial foreclosure lawsuit) instead of foreclosing its assessment lien under the procedures described by Section 209.0092.

Section Twenty-Three of SB 1168 adds Chapter 213 to the Texas Property Code. Chapter 213 establishes procedures for amending or removing restrictive covenants that restrict certain amenity property to use as a golf course. Such amendment procedures only apply if the amenity property has ceased being operated as a golf course for at least three years and the applicable restrictive covenant that restricts its use as a golf course requires the approval of 75% of the lots or units in the development in order to be amended. The new Chapter 213 also includes a provision that provides for expiration of Chapter 213 on September 1, 2021.

House Bill 262 (applies to Condominium Associations and Subdivision Associations)

HB 262 adds Section 75.0025 to the Texas Civil Practice and Remedies Code, which establishes a limitation on the liability of property owners, including Homeowners Associations, that allow their property (ie., common elements or common areas) to be used as a “community garden.” Section 27.0025 defines a community garden as a portion of land “used for recreational gardening by a group of people residing in a neighborhood or community for the purpose of providing fresh produce for the benefit of the residents of the neighborhood or community.”

House Bill 745 (applies to Condominium Associations and Subdivision Associations)

HB 745 modifies Section 430.002 of the Texas Transportation Code, which authorized a Homeowners Association to install speed feedback signs on roads within its development. The modified version of Section 430.002 now authorizes a Homeowners Association to also install solar-powered light-emitting diode (LED) stop signs on roads within its development.

House Bill 939 (applies to Condominium Associations and Subdivision Associations)

HB 939 adds Section 202.019 to Chapter 202 of the Texas Property Code. Section 202.019 restricts a Homeowners Association from adopting or enforcing a dedicatory instrument provision that prohibits or restricts a homeowner from owning, operating, installing, or maintaining a permanently installed “standby electric generator.” Section 202.019 defines a standby electric generator as a “device that converts mechanical energy to electrical energy and is: (1) powered by natural gas, liquefied petroleum gas, diesel fuel, biodiesel fuel, or hydrogen; (2) fully enclosed in an integral manufacturer-supplied sound attenuating enclosure; (3) connected to the main electrical panel of a residence by a manual or automatic transfer switch; and (4) rated for a generating capacity of not less than seven kilowatts.” Notwithstanding, Section 202.019 does not restrict a Homeowners Association from adopting or enforcing certain limited dedicatory instrument provisions that regulate the operation and installation of standby electric generators, which are described within such statute. Such permitted regulations include restrictions that require (1) installation of electrical, plumbing, and fuel line connections be performed by licensed contractors; (2) fuel lines be installed in accordance with applicable health, safety, electric and building codes; (3) the standby electric generator and its electrical and fuel lines to be maintained in good condition, and the repair, replacement, or removal of any deteriorated or unsafe components of a standby electric generator, including electrical or fuel lines; and (4) the owner to screen a standby electric generator under certain conditions, as well as restrictions that regulate the location of the standby electric generator, how often it may be used, and when it may be tested.

Senate Bill 1626 (applies to Condominium Associations and Subdivision Associations)

SB 1626 modifies Section 202.010 of the Texas Property Code, which restricts the enforcement of dedicatory instrument provisions that would prohibit a property owner from installing a solar energy device. The prior version of Section 202.010 allowed a declarant to still prohibit the installation of solar energy devices during the development period. The modified version of Section 202.010 now allows a declarant to still prohibit the installation of solar energy devices during the development period only if the development consists of less than 51 “planned residential units.” The modified version of Section 202.010 defines a planned residential unit as a structure or part of a structure intended for use as a single residence and that is: (1) a single-family house; or (2) a separate living unit in a duplex, a triplex, or a quadplex.

