CHAPTER 218

H.B. No. 33

AN ACT
relating to alternative methods of dispute resolution in certain disputes between the Department of Aging and Disability Services and an assisted living facility licensed by the department.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Section 247.051, Health and Safety Code, is amended to read as follows:

Sec. 247.051. INFORMAL DISPUTE RESOLUTION. (a) The Health and Human Services Commission by rule shall establish an informal dispute resolution process to address disputes between a facility and the department concerning a statement of violations prepared by the department in accordance with this section. The process must provide for adjudication by an appropriate disinterested person of disputes relating to a statement of violations [a proposed enforcement action or related proceeding under this chapter]. The informal dispute resolution process must require:

(1) the assisted living facility to request informal dispute resolution not later than the 10th day after the date of notification by the department of the violation of a standard or standards;

(2) the Health and Human Services Commission to complete the process not later than the 90th [30th] day after the date of receipt of a request from the assisted living facility for informal dispute resolution; [and]

(3) that, not later than the 10th business day after the date an assisted living facility requests an informal dispute resolution, the department forward to the assisted living facility a copy of all information that is referred to in the disputed statement of violations or on which a citation is based in connection with the survey, inspection, investigation, or other visit, excluding:

(A) the name of any complainant, witness, or informant;
(B) any information that would reasonably lead to the identification of a complainant, witness, or informant;
(C) information obtained from or contained in the records of the facility;
(D) information that is publicly available; or
(E) information that is confidential by law;

(4) the Health and Human Services Commission to give full consideration to all factual arguments raised during the informal dispute resolution process that:

(A) are supported by references to specific information that the facility or department relies on to dispute or support findings in the statement of violations; and
(B) are provided by the proponent of the argument to the Health and Human Services Commission and the opposing party;

(5) that informal dispute resolution staff give full consideration to the information provided by the assisted living facility and the department;

(6) that ex parte communications concerning the substance of any argument relating to a survey, inspection, investigation, visit, or statement of violations under consideration not occur between the informal dispute resolution staff and the assisted living facility or the department; and

(7) that the assisted living facility and the department be given a reasonable opportunity to submit arguments and information supporting the position of the assisted living
facility or the department and to respond to arguments and information presented against them.

(b) [any individual representing an assisted living facility in an informal dispute resolution process to register with the Health and Human Services Commission and disclose the following:

(A) the individual's employment history during the preceding five years, including employment in regulatory agencies of this state and other states;

(B) ownership, including the identity of the controlling person or persons, of the assisted living facility the individual is representing before the Health and Human Services Commission; and

(C) the identity of other entities the individual represents or has represented before the Health and Human Services Commission during the preceding 24 months.

(b) The Health and Human Services Commission shall adopt rules to adjudicate claims in contested cases.

(c) The Health and Human Services Commission may not delegate its responsibility to administer the informal dispute resolution process established by this section to another state agency.

(d) An assisted living facility requesting an informal dispute resolution under this section must reimburse the department for any costs associated with the department's preparation, copying, and delivery of information requested by the facility.

(d) A statement of violations prepared by the department following a survey, inspection, investigation, or visit is confidential pending the outcome of the informal dispute resolution process. Information concerning the outcome of a survey, inspection, investigation, or visit may be posted on any website maintained by the department while the dispute is pending if the posting clearly notes each finding that is in dispute.

SECTION 2. Chapter 247, Health and Safety Code, is amended by adding Subchapter E to read as follows:

SUBCHAPTER E. ARBITRATION

Sec. 247.081. SCOPE OF SUBCHAPTER. This subchapter applies to any dispute between a facility licensed under this chapter and the department relating to:

(1) renewal of a license under Section 247.023;

(2) suspension, revocation, or denial of a license under Section 247.041;

(3) assessment of a civil penalty under Section 247.045; or

(4) assessment of an administrative penalty under Section 247.0451.

Sec. 247.082. ELECTION OF ARBITRATION. (a) Except as provided by Subsection (d), an affected facility may elect binding arbitration of any dispute to which this subchapter applies. Arbitration under this subchapter is an alternative to a contested case hearing or to a judicial proceeding relating to the assessment of a civil penalty.

