

24-PART OMNIBUS BILL FOR TEXAS SUBDIVISION POAs
~ HB 2797 (by VILLALBA) & SB 1168 (by WEST) ~ AS INITIALLY FILED
 Prepared by Sharon Reuler for Report #5 on 2015 Texas POA-Pertinent Bills

The 84th Legislature's POA Omnibus Bill pertains to residential subdivisions, only. Nothing for condominiums. The Omnibus Bill, sponsored by Texas Community Association Advocates (TCAA), is filed as companions in both the House (HB 2797 by Villalba) and the Senate (SB 1168 by West).

Below is my subject index to the Omnibus Bill's 20 SECTIONS, which are described in more detail, and in numerical order, on the following pages. The section descriptions are also integrated into my Report #5 on all POA-Pertinent Bills, which is organized by subject.

Two-thirds of the provisions in the Omnibus Bill clarify or correct some of the 2011 HOA Reform Laws. I labeled them "**fixes**." The rest are substantive law changes ("**NEW**") - some significant, one particularly worrisome. If you have only limited time to review the Omnibus Bill, please focus on the **NEW** provisions.

An Omnibus Bill is a compilation of spot amendments packaged together under a single bill number. Although each spot amendment must relate to the caption of the bill, the bill's many parts don't relate to each other. It's hard to review an Omnibus Bill because there is no "whole," only parts, each of which must be reviewed as if it were a separate bill. Because the independent parts often don't get the scrutiny they deserve, significant law changes are easily overlooked. Be wary, be wise.

ALPHA SUBJECT INDEX TO POA OMNIBUS BILL HB 2797/SB 1168

BILL SECT	SUBJECT (assigned by Sharon Reuler)	FIX or NEW	PROPERTY CODE SECTION AFFECTED
1 & 2	APPLICABILITY - Chapter 207	fix	amends 207.001(2) & 207.002
4	APPLICABILITY - Chapter 209	fix	209.003 amends (d)
19	ASSESS - Foreclose (Methods)	NEW	209.092 adds (d)
19	ASSESS - Foreclose (Power of Sale)	NEW	209.092 amends (a)
18	ASSESS - Lienholders	NEW	209.0091 amends (a)&(b), adds (c)
16	ASSESS - Payment Application	fix	209.0063 adds (c)
15	ASSESS - Payment Plans	fix	209.0062 amends (c)
17	ASSESS - Payment Plans	fix	209.0064 amends (b)
3	CHAPTER 209 - Definitions	NEW	209.002 amends (4-a), adds (13)
20	DOCUMENTS - Amend	fix	209.0041 repeals (a)
5	DOCUMENTS - Amend	fix	209.0041 amends (h), adds (h-1)
6	GOVERN - Board Meetings	fix	209.0051 adds (c-2)

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6	GOVERN - Board Meetings	fix	209.0051 amends (b)
6	GOVERN - Board Meetings	NEW	209.0051 amends (h)
10	GOVERN-Board Qualifications	NEW	209.00591 adds (b-1)
10	GOVERN - Declarant Control	fix	209.00591 amends (c)
12	GOVERN - Elections	fix	209.00593 amends (d)
9	GOVERN - Election (Ballots)	NEW	209.0058 amends (a)
9	GOVERN - Election (Ballots)	fix	209.0058 amends (c)
13	GOVERN - Election (Ballots)	fix	209.00594 adds (b-1), amends (c)
7	GOVERN - Election (Notice)	NEW	209.0056 amends (a), adds (a-1)
8	GOVERN - Election (Recount)	fix	209.0057 amends 3 subs + adds 4 subs
11	GOVERN - Election (Voting)	fix	209.00592 amends (a), adds (a-1) & (c-1)
14	VIOLATIONS - Notice	fix & NEW	209.006 amends (a) & (b), adds (c)-(f)

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~ FOR SUBDIVISION POAs ~ AFFECTING CHAPTERS 207 & 209 OF PROPERTY CODE ~
~ IN NUMERICAL ORDER OF THE BILL'S SECTIONS ~

