Community Association Newsletter
June 2017 Special Edition

ROBERTS MARKEL WEINBERG BUTLER HAILEY PC

**Legislative Update**
By Brady Ortego

The regular session of the 85th Legislature has come to a close. If you paid attention to the media reports surrounding the close of the session, you heard reports of protests, theatrics, drama, and a good ole fashioned "shuvin' match" that took place on the floor. Community associations and the volunteer leaders that represent their members can breathe a sigh of relief that association services and amenities will continue to be funded. While we watched numerous bills throughout the session, our legislators seemed to appreciate the notion that the volume of changes that we have seen since the 82nd Legislature in 2011 are better left to marinate and trust that the law surrounding community associations serves them and the Texas families who reside within them well.

**House Bill 561—Package Delivery Bill (Passed)**

House Bill 561 amended Chapter 551 of the Transportation Code, is effective immediately, and may change how private gated subdivisions and condominiums regulate the pickup and delivery of mail, parcels, or packages most likely during the holiday season. Carriers like UPS or FedEx often set up a temporary hub for the delivery of packages during the holiday season using golf carts or utility vehicles. Prior to the passage of House Bill 561, private gated subdivisions and condominiums could prohibit carriers from the operation of these vehicles.

House Bill 561 prevents private gated subdivisions and condominiums from prohibiting these vehicles. The law does provide an association the opportunity to adopt reasonable safety and use rules, but enforceability may be challenging given that the carrier may be the non-compliant party. While we understand that residents enjoy the convenience of the temporary hub concept, we do question the practical effect of allowing operation of carrier vehicles within private gated subdivisions and condominiums even with the ability to adopt safety and use rules.

**House Bill 3528/Senate Bill 2234—Collection of Assessments (Did not pass)**

House Bill 3528 (and its Senate companion) proposed to amend Chapter 209 of the Property Code and, had it passed, would have eroded the incentive of association members to timely pay assessments. As introduced, this bill purported to change the assessment collection process from start to finish. Beginning with an overly complex non-payment charge structure that mostly ignored the terms of the covenants encumbering any association, the bill concluded with a formula for foreclosure that would have prohibited foreclosure in most Texas communities. While foreclosure for non-payment of assessments should remain a measure of last resort, an effective eradication of the process would leave many community associations underfunded and with reduced services and amenities available to the families that enjoy those services and amenities.

The collections bill also purported to create a new statutory notice framework that would have added numerous requirements to the initial notice of nonpayment to owners in arrears. In many cases, a simple reminder with nominal late fees, interest, and/or costs is all that is necessary to nudge a substantial percentage of nonpayers into payment or a payment plan. Adding a cumbersome notice process at the beginning with a reduced incentive to pay early or on time given reduced non-payment charges may cause many associations to be underfunded for the first half of the fiscal year, making it difficult for associations to implement strategy planning and initiation of community betterment projects. While we support the fair and reasonable collection of assessments, the collections bill had affects that mostly would punish the timely or early payers of the assessments by leaving them to carry the financial burden of those that slow pay or do not pay. While the collections bill did not pass, we may see another bill filed on the subject next legislative session.

**House Bill 1341—Omnibus Bill (Did not pass)**

Having good candidates volunteer to serve on the board is a struggle for many communities. With most meetings occurring in the evenings and some on weekends, it would have allowed every owner at least 30 minutes to address the board at every board meeting potentially resulting in marathon meetings. With longer meetings, it is likely that it would be even more difficult to obtain volunteers to serve on the board. Owners who typically participate by attending meetings may even decline to attend meetings that would seemingly have no end. By way of example, in a 100 lot community with one owner per lot, if one-half of the lots utilized this meeting time, the board meeting would last 25 hours. While this may be an extreme example, and we do support the right of owners to address the board within reasonable time constraints, the structure proposed by this bill could be easily abused and turn board meetings into never-ending filibuster sessions.

Another aspect of this bill was the potential for the attorney general, a district attorney, or a county attorney to levy a fine up to $25,000 against an association for any violation of the Property Code. While accountability is necessary, navigation through the technical components of Chapter 209 of the Property Code can be fraught with pit falls.

Lastly, a simple phone call or seemingly innocuous letter requesting records could trigger a statutory obligation to answer with a production or an inspection. House Bill 1341 proposed to allow an owner to request an inspection or production of association records via telephone. Without the checks and balances afforded by the certified mail concept, it is likely that vague records requests would clog our courts and mostly be decided on "he said, she said" testimony.