(b) An affected facility may elect arbitration under this subchapter by filing the election with the court in which the lawsuit is pending and sending notice of the election to the department and the office of the attorney general. The election must be filed not later than the 10th day after the date on which the answer is due or the date on which the answer is filed, whichever is earlier. If a civil penalty is requested after the initial filing of a Section 242.084 action through the filing of an amended or supplemental pleading, an affected facility must elect arbitration not later than the 10th day after the date on which the amended or supplemental pleading is served on the affected facility or the facility's counsel.

(c) The department may elect arbitration under this subchapter by filing the election with the court in which the lawsuit is pending and by notifying the facility of the election not later than the date on which the facility may elect arbitration under Subsection (b).

(d) Arbitration may not be used to resolve a dispute related to an affected facility that has had an arbitration award levied against it in the previous five years.
(e) If arbitration is not permitted under this subchapter or the election of arbitration is not timely filed:

(1) the court shall dismiss the arbitration election and retain jurisdiction of the lawsuit; and

(2) the State Office of Administrative Hearings shall dismiss the arbitration and does not have jurisdiction over the lawsuit.

(f) An election to engage in arbitration under this subchapter is irrevocable and binding on the facility and the department.

Sec. 247.083. ARBITRATION PROCEDURES. (a) The arbitration shall be conducted by an arbitrator.

(b) The arbitration and the appointment of the arbitrator shall be conducted in accordance with rules adopted by the chief administrative law judge of the State Office of Administrative Hearings. Before adopting rules under this subsection, the chief administrative law judge shall consult with the department and shall consider appropriate rules developed by any nationally recognized association that performs arbitration services.

(c) The party that elects arbitration shall pay the cost of the arbitration. The total fees and expenses paid for an arbitrator for a day may not exceed $1,000.

(d) The State Office of Administrative Hearings may designate a nationally recognized association that performs arbitration services to conduct arbitrations under this subchapter and may, after consultation with the department, contract with that association for the arbitrations.

(e) On request by the department, the attorney general may represent the department in the arbitration.

Sec. 247.084. ARBITRATOR QUALIFICATIONS. Each arbitrator must be on an approved list of a nationally recognized association that performs arbitration services or be otherwise qualified as provided in the rules adopted under Section 247.083(b).

Sec. 247.085. ARBITRATOR SELECTION. The arbitrator shall be appointed in accordance with the rules adopted under Section 247.083(b).

Sec. 247.086. ARBITRATOR DUTIES. The arbitrator shall:

(1) protect the interests of the department and the facility;

(2) ensure that all relevant evidence has been disclosed to the arbitrator, department, and facility; and

(3) render an order consistent with this chapter and the rules adopted under this chapter.

Sec. 247.087. SCHEDULING OF ARBITRATION. (a) The arbitrator conducting the arbitration shall schedule arbitration to be held not later than the 90th day after the date the arbitrator is selected and shall notify the department and the facility of the scheduled date.

(b) The arbitrator may grant a continuance of the arbitration at the request of the department or facility. The arbitrator may not unreasonably deny a request for a continuance.

Sec. 247.088. EXCHANGE AND FILING OF INFORMATION. Not later than the seventh day before the first day of arbitration, the department and the facility shall exchange and file with the arbitrator:

(1) all documentary evidence not previously exchanged and filed that is relevant to the dispute; and

(2) information relating to a proposed resolution of the dispute.

Sec. 247.089. ATTENDANCE. (a) The arbitrator may proceed in the absence of any party or representative of a party who, after notice of the proceeding, fails to be present or to obtain a postponement.

(b) An arbitrator may not make an order solely on the default of a party and shall require the party who is present to submit evidence, as required by the arbitrator, before making an award.
Sec. 247.090. TESTIMONY; RECORD. (a) The arbitrator may require witnesses to testify under oath and shall require testimony under oath if requested by the department or the facility.

(b) The department shall make an electronic recording of the proceeding.

(c) An official stenographic record of the proceeding is not required, but the department or the facility may make a stenographic record. The party that makes the stenographic record shall pay the expense of having the record made.

