



**LEGISLATIVE UPDATE FOR PROPERTY OWNERS'
ASSOCIATIONS**

84TH LEGISLATIVE SESSION

by

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Author's Note:

The 84th Legislative Session of the Texas Legislature brought a few changes to the way Property Owners Associations govern and manage their responsibilities. While this outline is intended as a resource for reference, many changes to the law are new concepts. It remains to be seen how the legislature and courts will interpret and enforce these restrictions. Furthermore, as change is a constant thing in legislation, any one of these new provisions may be amended, expanded, abandoned or redefined in subsequent legislative sessions. Please consult your legal representative and managing agent regarding these provisions and how they are practically applied to subdivisions in the state of Texas.

SB 1168 (Effective 09/01/15)

This is the largest of the bills related to property owners' associations, which was passed during this legislative session.

RESALE CERTIFICATES

TPC 82.157 & 207.002

For condominiums, resale certificates must also include the association's current balance sheet and any ownership transfer fees payable to the association or manager.

- ✓ While (13) purports to also add the requirement to include the association's current operating budget, this was already required in the language of paragraph (a).

TPC 207.002 is amended to clarify that chapter 207 (relating to resale certificates for subdivisions) does not apply to condominiums.

AMENDMENT OF DECLARATIONS

TPC 209.0041

Still caps the required vote for an amendment to the declaration at 67% of the total votes allocated to property owners entitled to vote on the amendment.

- However, it also adds a section which clarifies that, if the governing documents are silent on voting rights for an amendment of the declaration, then the required vote shall be 67% of the lots subject to the declaration.
- ✓ The underlined language above creates a potential conflict with the current 67% cap (lots v. votes). While most often this number will be the same, the use of different terminology could create an issue in certain circumstances.

NOTICE TO PROPERTY OWNERS

TPC 209.0042

This section was added to allow a property association to adopt alternative means for sending notices to owners (i.e. e-mail).

- However, when a statute specifically provides for a certain means for providing notice, the association can only utilize the alternative means if the owner to which the notice is sent expressly agrees to accept notice by such means.
- An owner cannot be required to accept notice by alternative means.
- ✓ If an association has not already done so, they should attempt to get members to sign a form providing an e-mail address and allowing delivery of any and all notices by e-mail.
- ✓ If e-mail is to be used, associations should request a delivery and read receipt and maintain proof of same in the owners' files.
- ✓ Does not provide same opt out if declaration provides for a specific means of delivery.

This provision was amended to provide some much needed flexibility and clarification regarding the ability of the Board to meet and/or take action by e-mail or telephonic means.

- Regular and special board meetings (which must be open to owners) can be held by electronic or telephonic means, so long as:
 - (1) each board member may hear and be heard by every other board member;
 - (2) for all matters not handled in executive session, all owners may hear all board members and all owners are allowed to listen using any electronic or telephonic communication method used or expected to be used by a board member; and
 - (3) the notice of the meeting includes instructions for owners to access any communication method.
- Paragraph (h) is amended to provide greater flexibility for board action outside of meetings.
 - Removes limitation to “routine and administrative matters” or “unforeseen emergency.” This expands the Board’s ability to take action without a meeting, so long as the action does not relate to the enumerated topics mentioned below.
 - Can do so if:
 - Each board member is given a reasonable opportunity to express the board member’s opinion to all other board members and to vote;
 - Any such action is summarized orally (including any known actual or estimated expenditures approved) and documented in the minutes of the next regular or special board meeting.
 - The Board does not consider or vote on those matters enumerated (i.e. fines, damage assessments, initiation of foreclosure actions, etc.). Note that the enumerated list has been expanded to include topics such as lending or borrowing money, amending the declaration, approval of a budget with greater than 10% increase, etc.
- ✓ Owners must now receive prior notice of a meeting to elect an officer. Previously, this could be done by the Board without notice to the members. Associations may want to consider including notice of board meeting immediately following Annual Meeting to elect officers.

Now provides for association wide votes to take place outside of a formal meeting and states the paragraph the notice requirements for votes or elections not taken in a meeting of the owners.

- Notice for election or vote taken at a meeting remains the same (10-60 days before the meeting).
- For an election or vote of owners not taken at a meeting, notice shall be given at least 20 days before the latest date ballots are due.

Amends procedure for recount of vote.