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BILL SECTION where it starts	NEW or fix	SUBJECT	TX PROPERTY CODE SECTION AFFECTED
SECTION 1 & SECTION 2 Pg 1, Lns 4&9	fix	APPLICABILITY - CHAPTER 207. Chapter 207 of the Texas Property Code was written in the late 1990s by the Texas Association of Realtors who wanted a resale certificate for single-family homes similar to what condos have under TUCA. Although "everyone knows" Chapter 207 doesn't apply to condos, the law's wording left open the nonsensical possibility that condos could be subject to two separate, though similar, resale certificate requirements. SECTIONS 1 and 2 of the bill fix that.	amends 207.001(2) & 207.002
SECTION 3 Pg 1, Ln 17	NEW	CHAPTER 209 - DEFINITIONS. Adds a new term - "verified mail" - which other sections of the Omnibus Bill use in place of "certified mail return receipt requested." The change from certified to verified seems linked to a change of measuring time from the date something is sent by the HOA instead of the date received by the owner. Only one other Texas statute defines "verified mail" - self-storage facility liens (TPC Chapter 59). This SECTION also tweaks the definition of "development period."	209.002 - amends (4-a) and adds (13)
SECTION 4 Pg 2, Ln 4	fix	APPLICABILITY - CHAPTER 209. Reinforces that Chapter 209 of the Property Code doesn't apply to condos, period. (Creative types have tried - without success - to shoehorn condos into Chapter 209. Tsk Tsk.)	209.003 - amends (d)
SECTION 5 Pg 2, Ln 8	fix	DOCUMENTS - AMEND. Before 2011, some subdivisions couldn't amend their declarations because amendments had to be approved by extraordinarily high percentages of owners. The new (in 2011) Sec. 209.0041 capped approvals at 67% of total votes allocated to owners if the declaration required more than 67%. Uncertainty arose for subdivisions created with different voting populations, such as "only patio home owners vote on amendments of patio home provisions." As an option to 67% of "total votes," this bill adds 67% of "those <u>entitled to vote</u> on the amendment." Query. If the declaration requires that non-owners (such as mortgage lenders) approve amendments of certain provisions, does the 67% apply to them, too? [See also SECTION 20]	209.0041 - amends (h) and creates (h-1)
SECTION 6 Pg 2, Ln 22	fix	GOVERN - BOARD MEETINGS. Section 209.0051 - requiring open board meetings - doesn't apply during the development period, with some exceptions. Because Chapter 209 now has a chapter-wide definition of "development period," the definition no longer needs to be repeated in each section to which it pertains. This removes the definition, but not the carve-out protection, from 209.0051.	209.0051 - amends (b)
SECTION 6 Pg 2, Ln 22	fix	GOVERN - BOARD MEETINGS. Confirms that the board may conduct all of its meetings by electronic or telephonic means, provided the directors can communicate with each other and provided all owners "in attendance at the meeting" can hear all the directors, except when they're in executive session. No change to notice requirements.	209.0051 - adds (c-2)

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SECTION 6 Pg 2, Ln 22	NEW	GOVERN - BOARD MEETINGS. Enacted in 2011, Subsection (h) of the Open Board Meetings section allows the board to <u>meet</u> by telephonic or electronic means, or to decide by unanimous written consents, without notifying the owners in advance, under certain circumstances. This bill re-writes Subsection (h) to address " <u>taking action outside of a meeting</u> " [new concept], while eliminating unanimous written consents. In place of requiring the directors to speak to and hear one another (two-way discussion which may lead to consensus), each director must have a reasonable opportunity to express his opinion (one-way) and vote. <u>Shapeshifter.</u>	209.0051 - amends (h)
SECTION 7 Pg 5, Ln 4	NEW	GOVERN - ELECTION (NOTICE). Enacted in 2011, Section 209.0056 requires the HOA to give owners prior notice of the election or vote - all owners get notice of association-wide votes, and categories of owners get notice of votes that pertain only to their category. This bill creates an inexplicable distinction between notices of voting at a meeting, versus voting <u>not</u> at a meeting. Why do <u>all</u> owners get notices of votes that pertain to only one category of owners if the vote is not taken at a meeting, but not if the vote <u>is</u> taken at a meeting? Can you explain to me? Also, this SECTION uses a new undefined term - "association owners."	209.0056 - amends (a) and adds (a-1)
SECTION 8 Pg 5, Ln 25	fix	GOVERN - ELECTION (RECOUNT). Enacted in 2011, Section 209.0057 allows an owner to challenge a vote of members by demanding a recount, which must be done by an official hired by the HOA, at the expense of the owner who demands the recount. This bill adds procedures for dealing with the costs of the recount. Essentially, HOA must have full prepayment in hand before initiating a recount. Other changes to Section 209.0057 are clarifying fixes. This uses "association owners" [new term] and changes certified mail to "verified mail." I could be convinced that these are substantive changes worthy of a " NEW " bill.	209.0057 - amends 3 subsections & adds 4 subsections
SECTION 9 Pg 8, Ln 16	NEW	GOVERN - ELECTION (BALLOT). Enacted in 2011, Sec. 209.0058 requires that all ballots be signed - period. This qualifies the signature requirement by limiting it to 5 types of issues on which HOA members vote: (1) a "director election" [new term], (2) amendments of dedicatory instruments, (3) increases in regular assessments, (4) adoption of special assessments, and (5) removal of directors. Why these issues and not others? Like, conveying common area or borrowing money? More important, I fear this <u>may create an expectation</u> that owners have a statutory right to vote on all these issues even if the declaration specifically authorizes the board to increase and levy assessments without a vote of owners. That would be B-A-D , methinks.	209.0058 - amends (a)
SECTION 9 Pg 8, Ln 16	fix	GOVERN - ELECTION (BALLOT). Because some ballots are for specific neighborhoods, this clarifies that all election ballots must be signed, not only ballots used in HOA-wide elections.	209.0058 - amends (c)

