

2015 LEGISLATIVE UPDATE

AN OVERVIEW OF THE 84TH TEXAS LEGISLATURE'S CHANGES TO THE LAWS AFFECTING CONDOMINIUM OWNERS' AND HOMEOWNERS' ASSOCIATIONS

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Prichard Bevis is a partner with the Fort Worth law firm of Whitaker Chalk Swindle & Schwartz PLLC, and he serves in the firm's real estate and oil and gas practice group.

Prichard grew up in a farming community in rural West Tennessee before moving to Memphis as a teenager. After graduating from Memphis University School, Prichard received his bachelor of business administration from the University of Mississippi in 1995 where he was a member of Sigma Alpha Epsilon. Prichard then obtained his law degree from the University of Oklahoma College of Law in 1998. Before joining Whitaker Chalk, Prichard practiced law in Dallas where he began his legal career with the appellate section of the Dallas County District Attorney's Office. After leaving the District Attorney's Office, Prichard practiced insurance defense and then commercial litigation before focusing his practice on real property, and especially oil and gas, about a decade ago.

As a practicing attorney Prichard handles all aspects of real property related transactions and litigation including purchases and sales, dedicatory instruments and other restrictions, easements and representation of homeowner's associations, municipalities and other public entities. In particular Prichard's practice is focused on upstream and midstream oil and gas development, representing not only operators and vendors but also mineral, royalty and surface owners. Prichard's oil and gas practice areas include the following: pipelines, easements and rights-of-way agreements and common carrier condemnation, executive rights disputes, title examination including drilling and division order title opinions and curative procedures, lease termination disputes, mineral leasing, organization of energy entities and partnerships, surface use agreements, mineral and royalty interest disputes, pad site transactions, surface use disputes including unreasonable surface use and environmental contamination, water sale agreements, energy financing and lending, assignments of mineral, royalty and working interests, joint exploration, development, participation and operating agreements and related disputes, pooling issues including Mineral Interest Pooling Act and bad faith pooling disputes, purchase and sale of producing and non-producing properties, drilling and vendor contracts and disputes, subsurface and seismic trespass disputes, master service agreements and related disputes, nuisance claims due to oil and gas operations, farmout agreements, mergers, acquisitions and divestitures, mineral receiverships, area of mutual interest agreements, purchase and sale agreements, partnership and joint venture transactions, government inverse condemnation claims, production sharing agreements, securities litigation, salt water disposal agreements, severance tax claims, oil field accidents including personal injury, premises liability and property damage, mineral adverse possession claims, seismic agreements and wind, solar and other renewable energy agreements.

Prichard's wife Kelly is a Financial Advisor with Wells Fargo Advisors, and Kelly and Prichard have two (2) daughters. In his free time Prichard enjoys spending time with his family, cooking, cycling the Trinity Trails and traveling. Kelly and Prichard are active members of Arlington Heights United Methodist Church.

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Patrick Rose is an attorney with the Fort Worth law firm of Whitaker Chalk Swindle & Schwartz PLLC and serves in the firm's corporate, real estate and healthcare practice groups.

Patrick grew up on his family's ranch in Brackettville, Texas, a small ranching community in southwest Texas. After high school, Patrick attended Howard Payne University in Brownwood, Texas, where he was a varsity football starter, the president of the Zeta Chi fraternity and graduated with honors. After college, Patrick attended Texas A&M University School of Law (formerly Texas Wesleyan University School of Law), where he was a member of the Texas A&M Law Review, the Moot Court Honor Society and Phi Delta Phi. While in law school, Patrick clerked at several civil law firms in Fort Worth and interned at the Second Court of Appeals of Texas in Fort Worth and the legal department of XTO Energy, a subsidiary of ExxonMobil.

After law school, Patrick practiced complex civil litigation at a litigation boutique in Fort Worth, where he participated in several multi-week jury trials and countless hearings. It was at this job that Patrick realized his passion for "doing deals" and practicing transactional law. Patrick's practice began to transition into corporate, real estate and healthcare transactional law before moving his practice to Whitaker Chalk Swindle & Schwartz PLLC in February of 2013.

At Whitaker Chalk, Patrick works with clients in a wide spectrum of industries, including oil & gas, healthcare, construction, food services and real estate. Patrick's business practice covers general corporate business counsel, small to large business transactions and business litigation. He works alongside his clients from the formation of their businesses, guides them through growth and turbulent times, represents them in disputes and protects them in the sale or re-structuring of their business.

