2015 YEAR IN REVIEW

HOMEOWNERS' ASSOCIATION UPDATE

by Nichole Plagens

LEGISLATIVE UPDATE

On June 1, 2015, the Texas Legislature concluded the 2015 legislative session and enacted over 30 new laws that apply to Texas Property Owner Associations, including homeowner associations, condominium associations, and subdivision associations. The following is a brief description of the new statutory law.

Senate Bills

SB 1168 – Omnibus Bill

Passed: 06/19/15
Effective: 09/01/15

SB 1168, or the so called "Omnibus Bill," consists of twenty-seven sections[1] and amends provisions of Chapter 82, Chapter 207, and Chapter 209 of the Texas Property Code. SB 1168 also adds Chapter 213 to Title 11 of the Texas Property Code.

Chapter 82 of the Texas Property Code, The Uniform Condominium Act

Section 1: Amendment to Section 82.157. Resale of Unit

The amendment to section 82.157(a) modifies what documentation a unit owner must provide to a purchaser. A unit owner, selling his unit, must furnish certain documents to a purchaser, including a Condominium Resale Certificate issued by the association. In addition to the information previously required under section 82.157(a), the resale certificate must now also include: (1) the association's current operating budget and balance sheet, and (2) a disclosure of all fees payable to the association or an agent of the association that are associated with the transfer of ownership, including a description of each fee, to whom the fee is paid, and the amount of the fee.

Chapter 207 of the Texas Property Code, The Disclosure of Information by Property Owners' Associations

Section 2 & 3: Amendments to Sections 207.001. Definitions and 207.002. Applicability

[1] Sections 24-27 apply to the effective date of the amended provisions and the applicability of the statutes prior to amendment in certain circumstances and are not discussed herein.

The amendments to Section 207.001(2) and 207.002 make clear that Chapter 207 of the Texas Property Code only applies to subdivision associations, as stated in its express terms. However, as previously written, there was some ambiguity as to whether Chapter 207 could also apply to condominium associations.

First, section 207.001(2) previously referenced section 202.001 to give the meaning of "dedicatory instrument," "property owners' association," and "restrictive covenant." The reference to section 202.001 created confusion as to whether Chapter 207 only applied to subdivision associations since Chapter 202 applies to planned development regimes, including condominium regimes. The amendment to 207.001(2) eliminates the reference to Chapter 202 and now references section 209.002 to give the meaning "dedicatory instrument," "property owners' association," and "restrictive covenant." By referencing Chapter 209, which also explicitly applies to subdivisions, the legislature eliminates the confusion that was caused by referencing section 202.001.

The legislature added further clarity that Chapter 207 only applies to subdivision associations, by adding a section to 207.002.Applicability. 207.002(b) now expressly states: "This chapter does not apply to a condominium council of owners governed by Chapter 81 or a condominium unit owners' association governed by Chapter 82.

Chapter 209 of the Texas Property Code, The Texas Residential Property Owners Protection Act

Section 4: Amendments and Additions to Section 209.002. Definitions

The amendments to section 209.002: (1) amend the definition of "development period;" and (2) add a definition for "verified mail."

Section 209.002 (4-a) now states that "development period" means a period of time that the declarant reserves ***either***: (1) a right to facilitate the development, construction and marketing of the subdivision; ***or*** (2) a right to direct the size, shape, and composition of the subdivision.

Section 209.002 (13) was added and states: "verified mail" means any method of mailing for which evidence of mailing is provided by the United States Postal Service or a common carrier.

Section 5: Amendment to Section 209.003. Applicability of Chapter

The amendment to section 209.003(d) clarifies that Chapter 209 does not apply to a condominium association under either Chapter 81 or Chapter 82. Previously, it only excluded condominium associations governed by Chapter 82. While arguably, this covered all condominium associations, since even condominium regimes created before the adoption of Chapter 82 are still automatically governed by some provisions of Chapter 82, this amendment clarifies that Chapter 209 does not apply to ***any*** condominium associations regardless of when they were created.

Section 6: Amendments Section 209.0041. Adoption or Amendment of Certain Dedicatory Instruments

The amendments to section 209.0041 modify who is allowed to vote to amend a subdivision's declaration. Prior to the amendment, section 209.0041 allowed all property owners in a subdivision to vote on an amendment to the subdivision's declaration, even if some of the property owners were not subject to the declaration and/or were not entitled to vote on amendments to the declaration under the declaration's express terms. The amendment makes clear that an amendment to the declaration of a subdivision must be approved by 67 percent of the total votes allocated to owners who are "entitled to vote on the amendment of the declaration." Additionally, the amendment states that if the declaration is silent as to who is entitled to vote on an amendment of the declaration, then only property owners subject to the declaration may vote. Finally, section 209.0041(a) was repealed. *See* SB 1168, Section 24.