Sec. 247.091. EVIDENCE. (a) The department or the facility may offer evidence and shall produce additional evidence as the arbitrator considers necessary to understand and resolve the dispute.

(b) The arbitrator is the judge of the relevance and materiality of the evidence offered. Strict conformity to rules applicable to judicial proceedings is not required.

Sec. 247.092. CLOSING STATEMENTS; BRIEFS. The department and the facility may present closing statements, but the record does not remain open for written briefs unless required by the arbitrator.

Sec. 247.093. EX PARTE CONTACTS PROHIBITED. (a) Except as provided by Subsection (b), the department and the facility may not communicate with an arbitrator other than at an oral hearing unless the parties and the arbitrator agree otherwise.

(b) Any oral or written communication, other than a communication authorized under Subsection (a), from the parties to an arbitrator shall be directed to the association that is conducting the arbitration or, if there is no association conducting the arbitration, to the State Office of Administrative Hearings for transmittal to the arbitrator.

Sec. 247.094. ORDER. (a) The arbitrator may enter any order that may be entered by the department, board, commissioner, or court under this chapter in relation to a dispute described by Section 247.081.

(b) The arbitrator shall enter the order not later than the 60th day after the last day of the arbitration.

(c) The arbitrator shall base the order on the facts established at arbitration, including stipulations of the parties, and on the law as properly applied to those facts.

(d) The order must:

(1) be in writing;

(2) be signed and dated by the arbitrator; and

(3) include a statement of the arbitrator's decision on the contested issues and the department's and facility's stipulations on uncontested issues.

(e) The arbitrator shall file a copy of the order with the department and shall notify the department and the facility in writing of the decision.

Sec. 247.095. EFFECT OF ORDER. An order of an arbitrator under this subchapter is final and binding on all parties. Except as provided by Section 247.097, there is no right to appeal.

Sec. 247.096. CLERICAL ERROR. For the purpose of correcting a clerical error, an arbitrator retains jurisdiction of the award until the 20th day after the date of the award.

Sec. 247.097. COURT VACATING ORDER. (a) On a finding described by Subsection (b), a court shall:

(1) on application of a facility, vacate an arbitrator's order with respect to an arbitration conducted at the election of the department; or

(2) on application of the department, vacate an arbitrator's order with respect to an arbitration conducted at the election of a facility.

(b) A court shall vacate an arbitrator's order under Subsection (a) only on a finding that:

(1) the order was procured by corruption, fraud, or misrepresentation;

(2) the decision of the arbitrator was arbitrary or capricious and against the weight of the evidence; or

(3) the order exceeded the jurisdiction of the arbitrator under Section 247.094(a).
(c) If the order is vacated, the dispute shall be remanded to the department for another arbitration proceeding.

(d) A suit to vacate an arbitrator's order must be filed not later than the 30th day after:
   (1) the date of the award; or
   (2) the date the facility or department knew or should have known of a basis for suit under this section, but in no event later than the first anniversary of the date of the order.

(a) Venue for a suit to vacate an arbitrator's order is in the county in which the arbitration was conducted.

Sec. 217.098. ENFORCEMENT OF CERTAIN ARBITRATION ORDERS FOR CIVIL PENALTIES. (a) This section applies only to a suit for the assessment of a civil penalty under Section 247.045 in which binding arbitration has been elected under this subchapter as an alternative to the judicial proceeding.

(b) On application of a party to the suit, the district court in which the underlying suit has been filed shall enter a judgment in accordance with the arbitrator's order unless, within the time limit prescribed by Section 247.097(d)(2), a motion is made to the court to vacate the arbitrator's order in accordance with Section 247.097.

(c) A judgment filed under Subsection (b) is enforceable in the same manner as any other judgment of the court. The court may award costs for an application made under Subsection (b) and for any proceedings held after the application is made.

(d) Subsection (b) does not affect the right of a party, in accordance with Section 247.097 and within the time limit prescribed by Section 247.097(d)(2), if applicable, to make a motion to the court or initiate a proceeding in court as provided by law to vacate the arbitrator's order or to vacate a judgment of the court entered in accordance with the arbitrator's order.