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SECTION 10 Pg 8, Ln 26	NEW	GOVERN - BOARD QUALIFICATIONS. Enacted in 2011, Sec. 209.00591 voids <u>all</u> provisions in HOA documents that could be used to disqualify an owner from serving on the HOA board. Prior to 2011, most HOA bylaws had criteria for service on the board, such as being current in assessments, term limits, being unrelated to other directors. The 2011 law change negated all of the board qualifiers in HOA bylaws. This SECTION 10 restores one qualifier - allowing HOA bylaws to require that a director live in the subdivision (thus disqualifying investor owners). <u>Why this one qualifier and not others?</u> It would not apply during the development[sic] period.	209.00591 - adds (b-1)
SECTION 10 Pg 8, Ln 26	fix	GOVERN - Declarant Control. Enacted in 2011, Section 209.00591 ensures that homeowners will have a seat at the table within 10 years or by the time the project is 75% complete and sold to homeowners, if not sooner. When the 10 year or 75% trigger is reached, the homeowners elect at least one-third of the board. This <u>much needed fix</u> clarifies that a developer's sale of vacant lots to homebuilders does not trigger the election requirement, which would be nonsensical in a subdivision of vacant lots. This fix still leaves the subdivision vulnerable to the conveyance of vacant lots to an intermediary, such as a broker, investor, or bank. Would be better if the 75% were based on improved lots - lots with houses - rather than the type of owner. But, this fix is better than no fix <u>for developers who are not homebuilders</u> but who need to control aspects of the project until it's built out.	209.00591 - amends (c)
SECTION 11 Pg 9, Ln 24	fix	GOVERN - ELECTION (VOTING). The voting procedures law enacted in 2011 has confounded practitioners and HOAs that sincerely want to be law-abiding. This bill <u>tries</u> to eliminate some of the confusion, such as counting absentee ballots even if nominations are taken from the floor of the meeting. Query. Why limit electronic ballots to an "additional way of voting"? Isn't the day fast approaching when electronic ballots will be universally used?	209.00592 - amends (a), adds (a-1) and (c-1)
SECTION 12 Pg 10, Ln 15	fix	GOVERN - ELECTIONS. The law requiring that directors be elected has an exception for the declarant-appointed board during the development period. This bill removes the definition of "development period" from the section because Chapter 209 now has a global definition that applies. Declarant's exemption is not changed.	209.00593 - amends (d)
SECTION 13 Pg 10, Ln 25	fix	GOVERN - ELECTION (BALLOTS). Enacted in 2011, Section 209.00594 regulates the handling of signed ballots. This confirms that the vote tabulator must not tell a living soul how someone votes, and narrows who can see the signed ballots.	209.00594 - adds (b-1), amends (c)

