

BILL ANALYSIS

C.S.S.B. 1105

By: Fraser

Licensing & Administrative Procedures
Committee Report (Substituted)

BACKGROUND AND PURPOSE

The Texas Timeshare Act was codified in the mid-1980s and amended several times in the early 1990s. The current Texas Timeshare Act is becoming outdated.

C.S.S.B. 1105 provides greater opportunities and protections for purchasers and increases the Texas Real Estate Commission's flexibility in regulating the industry. This substitute also makes changes to the regulatory process.

RULEMAKING AUTHORITY

It is the committee's opinion that rulemaking authority is expressly granted to the Texas Real Estate Commission in SECTION 4 (Section 221.024 and 221.026, Property Code) of this bill.

ANALYSIS

Amends Section 221.002, Property Code, to redefine "accommodation," "advertisement" (rather than "advertising"), "amenities," "developer," "escrow agent," "exchange company," "exchange disclosure statement," "exchange program," "project instrument," "promotion," "purchaser," "timeshare disclosure statement," "timeshare estate," "timeshare instrument," "timeshare period," "timeshare property," and "timeshare use."

The same section defines "assessment," "association," "component site," "incidental use right," "multi-state timeshare plan," "reservation system," "single-site timeshare plan," and "timeshare plan."

The section also deletes definitions for "council of purchasers," "master deed," "master lease," "declaration," "promotional disclosure statement," "seller," "substantially complete," "timeshare estate," "timeshare liability," "timeshare regime," "timeshare unit," "timeshare fees," and "owner." It also deletes former Subdivision 5 and renumbers accordingly.

Amends Section 221.003, Property Code, by adding Subsection (d) to provide that a timeshare property subject to this chapter is not subject to Chapter 209 (Texas Residential Property Owners Protection Act), unless an individual timeshare owner continuously occupies a single timeshare property as the owner's primary residence 12 months of the year.

Amends Sections 221.011, 221.012, 221.013, and 221.014, Property Code, as follows: Sec. 221.011. DECLARATION. (a) Requires the developer of a timeshare plan any part of which is located in this state to record the timeshare instrument in this state. Requires that a property be established as a timeshare plan when a person expressly declares an intent to subject the property to a timeshare plan through the recordation of a timeshare instrument that sets forth the information provided in Subsections (b) and (c).

(b) Requires the declaration made in a timeshare instrument recorded under this section to include certain items.

(c) Provides that any timeshare interest created under this section is subject to Section 1101.002(5)

(Definitions), Occupations Code, but Section 1101.351(a) (License Required), Occupations Code, does not apply to the acts of an exchange company in exchanging timeshare periods. Deletes former Subsection (d) regarding timeshare interests located wholly without this state.

Sec. 221.012. CONVEYANCE AND ENCUMBRANCE. Makes a conforming change. Sec. 221.013. COMMON OWNERSHIP. (a) Creates this subsection from existing text.

(b) Authorizes a timeshare estate to be jointly or commonly owned in the same manner as any other real property interest in this state. Sec. 221.014. PARTITION. Prohibits an action for partition of a timeshare interest from being maintained during the term of a timeshare plan.

Amends Chapter 221C, Property Code, by amending Sections 221.021, 221.022, 221.023, 221.024, and 221.025 and adding Section 221.026, as follows: Sec. 221.021. REGISTRATION REQUIRED. (a) Provides an exception and makes a conforming change.

(b) Authorizes a developer or any person acting on the developer's behalf, before a registration application for a timeshare plan is submitted or completed, to accept a reservation and a deposit from a prospective purchaser if the deposit is placed in a segregated escrow account with an independent escrow agent and if the deposit is fully refundable at any time at the request of the purchaser.

(c) Prohibits a developer or any person acting on the developer's behalf from offering or disposing of a timeshare interest during any period within which there is in effect an order by the Texas Real Estate Commission (TREC) or by any court of competent jurisdiction revoking or suspending the registration of the timeshare plan of which such timeshare interest is a part.

(d) Authorizes TREC, at the developer's request, to authorize the developer to conduct pre-sales before a timeshare plan is registered if the registration application is administratively complete, as determined by the commissioner of TREC or as established by TREC rule. Provides that the authorization for presales permits the developer to offer and dispose of timeshare interests during the period the application is in process. Requires the developer to provide certain items to obtain a pre-sales authorization.

(e) Requires the developer, during the pre-sales authorization period, to provide each purchaser and prospective purchaser a copy of the proposed timeshare disclosure statement that the developer submitted to TREC with the initial registration application and offer each purchaser the opportunity to cancel the purchase contract as provided by Section 221.041.

(f) Requires the developer to give each purchaser and prospective purchaser a copy of the proposed timeshare disclosure statement submitted to TREC with the registration application and provide the purchaser an opportunity to cancel the purchase contract as provided by Section 221.041 after the registration is completed if TREC determines that a material adverse change exists between the disclosures contained in the proposed timeshare disclosure statement and the final timeshare disclosure statement approved by the TREC.

(g) Provides that the requirements of this subchapter remain in effect during the period the developer offers or disposes of timeshare interests of the timeshare plan registered with TREC. Requires the developer to notify TREC in writing when all of the timeshare interests of a timeshare plan have been disposed.

Sec. 221.022. APPLICATION FOR REGISTRATION. (a) Requires an application for registration filed under this section to include a timeshare disclosure statement and any required exchange disclosure statement required by Section 221.033, rather than 201.033, copies of all timeshare instruments, and other information as may be required by TREC. Provides that if existing or proposed accommodations are in a condominium, an applicant who complies with this section is not required to prepare or deliver a condominium information statement or a resale certificate as described by Chapter 82 (Uniform Condominium Act).