In his corporate practice, Patrick has successfully negotiated, structured and closed complex transactions, including mergers and acquisitions in excess of \$15 million. Patrick has a keen ability to understand his client's goals and desires and to work alongside the client to accomplish those objectives in a way that protects the client's interest. Patrick genuinely cares about each client and matter and strives to accomplish the best possible outcome for his client.

Patrick also represents his clients in litigation matters, when needed, and utilizes the vast litigation resources of the firm to obtain successful verdicts, summary judgments and favorable settlements, many times avoiding litigation that will be less beneficial for the client's bottom line.

Outside of practicing law, Patrick enjoys spending time with his family, especially his niece (Emma Kate) and nephew (Jack Worth). Additionally, Patrick is an avid college football fan, enjoys any outdoor activity and loves to travel.

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Schyler Parker is an attorney with the Fort Worth law firm of Whitaker Chalk Swindle & Schwartz PLLC and serves in the firm's litigation and real estate practice groups.

Schyler was born and raised in Fort Worth, Texas. After high school, Schyler attended Baylor University in Waco, Texas, where she received Bachelor of Arts degrees in history and political science. After college, Schyler came right back to Fort Worth and attended Texas A&M University School of Law (formerly Texas Wesleyan University School of Law), where she was an articles editor of the Texas A&M Law Review. While in law school, Schyler clerked at several civil law firms, including Whitaker Chalk, and interned with Judge Don Pierson in County Court at Law No. 1 in Fort Worth.

After law school, Schyler practiced family law with a law firm in Fort Worth before coming back to Whitaker Chalk to expand into more areas of civil litigation. At Whitaker Chalk, Schyler works with clients in a wide spectrum of areas, including small to large business litigation, construction litigation, family law, tort, real estate litigation, and probate litigation. Schyler has now been with Whitaker Chalk since October 2013.

Schyler enjoys spending time with her family at their ranch in Stonewall County. She and her husband, Cody, have two dogs—a 100 pound Chesapeake Bay Retriever named Duke and a five pound Maltipoo named Zoey. They are also expecting a baby boy in February 2016. When she finds time, Schyler enjoys running and finding a really good book to read on her porch.

DISCLOSURE: This paper is meant to provide a general overview of the Texas Legislature's changes to the laws related to condominium owners' associations and homeowners' associations. It is not intended to be a comprehensive overview of the all of the Legislature's changes to or to provide legal advice as to any particular condominium owners' association and homeowners' association.

CONDOMINIUM OWNERS' ASSOCIATIONS

RESALE CERTIFICATES:

For most condominium owners' associations, the important statutory change relating to condominiums is the amendment of Section 82.157(a) of the Texas Property Code relating to what a condominium owner must provide to a potential buyer. This statute still only applies to a secondary sale because it does not apply to a sale by the declarant. A unit owner, before executing a contract or conveying a unit, is still required to provide to a potential buyer the documents required in the prior version of the statute. In addition to the pre-contract information and documents the seller previously had to provide to a potential buyer (i.e., a copy of the declaration, bylaws, rules, a resale certificate, amount of the assessments, the reserves, etc.), as of September 1, 2015 the resale certificate must now also provide (i) the association's current operating budget and balance sheet and (ii) a disclosure and description of all transfer fees including to whom they will be paid. The Texas Real Estate Commission has promulgated a new form incorporating these changes which can be found on its website. Effective September 1, 2015.

CONSTRUCTION DEFECT LITIGATION:

Section 82.119 was added to the Texas Property Code addressing the procedures an association must follow prior to filing suit or initiating arbitration due to a defect or design claim with regard to a unit or the common elements. In addition to certain

procedural requirement, the association must (i) obtain an inspection and report from a third-party engineer, (ii) provide pre-inspection notice to the person the subject of the claim, (iii) permit a co-inspection of the defect or design by the person the subject of the claim with the inspector, (iv) provide the inspector's report to the voting members, (v) permit the person the subject of the claim ninety (90) days to remedy the defect or design, and (vi) if not remedied, obtain the approval of more than fifty percent (50%) of the total votes allocated under the declaration prior to initiating a lawsuit or arbitration. The law does provide for a one (1) year tolling period during implementation of this procedure under certain circumstances. The statute further states that an arbitration provision in the declaration cannot be removed retroactively after the claim has arisen. Importantly, the law does not affect litigation or arbitration by an individual condominium owner or to other types of litigation by the association. Effective September 1, 2015.

