

BILL ANALYSIS

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S.B. 1168
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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

In the 82nd regular session, a number of bills amending provisions of Chapter 209 of the Property Code, dealing with the operation of property owners' associations (POA), were passed into law. Since that time, the boards of numerous POAs have encountered operational and technical issues that require further legislative refinement.

Accordingly, S.B. 1168 makes a number of clarifying changes to this area of law. Those changes include providing a definition of "verified mailing" and a confirmation that the vote required to amend a declaration is 67 percent of those whose property is affected by the amendment (owners not subject to a deed restriction do not vote on amendments to the restriction). The bill also clarifies when a board may meet by electronic or telephonic means, and what they can consider, and also provides more detail regarding the recount process for an election conducted by the board.

Additionally, the bill sets out the matters for which a vote must be signed and in writing, permits POAs to require board members to reside in the subdivision, further defines a homeowner's notice of the right to cure, allows for either judicial or expedited foreclosure of a lien, and permits the offer of a payment plan that is longer in length than 18 months, while also clarifying when such a plan is required. Finally, the bill clarifies that ballots cast by a homeowner in a property association vote are "secret" – not subject to review by any other owner.

As proposed, S.B. 1168 amends current law relating to the operation of certain property owners' associations.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 207.001(2), Property Code, to redefine "dedicatory instrument," "property owners' association," and "restrictive covenant."

SECTION 2. Amends Section 207.002, Property Code, as follows:

Sec. 207.002. APPLICABILITY. (a) Creates this subsection from existing text. Provides that this chapter applies to a subdivision with a property owners' association that is entitled to levy regular or special assessments.

(b) Provides that this chapter does not apply to a condominium council of owners governed by Chapter 81 (Condominiums Created Before Adoption of Uniform Condominium Act) or a condominium unit owners' association governed by Chapter 82 (Uniform Condominium Act).

SECTION 3. Amends Section 209.002, Property Code, by amending Subdivision (4-a) and adding Subdivision (13), to redefine "development period" and to define "verified mail."

SECTION 4. Amends Section 209.003(d), Property Code, to provide that this chapter does not apply to a condominium as defined by Section 81.002 (Definitions) or 82.003 (Definitions),

rather than provide that this chapter does not apply to a condominium development governed by Chapter 82.

SECTION 5. Amends Section 209.0041, Property Code, by amending Subsection (h) and adding Subsection (h-1), as follows:

(h) Authorizes a declaration to be amended, except as provided by Subsection (h-1), only by a vote of:

(1) Creates this subdivision from existing text; or

(2) 67 percent of those entitled to vote on the amendment of the declaration, in addition to any governmental approval required by law.

Makes nonsubstantive changes.

(h-1) Provides that if the declaration contains a lower percentage than prescribed by Subsection (h), the percentage in the declaration controls.

SECTION 6. Amends Section 209.0051, Property Code, by amending Subsections (b), (c-1), and (h) and adding Subsection (c-2), as follows:

(b) Deletes definition of "development period" and makes nonsubstantive changes.

(c-1) Requires a board meeting to be held in a county in which all or part of the property in the subdivision is located or in a county adjacent to that county, except for a meeting held by electronic or telephonic means under Subsection (c-2), rather than Subsection (h).

(c-2) Authorizes a board meeting be held by electronic or telephonic means provided that:

(1) all directors may hear and be heard by every other director; and

(2) except for any portion of the meeting conducted in executive session, all owners in attendance at the meeting may hear all directors.

(h) Authorizes the governing body of a property owners' association (board) to take action outside of a meeting, except as provided by this subsection, including voting by electronic or telephonic means, without prior notice to owners under Subsection (e) (requiring that members be given notice of the date, hour, place, and general subject of a regular or special board meeting, including a general description of any matter to be brought up for deliberation in executive session), if each director is given a reasonable opportunity to express the director's opinion to all other directors and to vote. Requires that any action taken without notice to owners under Subsection (e) be summarized orally, including an explanation of any known actual or estimated expenditures approved at the meeting, and documented in the minutes of the next regular or special board meeting. Prohibits the board from, without prior notice to owners under Subsection (e), voting on certain issues set forth.

Deletes existing text authorizing a board to meet by any method of communication, including electronic and telephonic, without prior notice to owners under Subsection (e), if each director may hear and be heard by every other director, or the board may take action by unanimous written consent to consider routine and administrative matters or a reasonably unforeseen emergency or urgent necessity that requires immediate board action.