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SECTION 14 Pg 11, Ln 10	fix & NEW	<u>VIOLATIONS - NOTICE.</u> It adds some procedures for violation notices given by the HOA to an owner. The owner's 30 day right to request a hearing begins when the HOA mails the notice, instead of when the owner receives it. It seems to carve out violations that "pose a threat to public health or safety," but doesn't address what to do with that category of violation. Also, it defines "public health or safety" in a way that has nothing to do with the "public," or property, or pets. It talks about violations of a "curable nature" (not defined) but not the type of violation that is "cured" by not being repeated. If this becomes law, it will need fixing next Session.	209.006 - amends (a) & (b), and adds (c)-(f)
SECTION 15 Pg 13, Ln 4	fix	<u>ASSESS - PAYMENT PLANS.</u> Clarifies the limited circumstances under which the HOA is not required to negotiate a payment plan with a delinquent owner.	209.0062 - amends (c)
SECTION 16 Pg 13, Ln 17	fix	<u>ASSESS - PAYMENT APPLICATION.</u> Clarifies that 2 types of payments to the HOA fall outside of the rigid statutory schedule for applying an owner's payments. The 2 exceptions are payments to the HOA (1) under court order or (2) by mutual agreement of owner and HOA.	209.0063 - adds (c)
SECTION 17 Pg 14, Ln 11	fix	<u>ASSESS - PAYMENT PLANS.</u> The 2011 HOA Reform laws exempt small subdivisions (14 or fewer lots) from the requirement to offer payment plans to delinquent owners. This fixes another section of Chapter 209 that talks about payment plans, so that it won't apply to the exempt small subdivisions.	209.0064 - amends (b)
SECTION 18 Pg 14, Ln 27	NEW	<u>ASSESS - LIENHOLDERS.</u> HUH? Doesn't read "right". This one's hard to figure out but looks dramatically new. HOAs are now required to give lienholders a pre-foreclosure notice and opportunity to cure the homeowner's debt to the HOA before the HOA can foreclose its assessment lien. Although the Property Code Section is still titled "Prerequisites to Foreclosure," this bill changes Subsection (a) from "HOA can't foreclose without notifying lienholders" to "HOA can't "SELL A PROPERTY PURSUANT TO A FORECLOSURE RIGHT" [?????] without notifying lienholders. What the heck does that mean? In a foreclosure, it's the trustee or sheriff who sells, not the HOA. Does this apply only if the HOA is the high bidder at the assessment lien foreclosure? Has 209.0091 become a post-foreclosure duty for the HOA? Am I reading it wrong? Help! NEW law.	209.0091 - amends (a) & (b), adds (c)

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SECTION 19 Pg 15, Ln 25	NEW	<p><u>ASSESS - FORECLOSE (POWER OF SALE).</u> WHOOAAA!! Say it ain't so, please. Sure hope I'm reading this wrong but . . . it looks like an ill-advised attempt to create a statutory private power of sale for subdivisions with declarations that lack magic words. In issuing Rules 735/736, the Texas Supreme Court emphasized that nonjudicial foreclosure requires magic words in the declaration - a clear private power of sale. That's been the law in Texas forever. Creative lawyers contend that 209.0092 was written in 2011 to give all POAs nonjudicial foreclosure authority, which seems odd in light of the Legislature's desire to put obstacles in the HOA's path to foreclosure. This law change reads like an end-run around the Texas Supreme Court, which sought to preserve judicial-only foreclosure for POAs lacking an express private power of sale in the declaration. If it's not for that purpose, what else could it mean? This bill adds the underlined text to the last sentence of 209.0092(a):</p> <p>"A property owners' association may use the procedure described by this subsection to foreclose any lien described by the association's dedicatory instruments <u>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.</u>"</p>	209.0092 - amends (a)
SECTION 19 Pg 15, Ln 25	NEW	<p><u>ASSESS - FORECLOSE (METHODS).</u> HUH? As a stand-alone addition, it seems innocuous - authorizes the HOA to choose judicial foreclosure if the HOA doesn't want to use Rules 735/736 for a nonjudicial foreclosure (assuming it has the right to foreclose nonjudicially). But, I suspect this is paired with the statutory power of sale to assure POAs that they still have a choice.</p>	209.0092 - adds (d)
SECTION 20 Pg 16, Ln 17	fix	<p><u>DOCUMENTS - AMEND.</u> Because Chapter 209 now has a chapter-wide definition of "development period," the definition no longer needs to be repeated in each section to which it pertains. This removes the definition, but not the carve-out protection, from 209.0041.</p>	209.0041 - repeals (a)