INAPPLICABILITY OF HOMEOWNERS' ASSOCIATION STATUTES:

Sections 207 and 209 of the Texas Property Code were amended to clarify that neither applies to a condominium owners' association. Consequently, if the association maintains a website, it is not required to post its dedicatory documents on the website. Additionally, this clarifies that, with regard to resale certificates, Section 82.157(a) and not Section 207 of the Property Code applies to condominiums. Effective September 1, 2015.

HIGH-RISE SPRINKLER:

Chapter 766, relating to smoke detectors and fire safety, was added to the Texas Health and Safety Code. This statute applies only to “residential high-rise buildings” (defined as buildings extending 75’ or more above the ground) containing elderly or disabled residents; however, it only applies to non-historic high-rise residential buildings in Bexar County. Effective September 1, 2015.

MODIFICATION OR TERMINATION OF GOLF COURSE OR COUNTRY CLUB RESTRICTION:

Section 213 was added to the Property Code addressing, in certain situations, the modification or termination of restrictive covenants to eliminate covenants related to a country club or golf course restriction on land that is to be redeveloped. The land in questions must not have been utilized as a golf course for at least thirty-six (36) months and all rezoning for the redevelopment must have been approved, if applicable. The golf course restriction may be removed upon the approval of a petition by at least seventy-five percent (75%) of the owners. An affidavit recorded in the real property records and served on each resident within two hundred (200) feet of the golf course and its amenities operates to remove the restriction. Section 213 applies to both homeowners’ and condominium owners’ associations; however, it expires

September 1, 2021. Effective September 1, 2015.

SOLAR POWER:

While the 2011 legislature prevented restrictions by either a condominium owners’ or homeowners’ association on solar panels, it did permit the developer to restrict solar panels during the development period. The 2015 legislature limited the developer’s rights to restrict solar panels to developments with less than fifty one (51) residential units. Unfortunately the legislature did not define a residential unit to include row townhouses. This change applies to both homeowners’ and condominium owners’ associations. Effective September 1, 2015.

HOMEOWNERS’ ASSOCIATIONS

NOTICE:

Associations are now permitted by Section 209.0042 of the Texas Property Code to, if a member agrees, provide alternative forms of “notice” such as by email. However, this provision does not appear to allow for the delivery of documents required by the covenants, conditions, and restrictions, only notice. Effective September 1, 2015.

MEMBER VOTING:

Section 209.00592 of the Texas Property Code was amended to provide that unless the dedicatory instrument states otherwise, an association is not required to provide an owner with more than one (1) voting method so long as an owner may vote by absentee ballot or proxy. Effective September 1, 2015.

Section 209.00593 now provides that for subdivisions with more than one hundred (100) lots, before sending absentee ballots, the association must solicit candidates for the office from the homeowners. Effective September 1, 2015.

ELECTIONS AND VOTING OUTSIDE OF A MEETING:

If the Association is holding a vote or election that will not take place at a meeting, the owners must be given at least twenty (20) days notice prior to the vote versus the usual requirement that notice be more than ten (10) days but not more than sixty (60) days. Effective September 1, 2015.

SECRET BALLOTS:

If the association does not provide for secret ballots, all ballots related to (i) votes outside of a meeting, (ii) in an election to fill a position on the board, (iii) on a proposed adoption or amendment of a dedicatory instrument, (iv) on a proposed increase in the amount of regular assessments or a proposed adoption of a special assessment, or (v) on the proposed removal of a board member

must be in writing and signed by the owner. Votes on other matters may either be in writing and signed or pursuant to Section 209.0058(d), be by secret ballot. Section 209.0058 is unclear who decides whether the ballot is secret or signed. This section was added to the Texas Property Code to permit an association to adopt rules to allow secreting voting in certain situations, previously prohibited by 2011 legislation, as long as measures are taken to ensure a member cannot cast more votes than eligible to cast and every vote is counted. Additionally, if the election is related to a board member, that member can appoint a person to observe the secret ballot count to ensure fairness. Effective partially May 29, 2015 and partially September 1, 2015

VOTE COUNTING:

Section 209.00594 was enacted to insure ballot secrecy. Absent a court order, anyone counting votes or ballots may not disclose to any person how a person voted. Effective September 1, 2015.