Makes nonsubstantive changes.

SECTION 7. Amends Section 209.0056, Property Code, by amending Subsection (a) and adding Subsection (a-1), as follows:

(a) Requires a property owners' association, for an election or vote taken at a meeting of the association owners, not later than the 10th day or earlier than the 60th day before the date of the election or vote, to give written notice of the election or vote to certain owners as set forth.

(a-1) Requires the property owners' association to give notice of the election or vote to all owners for an election or vote of association owners not taken at a meeting.

SECTION 8. Amends Section 209.0057, Property Code, by amending Subsections (b), (c), and (d) and adding Subsections (b-1), (b-2), (b-3), and (b-4), as follows:

(b) Authorizes any owner, not later than the 15th day after the date of the meeting of association owners at which the election or vote was held or the date of the announcement of the results of the election or vote if no meeting was held, to require a recount of the votes. Requires that a demand for a recount be submitted in writing either:

(1) by verified mail to the property owners' association's mailing address as reflected on the latest management certificate filed under Section 209.004 (Management Certificates); or

(2) Makes no change to this subdivision.

Deletes existing text requiring that a demand for mail by certified mail, return receipt requested, or by delivery by the United States Postal Service with signature confirmation service.

(b-1) Requires the association to estimate the costs for performance of the recount by a person qualified to tabulate votes under Subsection (c) and to send an invoice for the estimated costs to the requesting owner at the owner's last known address according to association records not later than the 20th day after the date the association receives the owner's demand for the recount.

(b-2) Requires the owner demanding a recount under this section to pay the invoice described by Subsection (b-1) in full to the property owners' association on or before the 30th day after the date the invoice is sent to the owner.

(b-3) Provides that if the invoice described by Subsection (b-1) is not paid by the deadline prescribed by Subsection (b-2), the owner's demand for a recount is considered withdrawn and a recount is not required.

(b-4) Requires the association to send a final invoice to the owner on or before the 30th business day after the date the results of the recount are provided if the estimated costs under Subsection (b-1) are lesser or greater than the actual costs. Authorizes any additional amounts not paid to the association before the 30th business day after the date the invoice is sent to the owner to be added to the owner's account as an assessment if the final invoice includes additional amounts owed by the owner. Provides that, if the estimated costs exceed the final invoice amount, the owner is entitled to a refund. Requires the association to issue the refund to the owner not later than the 30th business day after the date the invoice is sent to the owner.

(c) Requires the property owners' association, following receipt of payment under Subsection (b-2), at the expense of the owner requesting the recount, retain for the purpose of performing the recount the services of a person qualified to tabulate

votes under this subsection. Requires the association to enter into a contract for the services of certain persons as set forth. Makes nonsubstantive changes.

(d) Requires that any recount under Subsection (b) be performed on or before the 30th day after the date of receipt of payment, rather than receipt of a request and payment, for a recount in accordance with Subsection (b-2), rather than Subsections (b) and (c).

SECTION 9. Amends Sections 209.0058(a) and (c), Property Code, as follows:

(a) Requires that any vote cast by a member of a property owners' association in a director election or in a vote on the issue of whether to amend a dedicatory instrument, increase a regular assessment, adopt a special assessment, or remove a director be in writing and signed by the member. Deletes existing text requiring that any vote cast in an election or vote by a member of a property owners' association be in writing and signed by the member.

(c) Provides that in an association election, rather than in an association-wide election, written and signed ballots are not required for uncontested races.

SECTION 10. Amends Section 209.00591, Property Code, by adding Subsection (b-1) and amending Subsection (c), as follows:

(b-1) Authorizes a property owners' association's bylaws to require one or more board members to reside in the subdivision subject to the dedicatory instruments, notwithstanding any other provision of this chapter. Provides that a requirement described by this subsection is not applicable during the development period.

(c) Provides that, regardless of the period of declarant control provided by the declaration, on or before the 120th day after the date 75 percent of the lots that may be created and made subject to the declaration are conveyed to owners other than a declarant or a builder in the business of constructing homes who purchased the lots from the declarant for the purpose of selling completed homes built on the lots, at least one-third of the board members must be elected by owners other than the declarant.

SECTION 11. Amends Section 209.00592, Property Code, by amending Subsection (a) and adding Subsections (a-1) and (c-1), as follows:

(a) Authorizes the voting rights of an owner to be cast or given:

(1) if a meeting of the property owners' association is held, in person or by proxy at the meeting;

(2) by absentee ballot in accordance with this section; or

(3) by any method of representative or delegated voting provided by a dedicatory instrument.