- Notice shall be delivered by “verified” mail, rather than certified mail. This is defined as any method of mailing for which evidence of mailing is provided by the U.S. Postal Service or a common carrier.
 - ✓ The certified mail requirement is replaced with verified mail in a few other sections.
- The most significant change relating to the recount process is the procedure for obtaining prepayment of the cost of the recount.
 - The property owners association is to provide an invoice for the estimated cost of conducting the recount to the requesting party within 20 days of receiving the recount request.
 - The requesting party must pay within 30 days of the date the invoice is sent. If the requesting fails to do so, the recount is not required.
 - The association can bill the requesting party for any additional amounts if the actual cost exceeds the estimated cost and, if the requesting party fails to pay the amounts timely, those amounts may be added to the owner’s account as an assessment.
 - Likewise, the association must refund any excess funds received.

Amends provisions related to voting methods and provides a framework for an Association to establish secret ballot protocols at its discretion.

- Provides that, except when secret ballots are permitted (below), a vote cast must be in writing and signed by the member if the vote is cast:
 - (1) Outside of a meeting;
 - (2) In an election to fill a position on the board;
 - (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 board member.
 - Paragraph (a-1) is added to require that, if an Association elects to use a ballot for a vote on a matter other than those listed above, the ballot must be in writing and signed by the owner, if not by secret ballot.
 - An association is allowed to adopt rules to allow for voting by secret ballot and to provide certain requirements for such rules (i.e. ensure proper number of votes per member are counted and provide for mechanism for candidate to name someone to observe vote count). [addition of paragraph (d)]
- ✓ If an association wishes to utilize secret ballots, it will need to adopt a policy setting forth the procedures for handling such ballots.

- An association is allowed to require that one or more, but not all, board members reside in the subdivision. This is designed to avoid absent homeowners or investment property owners from running the association. [addition of paragraph (a-1)]
- The limitation on eligibility for an individual who convicted of a felony or crime involving moral turpitude is now limited to convictions which occurred no more than 20 years before.
- Paragraph (c) was amended to require that at least 1/3 of all Board members must be elected by owners other than the declarant on or before:
 - The 120th day after conveyance of 75% of lots by the developer to either an owner or a builder who intends to build and sell; OR

- The 10th anniversary of the date the declaration was recorded.
- ✓ Associations may want to consider amending their bylaws if their current bylaws conflict with the current law to avoid continued enforcement of invalid provisions or restrictions.

VOTING METHODS	TPC 209.00592
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- An association need only provide one method of voting; however, the association must at least provide for either absentee ballot or proxy. [addition of paragraph (a-1)]
- ***Paragraph (b-1) provides much needed clarification.*** Previously, it was unclear whether an absentee ballot could be counted for a final vote in an election if nominations were accepted from the floor at the meeting, as this would alter the language of the absentee ballot (see 209.00592(b)(3)). Now, paragraph (b-1) clearly states that, for purposes of section 209.00592(b), a nomination taken from the floor in a board member election is not considered an amendment to the proposal for the election.

ELECTION OF BOARD OF DIRECTORS	TPC 209.00593
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- For associations with more than 100 lots, paragraph (a-1) was added to set forth procedures for dissemination of absentee ballots and instructions for becoming a candidate.
 - Must solicit candidates at least 10 days before disseminating absentee ballots.
 - Must provide instructions for getting placed on the absentee ballot.
 - Must allow 10 days to request name be added to absentee ballot.
 - Must provide such solicitation by mail **or** by posting and e-mail (to those who have registered an e-mail address).

NOTICE BEFORE ENFORCEMENT ACTION	TPC 209.006
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- A notice of violation does not need to provide an opportunity to cure the violation **if** the violation is incurable or poses a threat to public health or safety. [amendment to par. (b)(2)(A)]
- The association must now specify the **date** by which a violation must be cured.
 - ✓ It is not sufficient to state a timeframe. Such date must allow a reasonable time to cure.

- The notice must be sent by verified mail (any method of mail for which delivery can be verified).
 - ✓ While the amendment adds language to indicate notice must be sent by verified mail, the amendment failed to amend the language in paragraph (a) to remove the certified mail requirement. They only removed “return receipt requested.”
- As before, no notice is required if notice of same violation was forwarded within the preceding six months. However, such notice must meet all requirements (i.e. provide for right to hearing, advise of possible rights under SCRA, etc.) to satisfy this exemption. Previously, only had to advise of violation and provide opportunity to cure.
- Paragraph (e) clarifies that, if violation cured before expiration of deadline, a fine cannot be imposed.
- Paragraph (f) defines a violation as a “threat to public health or safety” if the violation could materially affect the physical health or safety of an ordinary resident.
- Paragraph (g) defines a violation as “uncurable” if the violation has occurred but is not a continuous action or a condition capable of being remedied by affirmative action. Further, mere non-repetition of a one-time violation is not considered an adequate remedy.
- ✓ It may be difficult to determine what constitutes curable v. uncurable violations. Example: Given the definition above, why is shooting fireworks uncurable, while a parking violation is curable?
 - Paragraph (h) provides examples of uncurable acts:
 - Shooting fireworks;
 - An act constituting a threat to health or safety;
 - A noise violation
 - Property damage (including the removal or alteration of landscape);
 - Holding a garage sale or other event which is prohibited by the governing documents.
 - Paragraph (i) provides examples of curable acts:
 - Parking violation;
 - Maintenance violation;
 - Failure to construct improvements or modifications per approved plans;
 - Ongoing noise violation.