VOTE RECOUNT:

Section 209.0057 now provides for specific times for an owner to demand a recount and for the association to respond. Additionally, the association must hire a person qualified to conduct the recount, as defined by the statute, and the owner demanding the recount must pay in advance the cost of the recount. Effective September 1, 2015.

BOARD MEMBERSHIP QUALIFICATION:

Section 209.00591(b) of the Texas Property Code was amended to disqualify a member of an association from serving on the association board if convicted of a felony or a crime of moral turpitude only if the conviction is less than twenty (20) years old. Effective September 1, 2015.

OPEN BOARD MEETING:

Section 209.0051 was substantially rewritten to provide how electronic or telephonic board meetings may take place including requiring that all board members can communicate with each other and, except in an executive session, all owners must be given notice of and means to listen to the meeting. Nevertheless, a board may take action without a meeting, either by voting via email or by telephone, without prior notice to the members if each board member is given reasonable opportunity to express his or her opinion in certain situations. Added to the previous list of actions that board may not take without a meeting include voting to lend or borrow money, the adoption or amendment of a dedicatory instrument, the approval of the annual budget or an amendment to the budget that increases the budget by more than ten percent (10%), the sale or purchase of real property, the filling of a vacancy on the board, the construction of capital improvements other than the repair, replacement, or enhancement of existing capital improvement, and the election of an officer. The requirement for open board meetings does not apply during the development period except in

certain situations. Effective September 1, 2015.

BOARD MEMBERSHIP:

Section 209.00591 voids any provision in dedicatory instruments that prevents an owner from serving on the board, except in the cases of criminal convictions or a felony or a crime of moral turpitude, but this prohibition is limited to twenty (20) years. However an association can now require that “one or more” board members actually reside in the neighborhood. However, the association cannot require that all of the board members reside in the neighborhood. Effective September 1, 2015.

SOLAR POWERED STOP SIGNS:

Section 430.002 of the Texas Transportation Code was amended to permit a homeowners’ association, with the consent of the political subdivision where it is located, to install, at the association’s cost, a solar-powered light-emitting diode (LED) stop sign on a road, highway, or street within the association’s jurisdiction. After installation, the association is responsible for the maintenance of the sign. The statute contains no limit on the time the association is responsible for the sign maintenance. Effective June 10, 2015.

SOLAR POWER

While the 2011 legislature prevented restrictions by either a condominium owners’ or homeowners’ association on solar panels, it did permit the developer to restrict solar panels during the

development period. The 2015 legislature limited the developer's rights to restrict solar panels to developments with less than fifty one (51) residential units. Unfortunately the legislature did not define a residential unit to include row townhouses. This change applies to both homeowners' and condominium owners' associations. Effective September 1, 2015

STANDBY ELECTRIC GENERATORS:

Section 202.019 was added to the Texas Property Code to preclude an association from adopting or enforcing a prohibition or restriction on owning, operating, installing, or maintaining a standby generator if the generator meets certain criteria. The statute does, however, permit the association to regulate generators in certain limited ways for safety and aesthetic purposes, for example, requiring the generator to be installed pursuant to the manufacturer's specifications and in conformity with governmental regulations and requiring screening if the generator is placed in certain locations. The association must enforce its rules related to generators in a reasonable manner, but the regulation is unenforceable if it increases the installation cost by ten percent (10%) or increases the installation and connection cost by twenty percent (20%). In any proceeding where the proposed or installed generator is in compliance with the statute, the association would bear the burden of proving non-compliance. Effective June 19, 2015.

RENTALS:

Section 209.016 was added to the Texas Property Code preventing an association from adopting or enforcing a provision in its dedicatory instruments that requires a lessee to be approved by the association; provided however, the statute does not prevent the adoption or enforcement of a restriction prohibiting leasing. If a lease is required to be submitted to the association, certain personal information defined in the statute may be redacted. June 19, 2015.

VERIFIED MAIL:

Section 209.002 was amended to add the definition of "verified mail" as a means of service meaning "any method of mailing for which evidence of mailing is provided by the United States Postal Services or a common carrier." Presumably, this definition was added to permit service via Federal Express, UPS, and other delivery services. Effective September 1, 2015.