Section 7: Addition of Section 209.0042. Methods of Providing Notice to Owners

SB 1168 adds section 209.0042 and authorizes a subdivision association to adopt an alternative method for providing notices to its property owners that is different from the method prescribed by law, if the property owners 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 or force its property owners to allow it to provide notice under the alternative notice method if another notice method is prescribed by law.

Section 8: Amendments and Additions to Section 209.0051. Open Board Meetings

The amendments to section 209.0051 modify the procedures for calling and conducting a meeting of a subdivision association's board of directors. The amendments add actions which may not be taken unless in an open meeting for which prior notice was given to the owners, including actions on: (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; (6) the construction of capital improvements other than the repair, replacement, or enhancement of existing capital improvements; or (7) the election of an officer. Additionally, for those actions that may be taken outside of a meeting, the amendments outline the procedures for conducting a board meeting by electronic or telephonic means.

Section 9: Addition to Section 209.0056. Notice of Election or Association Vote

The amendment to section 209.0056 adds procedures for providing notice to a subdivision association's property owners for an election or vote of the owners when the election or vote is going to be conducted without calling a meeting. Under such circumstances, notice of the election or vote must be given to the property owners no later than the 20th day before the latest date on which a ballot may be summited to the subdivision to be counted.

Section 10: Additions to Section 209.0057. Recount of Votes

The amendment to section 209.0057 adds procedures for requesting and conducting a recount of ballots. The new deadline to request a recount is 15 days from any meeting of owners at which the election or vote was held and announced, or if not announced at the meeting, 15 days from the date of the announcement of the results of the election or vote. 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, the association must now estimate the cost of conducting the recount and send an invoice for the estimated cost to the requesting property owner, who must pay such invoice within 30 days from the date the invoice is sent. If the owner fails to timely pay the invoice, the recount is considered withdrawn and is no longer required to be performed. If the owner pays the invoice and the resulting recount changes the results of the vote, the association shall reimburse the requesting owner within 30 days after the date the results of the recount are provided for the cost of the recount. 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 11: Amendments and Additions to Section 209.0058. Ballots

The amendment to section 209.0058 modifies the requirements for casting ballots 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. Under the modified version of section 209.0058 ballots are only required 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) property owners cannot cast more votes than they are eligible to cast; (2) the subdivision association counts each vote cast by a property owner that the property owner is eligible to cast; and (3) if the vote is an election for the board of directors, each candidate may name one person to observe the counting of ballots, provided this does not allow any observer to see the name of the individual who cast the ballot, and that any disruptive observer is removed.

Section 12: Addition to Section 209.0059. Right to Vote

The addition to section 209.0059 creates an exception to the statute as previously written. Under the prior version of section 209.0059, any provision in a dedicatory instrument that disqualified a property owner from voting in an election or vote was void. The addition provides an exception for residential subdivision developments with ten or fewer lots which the declaration was recorded before January 1, 2015, and states that a person may not vote in the

subdivision association election unless the person is subject to the dedicatory instrument that governs the subdivision association and grants the association its authority.

Section 13: Additions to Section 209.00591. Board Membership

The additions to section 209.00591 allow a subdivision association's bylaws to require one or more board members to live in the subdivision, but may not require all board members to live in the subdivision. The addition goes on to state that the requirement does not apply during the development period.

Section 14: Additions to Section 209.00592. Voting; Quorum

The additions to section 209.00592 make clear that, unless otherwise required by the subdivision's declaration, a subdivision association is not required to provide a property owner more than one method of voting, so long as the owners are allowed to vote by absentee ballot or proxy vote. The modification also makes clear that if a nomination is taken from the floor in a board of directors' election, the nomination is not considered an amendment to the election proposal that would invalidate the absentee ballot that does not contain the nomination from the floor.

Section 15: Additions to Section 209.00593. Election of Board Members

The additions to section 209.00593 now require a subdivision association with more than 100 lots—that wants to use an absentee ballot in an election to the board of directors—to provide a notice to the association membership that solicits candidates from the association members who are interested in running for a position on the board. The notice must be provided at least 10 days before the date that the subdivision disseminates the absentee ballots and must contain instructions for how an eligible candidate is to notify the association of the candidates request to be placed on the ballot, including the deadline for notification. Notice may be provided a number of ways, including, mailing to the property owners, posting the notice in a conspicuous manner, or e-mailing the notice to association members.