**House Bill 923—Fines (Did not pass)**

House Bill 923 as originally introduced required fines to be reasonable in the context of the nature and frequency of the violation and the effect of the violation on the subdivision as a whole. With several subjective components to the introductory language, it was difficult to understand how any association would determine the amount of any fine for non-compliance issues. Unfortunately, fining is sometimes a necessary part of the enforcement structure of many

rules. Whether it is a traffic citation, city ordinance, or an association rule, the ability to fine is sometimes the only way for an enforcing entity like an association to obtain compliance. Had this bill passed with the subjective language in place, the potential existed that the courtroom would be the deciding ground for the reasonableness of fines. [Again, what does the statute say . . . summarize].

**House Bill 522/Senate Bill 1609—Display of Religious Items (Did not pass)**

As originally drafted, the imagination was the limit to the potential display of religious items. With no limit on the size, number, or location of religious display items, the potential for abuse afforded by this bill could have resulted in owner-to-owner disputes with religion at the center of the dispute. While we generally support religious freedom, we believe most owners would prefer reasonable regulation of religious displays within their community even if the display is associated with a sincere religious belief. We do understand that there is a chance that we may see this bill next session.

**Senate Bill 1620—Chicken Bill (Did not pass)**

Despite the notion that this bill never purported to affect the ability of a community association to enforce its own animal restrictions, many board members and community management teams were concerned about the possibility of dealing with an influx of chickens into deed restricted communities. Applicable to political subdivisions, a term that as defined by the Local Government Code does not include community associations, Senate Bill 1620 purported to allow six chickens per resident. While the spirit of the legislation was difficult to oppose (access to fresh eggs and facilitating student access to agricultural education programs), your average household of four family members could raise or keep 24 chickens. We have been involved in numerous chicken disputes for our community association clients, and the adjacent neighbors (not the board members) are typically the most concerned and certainly the most affected by a breach of a restrictive covenant prohibiting chickens. While the bill did add restrictions against breeding and roosters, it is easy to imagine that enforcement of these regulations may prove difficult with the potential for such a great number of chickens per lot.

**Other Bills of Note that Did Not Pass**

Local regulation of short-term leasing may have been restricted had Senate Bill 451 or its companion passed. With a provision excluding application to associations as defined by Chapter 202 of the Property Code, we were not concerned with a negative effect on community associations' abilities to regulate short term leasing as may be provided by the governing documents. We do understand that the lobby supporting these bills has taken a nationwide approach to prohibition against local regulations of short-term leasing. Thus, we anticipate seeing legislation on this issue again in the future.

House Bill 2320 relating to the developer control period purported to require a majority of the board to be elected by the membership 120 days after 75% of the lots were conveyed to an owner other than the developer or a builder. House Bill 2320 did not pass and would have been a tough blow to developers.

House Bill 1228 would have required "immediate" approval of an architectural application to repair damage to property caused by a weather-related event if the application was to substantially restore the property to the condition that pre-existed the weather-related event.

Senate Bill 1506 (companion—House Bill 3065) would have allowed a contractor to file a mechanic's and materialmen's lien on an entire condominium including the units in relation to improvements to common elements.

House Bill 1053 would have reduced from 10 years to 5 years the period to bring a claim against a defendant after substantial completion. This reduction would have put Texas amongst the states in the county with the shortest statutory periods of repose.

**Special Session Begins July 18th**

Governor Abbott called a special session to discuss some 20 agenda items; ambitious to say the least. From a community association perspective, only one agenda item has the potential to pull in a community association related bill. We are watching the agenda item covering municipal regulation of trees. This agenda item grew out of a personal experience of our governor with the City of Austin involving a pecan tree on his property. We are watching this agenda item in relation to a bill that did not pass (House Bill 1572) that contained a provision purporting to prohibit enforcement of restrictions preventing owners from removing a tree or vegetation on their property. The component of House Bill 1572 effecting community associations would have allowed an owner to remove a tree that the owner believed to pose a fire risk. The tree could be on the owner's property or adjacent property not owned by the owner.

While it appears unlikely that all special session agenda items will be reached or that the agenda item regarding tree removal, we are nonetheless watching the special session closely.

**Conclusion**

While this report is more about what could have been, it is important to note that the subject matter of many of these bills are points of contention of those that challenge community association living. While most owners living in community associations favor the concept and are pleased or accepting of the decisions made by the board of directors, we remain concerned that the face of community associations may change based on the opinions of the remaining percentage.

**To learn what you can do to help preserve the ability of owners to self-regulate their own communities, schedule your legislative update with our office by calling Cherie Wilson at 512-660-9262.**

**About the Author, Brady Ortego**

Brady Ortego is a shareholder with the firm and is Board Certified in Residential Real Estate Law. Brady's practice areas include Community Association Law where he represents a variety of property owners' associations across the state of Texas. Brady also has experience working with real estate developers in relation to the creation of communities and community associations. Brady is a member of Community Associations Institute and is Co-Chair of the Texas Community Association Advocates.

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