Redesignates existing Subdivision (4) as Subdivision (3). Makes nonsubstantive changes.

(a-1) Authorizes the board in its discretion to use electronic ballots in accordance with this section as an additional method of voting.

(c-1) Provides that for purposes of Subsection (b), a nomination taken from the floor in an election of directors is not considered an amendment to the proposal for the election.

SECTION 12. Amends Section 209.00593(d), Property Code, as follows:

(d) Provides that this section does not apply to the appointment of a board member during a development period. Deletes existing text defining "development period."

SECTION 13. Amends Section 209.00594, Property Code, by adding Subsection (b-1) and amending Subsection (c), as follows:

(b-1) Prohibits a person performing a recount under Section 209.0057(c) from disclosing to any other person how an individual voted.

(c) Provides that only a person who tabulates votes under Subsection (b) or who performs a recount under Section 209.0057(c) is authorized to be given access to the ballots cast in the election or vote, notwithstanding any other provision of this chapter or any other law, rather than authorizes a person other than a person who tabulates votes under Subsection (b), including a person described by Subsection (a), to be given access to the ballots cast in the election or vote only as part of a recount process authorized by law, notwithstanding any other provision of this chapter or any other law.

SECTION 14. Amends Section 209.006, Property Code, as follows:

Sec. 209.006. NOTICE REQUIRED BEFORE ENFORCEMENT ACTION. (a) Requires the association or its agent to give written notice to the owner by verified mail, rather than certified mail, return receipt requested, before a property owners' association may suspend an owner's right to use a common area, file a suit against an owner other than a suit to collect a regular or special assessment or foreclose under an association's lien, charge an owner for property damage, or levy a fine for a violation of the restrictions or bylaws or rules of the association.

(b) Requires the notice to:

(1) describe the nature of the violation or property damage that is the basis for the suspension action, charge, or fine and state any amount due the association from the owner;

(2) except as provided in Subsection (d), inform the owner that the owner:

(A) is entitled to a reasonable period to cure the violation and avoid the fine or suspension;

(B) may request a hearing under Section 209.007 (Hearing Before Board; Alternative Dispute Resolution) on or before the 30th day after the date the notice was mailed to the owner, rather than may request a hearing under Section 209.007 on or before the 30th day after the date the owner receives the notice; and

(C) may have special rights or relief related to the enforcement action under federal law, including the Servicemembers Civil Relief Act (50 U.S.C. App. Section 501 et seq.), if the owner is serving on active military duty;

(3) specify the date by which the owner must cure the violation if the violation is of a curable nature and does not pose a threat to public health or safety; and

(4) be sent by verified mail to the owner at the owner's last known address as shown on the association records.

Deletes existing text requiring that the owner is entitled to a reasonable period to cure the violation and avoid the fine or suspension unless the

owner was given notice and a reasonable opportunity to cure a similar violation within the preceding six months.

(c) Requires that the date specified in the notice under Subsection (b)(3) provide 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.

(d) Provides that Subsections (a) and (b) do not apply to a violation for which the owner has been previously given notice under this section and the opportunity to exercise any rights available under this section in the preceding six months.

(e) Provides that if the owner cures the violation before the expiration of the period for cure described by Subsection (c), any fine assessed for the violation is void.

(f) Provides that, for purposes of this section, a violation is considered a threat to public health or safety if the violation could materially affect the physical health or safety of an ordinary resident.

SECTION 15. Amends Section 209.0062(c), Property Code, as follows:

(c) Provides that a property owners' association is not required to allow a payment plan for any amount that extends more than 18 months from the date of the owner's request for a payment plan. Provides that the association is not required to make a payment plan available to an owner after the period for cure described by Section 209.0064(b)(3) (providing a period of at least 30 days for the owner to cure the delinquency before further collection action is taken) expires. Provides that the association is not required to allow an owner to enter into a payment plan more than once in any 12-month period. Makes a nonsubstantive change.

SECTION 16. Amends Section 209.0063, Property Code, by amending Subsection (a) and adding Subsection (c), as follows:

(a) Requires that a payment received by a property owners' association from the owner be applied to the owner's debt in order of priority, except as provided by Subsections (b) and (c), rather than Subsection (b). Sets forth the order of priority.