Section 16: Amendments and Additions to Section 209.00594. Tabulation of and Access to Ballots

The amendments and additions to section 209.0594 make clear that a person who tabulates the votes in an association election, vote, ***or recount*** may not disclose how an individual voted. The previous version did not explicitly address non-disclosure by an individual that performs recounts.

Section 17: Amendments and Additions to Section 209.006. Notice Required Before Enforcement Action

The amendments and additions to section 209.006 modify the notice requirements that a subdivision association must abide by before it takes certain types of enforcement actions, including suspending an owner's right to use common areas, filing a suit against an owner—

other than a suit to collect assessments or foreclosure under an association lien, charging an owner for property damage, or levying a fine for a violation of the restrictions, bylaws, or rules of the association. A subdivision association must give written notice by certified mail, the notice must describe the violation, including any amount due by the owner to the association, and inform the owner that he is entitled to a reasonable time to cure the violation, and avoid the fine or suspension, if the violation is curable and does not pose a threat to public health or safety.

The addition of section 209.006(d) makes clear that the notice requirement and right to appeal or cure does not apply to a violation that the owner has already been given notice and the opportunity to exercise the available rights under this section in the last six months. It also defines what are considered curable acts, uncurable acts, and threats to public health or safety. Finally, it establishes that if the owner cures the violation before the expiration of the cure date specified in the written notice, a fine may not be levied.

Section 18: Amendments to Section 209.0062. Alternative Payment Schedule for Certain Assessments

The amendments to section 209.0062 modify the types of allowable alternative payment schedules that a subdivision consisting of fifteen or more lots may enter into with a property owner for the payment of assessments or any other amount owed to the association. While a subdivision is not required to allow a payment plan that extends more than 18 months, it is no longer prohibited from entering into such a plan with a property owner. An association is also not required to make a payment plan available to a property owner who has been given a period of time to cure a violation and has failed to cure or to a property owner who has entered into a payment plan more than once in any 12-month period.

Section 19: Amendments to Section 209.0064. Third Party Collections

The amendments to section 209.0064 modify the written notice requirements that the subdivision association must provide to a property owner before the property owner may be held liable for the fees associated with retaining a third party collection agent to collect monies due to the association. SB 1168 adds a requirement that if the subdivision consists of at least 15 lots or its dedicatory instruments contain a requirement to offer a payment plan, the association must explain the options available to the owner to avoid having the account turned over to a collection agent.

Section 20: Additions to Section 209.009. Foreclosure Sale Prohibited in Certain Circumstances

The amendment to section 209.009 adds to the list of types of debts that a subdivision association may not foreclose a property owners' association's assessment lien on, and adds unreimbursed costs of conducting a vote recount that exceeded the estimated costs invoices and paid by the property owner who requested the vote recount.

Section 21: Amendments and Additions to Section 209.0091. Prerequisites to Foreclosure: Notice and Opportunity to Cure for Certain Other Lienholders

The amendments and additions to section 209.0091 make clear that a subdivision association may not file an expedited judicial foreclosure proceeding or file a judicial foreclosure lawsuit before providing the statutory required notice to junior deed of trust lienholders. The amendments also changes the commencement of the 60-day cure period for a junior deed of trust lienholder, from the date the lienholder received the notice to the date the subdivision association mailed the notice to the lienholder and removes the requirement that the notice be sent certified mail, return receipt requested, to just sent by certified mail, no return receipt required.

Section 22: Amendments and Additions to Section 209.0092. Judicial Foreclosure Required

The amendments and additions to section 209.0092 modify the requirements for 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 modifications make clear that a subdivision association may still elect to judicially foreclose its assessment lien by judicial foreclosure lawsuit instead of foreclosing its assessment lien under the new provisions of section 209.0092.

Chapter 213 of the Texas Property Code, Modification or Termination of Restrictions in Certain Real Estate Developments by Property Owners' Association or Property Owner Petition

Section 23: Addition of Chapter 213, Modification or Termination of Restrictions in Certain Real Estate Developments by Property Owners' Association or Property Owner Petition

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 that has been restricted for use as a golf course or country club. Such amendment procedures only apply if the amenity property has ceased being operated as a golf course or country club for at least three years and the applicable restrictive covenant that restricts its use as a golf course or country club requires the approval of 75% of the lots or units in the development in order to be amended. Chapter 213 also includes a provision that provides for its expiration on September 1, 2021.

SB 862 – Voting Methods

Passed: 05/29/15
Effective: 09/01/15

SB 862 modifies section 209.00592 of the Texas Property Code in substantially the same manner as Section Fourteen of SB 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.