PAYMENT PLANS

TPC 209.0062

- An association is no longer limited to a maximum of 18 months for a payment plan. Minimum is still 3 months.
- An association continues to be excused from having to allow for a payment plan for 2 years after a homeowner defaults on a previous payment plan.
- Further, this section is amended to also excuse an association from the requirement to allow a payment plan if:
 - A homeowner waits until after the deadline to cure the default (at least 30 days) set forth in the notice required prior to turning over to the attorney to request the payment plan.
 - A homeowner has been in a payment plan within the past 12 months.
- ✓ Given that there is no longer a maximum duration for payment plans, associations may want to amend any existing payment plan policy to reflect this change.

PREREQUISITES TO FORECLOSURE

TPC 209.0091

- Clarifies that an association cannot file for expedited foreclosure or for judicial foreclosure without first providing notice to the inferior lienholders.
 - ✓ Previously, it was unclear whether you could file and get judgment so long as you advised inferior lienholders before foreclosing the lien.
- The time a subordinate lienholder has the right to cure the delinquency is measured from the date the association mails the notice (v. the date the notice is received by the lienholder).
- Paragraph (c) provides that notice can be provided to any lienholder, even if they are superior.
 - ✓ This provision protects the association from any claims that notifying a superior lienholder may violate the homeowner's privacy or collection regulations.

JUDICIAL FORECLOSURE

TPC 209.0092

- Provides for a statutory power of sale for purposes of proceeding with expedited foreclosure, so long as the dedicatory instruments grant a right of foreclosure. No longer need to use the words "power of sale."

- The amendments clarify that, while an association may have the right to proceed through expedited foreclosure, the association can choose to proceed via judicial foreclosure.

GOLF COURSE OR COUNTRY CLUB AMENITIES

TPC 213

This entire chapter was added and relates to property restricted to use as a golf course or country club.

- This chapter provides for a procedure by which owners with an interest in golf course or country club property may petition to have a use restriction modified or terminated.
- This chapter only applies if there is no proper mechanism for amendment or termination in the governing documents or other chapters of the Texas Property Code.
- This chapter is designed to give property owners a means to remove a restriction on a golf course or country club property when the golf course or country club property is not operating as it is currently set up.

HB 2489 (Effective 06/19/15)

RESIDENTIAL LEASES OR RENTAL AGREEMENTS

TPC 209.016

- An association cannot adopt or enforce a provision in its governing documents which requires:
 - That the association approve a tenant; or,
 - That the association be provided with a credit report or lease/tenant application
- If an association requires that a copy of the lease or rental agreement be provided, all sensitive personal information (i.e. social security number, drivers license number, government identification number, or debit or credit card number) may be redacted.

HB 939 (Effective 06/19/15)

STANDBY ELECTRIC GENERATORS	TPC 202.019
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- This section was added to prohibit an association from adopting or enforcing a provision in its governing documents which prohibits or restricts, or has the effect of prohibiting or restricting an owner's ability to own, operate, install or maintain a permanently installed standby electric generator.
- An association can establish certain requirements for such generators and prior approval may be required.
- ✓ If an association wishes to regulate the appearance and placement of electric generators, the association will need to adopt a policy setting forth any such requirements.

HB 1455 (Effective 09/01/15)

CONSTRUCTION OR DESIGN DEFECT CLAIMS (CONDOMINIUMS)

This legislation places a great burden on associations wishing to file a construction-defect lawsuit or pursue such a claim through arbitration.

Section 82.119 – Prerequisites to Filing Suit or Initiating Arbitration for Defect or Design Claims

- Must obtain an inspection and written independent 3rd party report from a licensed professional engineer which sets forth specific items.
- Must obtain approval from unit owners holding more than 50% of the total votes at a meeting at which the association must provide a significant list of items.
- Must provide prior written notice of an inspection to all parties subject to a claim.
- Must allow 90 days after the date of the report to inspect and cure any condition identified in the report.

Section 82.120 – Binding Arbitration

- Declarations may provide for binding arbitration and a process for same.
- Any modification or amendment to declarations providing for binding arbitration cannot be applied retroactively based upon an act or omission that occurred before the amendment.