(c) Provides that this section does not apply to a payment made pursuant to a final judgment, another binding court order, or any mutual agreement of the parties entered into after the 30-day period described in Section 209.0064(b)(3).

SECTION 17. Amends Section 209.0064(b), Property Code, as follows:

(b) Prohibits a property owners' association from holding an owner liable for fees of a collection agent retained by the property owners' association unless the association first provides written notice to the owner by certified mail, return receipt requested, that:

(1) Makes no change to this subdivision;

(2) if the property owners' association is subject to Section 209.0062 (Alternative Payment Schedule for Certain Assessments), describes the options the owner has to avoid having the account turned over to a collection agent, including information regarding availability of a payment plan through the association; and

(3) Makes no change to this subdivision.

SECTION 18. Amends Section 209.0091, Property Code, as follows:

Sec. 209.0091. PREREQUISITES TO FORECLOSURE: NOTICE AND OPPORTUNITY TO CURE FOR CERTAIN OTHER LIENHOLDERS. (a) Prohibits a

property owners' association from selling a property pursuant to a foreclosure right unless the association has:

(1) Makes no change to this subdivision;

(2) provided the recipient of the notice an opportunity to cure the delinquency before the 61st day after the date the association mails the notice described in Subdivision (1), after the recipient receives the notice.

(b) Requires notice under this section be sent by verified mail, rather than certified mail, return receipt requested, to the address for the lienholder shown in the deed records relating to the property that is subject to the property owners' association assessment lien.

(c) Authorizes notice under this section to be provided to any holder of a lien of record on the property, notwithstanding any other law.

Deletes existing text prohibiting a property owners' association from foreclosing a property owners' association assessment lien on real property by giving notice of sale under Section 51.002 (Sale of Real Property Under Contract Lien) or commencing a judicial foreclosure action.

SECTION 19. Amends Section 209.0092, Property Code, by amending Subsection (a) and adding Subsection (d), as follows:

(a) Prohibits a property owners' association from foreclosing a property owners' association assessment lien unless the association first obtains a court order in an application for expedited foreclosure under the rules adopted by the supreme court under Subsection (b), except as provided by Subsection (c) or (d), rather than provided by Subsection (c) and subject to Section 209.009 (Foreclosure Sale Prohibited in Certain Circumstances). Authorizes a property owners' association to use the procedure described by this subsection to foreclose any lien described by the association's dedicatory instruments and is considered to have with respect to the lien any power of sale required by law as a condition of using the procedure described by this subsection.

(d) Authorizes the association to, in its discretion, elect not to use the expedited procedure described by Subsection (b) and instead foreclose the association's assessment lien under court judgment foreclosing the lien and ordering the sale, pursuant to Rules 309 and 646a, Texas Rules of Civil Procedure.

SECTION 20. Repealer: Section 209.0041(a) (defining "development period"), Property Code.

SECTION 21. (a) Provides that the changes in law made by this Act to Chapter 207 (Disclosure of Information by Property Owners' Associations), Property Code, apply only to a request for subdivision information made on or after the effective date of this Act and any resale certificate delivered in response to that request. Makes application of this Act prospective.

(b) Provides that Sections 209.0041 (Adoption or Amendment of Certain Dedicatory Instruments), 209.0056 (Notice of Election or Association Vote) , 209.0057 (Recount of Votes), 209.0058 (Ballots), 209.00592 (Voting; Quorum), and 209.00594(c) (authorizing a person other than a person who tabulates votes under Subsection (b), including a person described by Subsection (a), be given access to the ballots cast in the election or vote only as part of a recount process authorized by law, notwithstanding any other provision of this chapter or any other law), Property Code, as amended by this Act, apply only to an election or vote held on or after the effective date of this Act. Makes application of this Act prospective.

(c) Provides that Section 209.006 (Notice Required Before Enforcement Action), Property Code, as amended by this Act, applies only to an enforcement action taken on or after the effective date of this Act. Makes application of this Act prospective.

(d) Provides that Section 209.0064 (Third Party Collections), Property Code, as amended by this Act, applies only to a collection action taken on or after the effective date of this Act. Makes application of this Act prospective.

(e) Provides that Section 209.0091 (Prerequisites to Foreclosure: Notice and Opportunity to Cure for Certain Other Lienholders), Property Code, as amended by this Act, applies only to a foreclosure sale that takes place on or after the effective date of this Act. Makes application of this Act prospective.

SECTION 22. Effective date: September 1, 2015.