SECTION 3. Section 531.058, Government Code, is amended by amending Subsection (a) and adding Subsection (d) to read as follows:

(a) The commission by rule shall establish an informal dispute resolution process in accordance with this section. The process must provide for adjudication by an appropriate disinterested person of disputes relating to a proposed enforcement action or related proceeding of the Texas Department of Human Services under Section 32.021(d), Human Resources Code, or Chapter 242, 247, or 252, Health and Safety Code. The informal dispute resolution process must require:

(1) an institution or facility to request informal dispute resolution not later than the 10th calendar day after notification by the department of the violation of a standard or standards; and

(2) the commission to complete the process not later than:
   (A) the 30th calendar day after receipt of a request from an institution or facility, for informal dispute resolution, for other than an assisted living facility, or informal dispute resolution; or
   (B) the 90th calendar day after receipt of a request from an assisted living facility for informal dispute resolution; and

(3) any individual representing an institution or facility in an informal dispute resolution process to register with the commission and disclose the following:
   (A) the individual's employment history during the preceding five years, including employment in regulatory agencies of this state and other states;
   (B) ownership, including the identity of the controlling person or persons, of the institution or facility the individual is representing before the commission; and
   (C) the identity of other entities the individual represents or has represented before the commission during the previous 24 months.

(d) The commission shall use a negotiated rulemaking process and engage a qualified impartial third party as provided by Section 2009.053, with the goal of adopting rules that are fair and impartial to all parties not later than January 1, 2015. This subsection expires September 1, 2015.

SECTION 4. Section 247.051, Health and Safety Code, as amended by this Act, and Section 247.081, Health and Safety Code, as added by this Act, apply only to disputes
described by those sections, as amended or added, that occur on or after the effective date of
this Act. A dispute that occurs before the effective date of this Act is governed by the law
applicable to the dispute immediately before the effective date of this Act, and that law is
continued in effect for that purpose.

SECTION 5. This Act takes effect September 1, 2013.

Passed by the House on April 18, 2013: Yeas 143, Nays 0, 2 present, not voting;
passed by the Senate on May 20, 2013: Yeas 31, Nays 0.

Approved June 14, 2013.
Effective September 1, 2013.

CHAPTER 219

H.B. No. 35

AN ACT

relating to the authority of a property owners' association to regulate the use of certain lots for
residential purposes.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Chapter 209, Property Code, is amended by adding Section 209.015 to read
as follows:

Sec. 209.015. REGULATION OF LAND USE: RESIDENTIAL PURPOSE. (a) In this
section:

(1) “Adjacent lot” means:
(A) a lot that is contiguous to another lot that fronts on the same street;
(B) with respect to a corner lot, a lot that is contiguous to the corner lot by either a
side property line or a back property line; or
(C) if permitted by the dedicatory instrument, any lot that is contiguous to another
lot at the back property line.

(2) “Residential purpose” with respect to the use of a lot:
(A) means the location on the lot of any building, structure, or other improvement
customarily appurtenant to a residence, as opposed to use for a business or commercial
purpose; and
(B) includes the location on the lot of a garage, sidewalk, driveway, parking area,
children’s swing or playscape, fence, septic system, swimming pool, utility line, or water
well and, if otherwise specifically permitted by the dedicatory instrument, the parking
or storage of a recreational vehicle.

(b) Except as provided by this section, a property owners' association may not adopt or
enforce a provision in a dedicatory instrument that prohibits or restricts the owner of a lot
on which a residence is located from using for residential purposes an adjacent lot owned by
the property owner.

(c) An owner must obtain the approval of the property owners' association or, if
applicable, an architectural committee established by the association or the association's
dedicatory instruments, based on criteria prescribed by the dedicatory instruments specific
to the use of a lot for residential purposes, including reasonable restrictions regarding size,
location, shielding, and aesthetics of the residential purpose, before the owner begins the
construction, placement, or erection of a building, structure, or other improvement for the
residential purpose on an adjacent lot.

(d) An owner who elects to use an adjacent lot for residential purposes under this section
shall, on the sale or transfer of the lot containing the residence:

(1) include the adjacent lot in the sales agreement and transfer the lot to the new owner
under the same dedicatory conditions; or

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