SB 864 – Use of Secret Ballots

Passed: 05/29/15
Effective: 09/01/15

SB 864 modifies section 209.0058 of the Texas Property Code in substantially the same manner as Section Eleven of SB 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.

SB 1626 – Solar Energy

Passed: 05/23/15
Effective: 09/01/15

SB 1626 modifies section 202.010 of the Texas Property Code and allows the declarant of a project property with 50 planned units or less to prohibit the installation of solar energy device during the development period. 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.

SB 1852 – Amendment of Restrictions

Passed: 06/18/15
Effective: 06/18/15

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, described by section 211.002. The amendment now makes Chapter 211 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.

House Bills

HB 262 – Community Gardens

Passed: 06/17/15
Effective: 09/01/15

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 (i.e., 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."

HB 745 – Solar Powered LED Stop Signs

Passed: 06/10/15
Effective: Immediately

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.

HB 939 – Standby Electric Generators

Passed: 06/19/15
Effective: Immediately

HB 939 adds section 202.019 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. 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.

HB 1072 – Service on Board of Directors

Passed: 06/17/15

Effective: 09/01/15

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 puts a limitation on who can be disqualified from serving on a board of directors, and now only disqualifies a person from serving if the conviction occurred within the last 20 years from when the evidence of the conviction is presented to the board.

HB 1455 – Construction Defect Claims

Passed: 06/17/15
Effective: 09/01/15

HB 1455 adds sections 82.119 and 82.120 to the Texas Property Code. 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 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 association at a meeting called in accordance with the 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. Further, 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 attorney's fees to be incurred in prosecuting the construction defect claim. Finally, section 82.120 authorizes a condominium declaration to include a binding arbitration provision for construction defect claims.

HB 2489 – Leasing Restrictions

Passed: 06/19/15
Effective: Immediately

HB 2489 adds section 209.016 to the Texas Property Code. Section 209.016 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 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 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.

HOMEOWNERS' ASSOCIATION CASES

***Zuehl Land Development, LLC v. Zuehl Airport Flying Community Owners Association, Inc.*, No. 01-14-00562-CV (Tex. App.—Houston [1st Dist.] April 21, 2015, no pet. h.)**

For purposes of recovering attorneys' fees, a party is considered the prevailing party even if the matter is resolved through a settlement, if that settlement achieves the ends that the party was trying to achieve through trial. A finding of breach or liability is not necessary.

This dispute arose between landowners and a homeowners association for a subdivision adjacent to the landowners' property when the homeowners association attempted to interfere with the landowners' use of one of the subdivision's roads that was also used to access the landowners' land. The landowners brought suit to enjoin the association from interfering with their access and use of the road, including seeking the removal of a fence that was placed on the road blocking the landowners' access and use.

After over ten years of litigation, the parties reached a settlement and submitted to the trial court an agreed partial summary judgment. The agreed order was entered and contained various declarations including: (1) that the subdivision's road is a private road burdened by an easement for access to the landowners' land; and (2) while a boundary fence is permissible under the Declaration, it cannot interfere with the easement for use of the road. The agreed order went on to state: (1) that the association voluntarily removed a fence blocking the landowners' access to the road before entry of the order; (2) since the fence was no longer present there was no on-going dispute for the court to resolve; (3) all tort claims and claims for breach of restrictive covenant were denied; and (4) the parties took nothing on their breach of covenant claims, except the court reserved for further consideration the parties' competing claims for attorneys' fees under section 5.006 of the Property Code. Finally, the order stated that "notwithstanding the foregoing…construction of any fence or other barrier restricting the free and unimpeded use of the easement…is prohibited."

The association moved for entry of final judgment, specifically arguing that because the case was settled, no party prevailed and no attorney's fees were authorized under section 5.006 of the Property Code. The landowners filed a response requesting attorney's fees be awarded to them. Following a hearing, the trial court entered a final judgment denying attorney's fees to the landowners. The landowners appealed.

The Appellate Court found that the landowners prevailed in the litigation under the terms of the agreed partial summary judgment since the association is forbidden from erecting a fence and barring their access and use of the road, the subject of dispute throughout the multi-year litigation. Based on the agreed order, the landowners received something of value and the order

materially altered the legal relationship between the parties by prohibiting the association from placing another fence in the objected-to area. The fact that the case was resolved through a favorable settlement as opposed to a trial and a finding of breach or liability did not prevent the landowners from being the prevailing party.