House Bill 1455 (applies to Condominium Associations only)

HB 1455 adds Sections 82.119 and 82.120 to Chapter 82 of the Texas Property Code. New Section 82.119 establishes procedures that must be followed by a Condominium Association (consisting of eight or more units) before it may file a lawsuit or initiate an arbitration proceeding concerning claims related to the construction or design of a unit or common elements (generally referred to as “construction defect claims”). Such procedures require the Condominium Association to (1) obtain an inspection and written report from a licensed professional engineer; and (2) obtain approval from unit owners holding 50% of the total votes in the Condominium Association at a meeting called in accordance with the Condominium Association’s declaration or bylaws. In addition, before conducting the inspection, the

Condominium Association must notify all parties who may be subject to the construction defect claims of the date and time of the inspection and allow such parties to attend the inspection, and before scheduling the meeting of the unit owners to vote on pursuing the construction defect claims, the Condominium Association must provide copies of the engineer's report to each party who may be subject to the construction defect claims and allow each such party at least 90 days to inspect and correct any condition identified in the engineer's report. At least 30 days before conducting the meeting of the unit owners, the Condominium Association must also provide written notice of the meeting to all unit owners, and the notice must include a description of the construction defect claim, a copy of the engineer's report, and other information pertaining to the cost of repair of the construction defect and the attorneys fees to be incurred in prosecuting the construction defect claim. Finally, new Section 82.120 authorizes a condominium declaration to include a binding arbitration provision for construction defect claims.

House Bill 1072 (applies to Subdivision Associations only)

HB 1072 modifies Section 209.00591 of the Texas Property Code. Section 209.00591 was originally enacted in 2011 and disqualified a person from serving on a Subdivision Association's Board of Directors if he or she had been convicted of a felony or crime involving moral turpitude. The modified version of Section 209.00591 now disqualifies a person from serving on a Subdivision Association's Board only if the conviction occurred within the most recent 20 years.

House Bill 2489 (applies to Subdivision Associations only)

HB 2489 adds Section 209.016 to Chapter 209 of the Texas Property Code. Section 209.016 now restricts a Subdivision Association from adopting or enforcing a dedicatory instrument provision that: (1) requires a prospective tenant to be submitted to and approved for tenancy by the Subdivision Association; or (2) requires a consumer credit report for a prospective tenant or the rental application submitted by the prospective tenant to the property owner to be submitted to the Subdivision Association. In addition, Section 209.016 provides that if a copy of the lease is required to be submitted to the Subdivision Association, any "sensitive personal information" may be redacted or made unreadable. Section 209.016 defines sensitive personal information as an individual's: (1) social security number; (2) driver's license number; (3) government-issued identification number; or (4) account, credit card, or debit card number.

Senate Bill 862 (applies to Subdivision Associations only)

SB 862 modifies Section 209.00592 of the Texas Property Code in substantially the same manner as Section Fourteen of Senate Bill 1168, by clarifying that, unless otherwise required by its dedicatory instrument, a Subdivision Association is not required to provide a property owner more than one method of voting so long as a property owner is allowed to vote by absentee ballot or proxy.

Senate Bill 864 (applies to Subdivision Associations only)

SB 864 modifies Section 209.0058 of the Texas Property Code in substantially the same manner as Section Eleven of Senate Bill 1168, by authorizing a Subdivision Association to adopt rules to allow voting by secret ballot and requiring the Subdivision Association to take measures to ensure that: (1) a property owner cannot cast more votes than he or she is eligible to cast in an election or vote; and (2) the Subdivision Association counts every vote cast by a property owner who is eligible to cast a vote.

Senate Bill 1852 (applies to Subdivision Associations only)

SB 1852 modifies Section 211.002 of the Texas Property Code. Chapter 211 of the Texas Property Code establishes procedures for amending restrictions applicable to residential subdivision developments located in certain geographic areas of Texas, as described within Section 211.002. The modified version of Section 211.002 now makes Chapter 211 also applicable to residential subdivision developments located, wholly or partially, within a county that borders Lake Livingston and that has a population of less than 50,000, which includes San Jacinto County, Polk County, and Trinity County.

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