AMENDMENT TO DEDICATORY INSTRUMENT:

Section 209.0041, as amended, maintained the current percentage to amend the covenants, conditions, and restrictions at sixty seven percentage (67%); however, the statute now provides that the required percentage relates to the owners "entitled to vote on the amendment" and not sixty seven percentage (67%) of the owners in the association as previously provided. This is significant if the association has different voting populations where different types of homes have different voting rights. The statute also now clarifies this percentage applies even if

the covenants, conditions, and restrictions do not set forth a percentage of votes to amend. Effective September 1, 2015.

Section 211, relates to the amendment and enforcement of restrictions in only certain rural counties, and the 2015 legislature expanded the counties to include Polk, San Jacinto, and Trinity counties. Effective June 19, 2015.

DECLARANT CONTROL PERIOD:

Section 209.002 was amended to define the “development period” for all of Chapter 209. “Development period” now means a period “stated in the declaration when the declarant reserves the right to facilitate the development, construction, and marketing of the subdivision, or a right to direct the size, shape, and composition of the subdivision.” (emphasis added) Effective September 1, 2015.

Section 209.0059 provides at least 1/3 of the board must be non-declarant appointees the earlier of ten (10) years after the dedication was filed or seventy five percent (75%) of the lots are sold. The legislature changed the later provision to apply only when seventy five percent (75%) of the lots are conveyed to owner other than “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.” Effective September 1, 2015.

VIOLATION OF COVENANTS, CONDITIONS, AND RESTRICTION:

There were significant changes to Section 209.006 regarding notice requirements prior to enforcement action. The changes to the statute differentiate between curable and non-curable violations. If the violation is curable and does not pose a threat to public health or safety, the notice to the homeowner must provide a reasonable time to cure the violation. A violation is considered to be a threat to public health or safety if it “could materially affect the physical health or safety of an ordinary resident.” Additionally, the time for the owner to request a hearing prior to enforcement action is now based upon the date the notice is mailed and not when it is received. The notice must be sent via verified mail, as discussed above. If the violation is cured prior to the date to cure provided in the notice, a fine may not be assessed for the violation. This notice requirement does not apply to a violation for which the owner has previously been provided notice. The statute defines an incurable violation as a violation that has occurred but is not a continuous action or a condition capable of being remedied by affirmative action. Examples of incurable violations include, among others, shooting fireworks, a noise violation that is not ongoing, property damage, holding an event prohibited by the covenants. Examples of curable violations are parking violations, maintenance violations, the failure to construct improvements or modifications in conformity with approved plans and ongoing noise violations such as a

barking dog. Effective September 1, 2015.

PAYMENT PLAN:

While a homeowners' association is still required to offer a payment plan to a homeowner, the association is no longer required to make a payment plan available to an owner in certain circumstances after the thirty (30) time period to cure has passed or if the homeowner has entered into a payment plan in the prior twelve months. Section 209.0062(c). Effective September 1, 2015.

FORECLOSURE:

Section 209.009 was amended to preclude foreclose for debts consisting of certain charges. Section 209.0091 was also amended to slightly alter the required pre-foreclosure notice procedures to the lienholders. Importantly, previous statutory changes required an association to judicially foreclose; however, Section 209.0092 now appears to permit non-judicial foreclosure similar to what a lender may use to foreclose upon a mortgage. Additionally, Section 209.0092 was clarified to provide an association is not required to use the

statutory power of sale and instead may elect to judicially foreclose. Effective September 1, 2015.

MODIFICATION OR TERMINATION OF GOLF COURSE OR COUNTRY CLUB RESTRICTION:

Section 213 was added to the Property Code addressing, in certain situations, the modification or termination of restrictive covenants to eliminate covenants related to a country club or golf course restriction on land that is to be redeveloped. The land in questions must not have been utilized as a golf course for at least thirty-six (36) months and all zoning for the redevelopment must have been approved, if applicable. The golf course restriction may be removed upon the approval of a petition by at least seventy-five percent (75%) of the owners. An affidavit recorded in the real property records and served on each resident within two hundred (200) feet of the golf course and its amenities operates to remove the restriction. Section 213 applies to both homeowners' and condominium owners' associations; however, it expires September 1, 2021. Effective September 1, 2015.