Having concluded that the landowners were the prevailing party and stating that under section 5.006, an award of reasonable attorney's fees to a prevailing party is mandatory, the Appellate Court reversed the trial court's order denying attorney's fees and remanded the attorney's fee issue for an evidentiary hearing to determine an award of reasonable attorney's fees to the landowners.

***Park v. Escalera Ranch Owners' Ass'n*, No. 03-12-00314-CV, 2015 WL 737424 (Tex. App.—Austin Feb. 13, 2015, no pet.)**

The notice provision of section 209.006 of the Texas Property Code requiring a property owners' association give an owner notice of the owner's right to a hearing before suing an owner is mandatory, but not jurisdictional.

Appellant, Dr. Saung Zin Park, purchased a lot in the Escalera Ranch subdivision and built a new home. The lot is subject to a Declaration that established the Escalera Ranch Owners' Association ("the Association") and gave the Association the authority to administer and enforce the provisions of the Declaration, including covenants and restrictions relating to all construction in the subdivision. The Declaration dictates that the construction and design of a home in the subdivision must be approved by the Master Design Committee ("the Committee"). The new home that Park built had windows installed that were not approved by the Committee.

On September 28, 2009, the Association Board and the Committee notified Park via email that the installed windows had not been approved and asked him to address the violation as soon as possible. Park responded by arguing that the installed windows were not in violation and stated that if the Committee did not immediately withdraw any prohibition from construction progression he would pursue judicial relief. Over the course of two weeks, the Association sent two letters to Park demanding that Park bring the windows into compliance within two working days from the dates of the letters. The letters went on to state that failure to do so could result in the Association taking adverse action against Park, including but not limited to filing a lawsuit to enforce the Declaration. The letters did not include the statutorily required notice that Park could request a hearing under Section 209.007 of the Texas Property Code on or before the 30th day after the date the owner receives the notice of violation of the property owners' association's restrictions. Park did not bring the windows into compliance and did not request any additional time.

On October 30, 2009, the Association brought suit asserting that Park had breached the restrictive covenants in the Declaration and sought an injunction that Park remove the noncomplying windows and install windows that complied with the approved design plan, damages under Section 202.004 of the Property Code, and attorney's fees under Section 5.006 of

the Property Code. Park answered and asserted various affirmative defenses and a counterclaim for breach of duty of good faith and fair dealing.

On September 22, 2010—almost a year after filing suit—the Association sent Park a letter attempting to cure its failure to provide Park the presuit notice of his right to request a hearing before the Board regarding the violation and again requested that Park remove the noncompliant windows. Park did not request a hearing and did not remove the windows.

After a two-day bench trial, the trial court ruled in favor of the Association and against Park. The trial court granted the Association's request for injunctive relief, denied the Association's request for statutory damages under Section 202.004 of the Property Code, and granted the Association's request for attorney's fees. However, the trial court only awarded attorneys' fees from October 25, 2010, the deadline for Park to have requested a hearing if the Association's September 22, 2010 letter had properly provided notice of the right to request a hearing as required under Section 209.007. The limitation on the Association's award of attorneys' fees was based on Section 209.008(b) establishing that an owner is not liable for attorneys' fees incurred by an association if the fees are incurred before the conclusion of a hearing on the alleged violation or before the date that the owner must request a hearing.

Park appealed, focusing on the Association's failure to provide the statutorily required presuit notice, claiming that the Association's failure to provide the notice deprived the trial court of jurisdiction.

In a matter of first impression, the Appellate Court denied Park's contentions finding that the presuit notice was mandatory but not jurisdictional. In reaching its holding, the Appellate Court looked to: (1) the plain language of Section 209.006—finding that the language indicates that the notice requirement is mandatory, but nothing dictates dismissal for noncompliance, weighing in favor of a nonjurisdictional interpretation; (2) the statutes purpose—finding that the purpose of the statute was to protect the rights of property owners, but that purpose does not implicitly mean that the Legislature intended to deprive trial courts of subject-matter jurisdiction when an association fails to provide the required notice; and (3) the consequences of the alternative interpretation—finding that if it were to determine that the presuit notice requirement was jurisdictional, it would preclude a trial court from considering an association's claims, if that association failed to provide the required notice, and would void for lack of jurisdiction and subject to collateral attack any judgments that had been rendered in cases that lacked presuit notice.

In so finding, the Appellate Court stated that the cure for an association's failure to provide the required notice would be a timely plea in abatement to allow for the provision of the notice. Finding that Park waived notice by failing to request abatement, the Appellate Court affirmed the trial court's final judgment granting the Association injunctive relief, attorneys' fees, interest, and costs.