(b) Changes "timeshare units" to "accommodations."

(c) Authorizes TREC to accept an abbreviated registration application from a developer of a timeshare plan if all accommodations in the plan are located outside this state. Requires the developer to file written notice of the intent to register under this section not later than the 15th day before the date the abbreviated application is submitted.

(d) Prohibits a developer of a timeshare plan with any accommodation located in this state from filing an

abbreviated application unless the developer is a successor in interest after a merger or acquisition and the previous developer registered the timeshare plan in this state preceding the merger or acquisition.

(e) Requires a developer filing an abbreviated application to provide certain information.

(f) Requires a foreign jurisdiction providing evidence of registration as provided by Subsection (e)(7) to have registration and disclosure requirements that are substantially similar or stricter than the requirements of this chapter.

(g) Redesignated from existing Subsection (c). Sec. 221.023. AMENDMENT OF REGISTRATION. Requires the developer to file amendments to the registration reporting to TREC any material and adverse change in any document contained in the registration not later than the 30th day after the date the developer knows or reasonably should know of the change. Authorizes the developer to continue to offer and dispose of timeshare interests under the existing registration pending review of the amendments by TREC if the material and adverse change is disclosed to prospective purchasers.

Sec. 221.024. POWERS OF COMMISSION. (a) Authorizes TREC to prescribe and publish forms and adopt rules necessary to carry out the provisions of this chapter and to suspend or revoke the registration of any developer, place on probation the registration of a developer that has been suspended or revoked, reprimand a developer, or take any other disciplinary action authorized by this chapter if, after notice and hearing, TREC determines that a developer has materially violated this chapter, the Deceptive Trade Practices-Consumer Protection Act (Chapter 17E, Business & Commerce Code), or the Contest and Gift Giveaway Act (Chapter 40, Business & Commerce Code). Deletes language authorizing TREC to bring suit in a district court of Travis County, Texas, to enjoin a violation of this Act or for any other relief as the court may deem appropriate.

(b) Authorizes TREC to authorize specific employees to conduct hearings and issue final decisions in contested cases and establish reasonable fees for forms and documents it provides to the public and for the filing or registration of documents required by this chapter.

(c) Provides that if TREC initiates a disciplinary proceeding under this chapter, the person is entitled to a hearing before TREC or a hearing officer appointed by TREC. Requires TREC by rule to adopt procedures to permit an appeal to TREC from a determination made by a hearing officer in a disciplinary action.

(d) Requires TREC to set the time and place of the hearing.

(e) Provides that a disciplinary procedure under this chapter is governed by the contested case procedures of Chapter 2001 (Administrative Procedure), Government Code.

(f) Authorizes the commission to file a suit in a district court of Travis County to prevent a violation of this chapter or for any other appropriate relief.

(g) Provides that judicial review of a commission order imposing an administrative penalty is instituted by filing a petition as provided by Chapter 2001G, Government Code and by trial de novo.

Sec. 221.025. EFFECT OF REGISTRATION: SALE EXEMPT FROM SECURITIES ACT. Provides that a developer's compliance with this chapter exempts the developer's offer and disposition of timeshare interests subject to this chapter from The Securities Act (Article 581-1 et seq., V.T.C.S.).

Sec. 221.026. ISSUANCE AND RENEWAL OF REGISTRATION. (a) Requires the commission by rule to adopt requirements for the issuance and renewal of a developer's registration under this chapter, including the form required for application for registration or a renewal of registration and any supporting documentation required for registration or renewal of registration.

(b) Requires the commission to issue or renew a registration under this chapter for a period not to exceed 24 months.

(c) Authorizes the commission to assess and collect a fee for the issuance or renewal of a registration under this chapter.

(d) Authorizes the commission to assess and collect a late fee if the commission has not received the fee or any supporting documentation required before the 61st day after the date a registration is issued or renewed under this section.

(e) Provides that failure to pay a renewal or late fee is a violation of this chapter.

Amends Sections 221.031 and 221.032, Property Code, as follows: Sec. 221.031. New heading: ADVERTISING AND PROMOTIONS. (a) Authorizes TREC, at any time, to request a developer to file for review by TREC any advertisement used in this state by the developer in connection with offering a timeshare interest. Requires the developer to provide the advertisement not later than the 15th day after the date TREC makes the request. Requires TREC, if TREC determines that the advertisement violates this chapter or Chapter 40 (Contests and Giveaways), Business & Commerce Code, to notify the developer in writing, stating the specific grounds for TREC's determination not later than the 15th day after the date TREC makes its determination. Authorizes TREC to grant the developer provisional approval for the advertisement if the developer agrees to correct the deficiencies identified by TREC. Authorizes a developer, on its own initiative, to submit any proposed advertisement to TREC for review and approval by TREC.

(b) Requires any advertisement that contains a promotion in connection with the offering of a timeshare interest to comply with Chapter 40, Business & Commerce Code.

(c) Requires any advertisement that contains a promotion in connection with the offering of a timeshare interest to include, in addition to any disclosures required under Chapter 40, Business & Commerce Code, certain other information. Deletes former Subdivision (b) relating to the determination of the retail value of an item.

Sec. 221.032. TIMESHARE DISCLOSURE STATEMENT. (a) Deletes "contract."

(b) Requires the timeshare disclosure statement to include certain information.

(c) Authorizes the developer to include any other information in the timeshare disclosure statement on approval by TREC.

(d) Requires a developer who offers a multisite timeshare plan to include in a timeshare disclosure statement in written, graphic, or tabular form certain information.

(e) Authorizes a developer who offers a multisite timeshare plan to include any other information in the timeshare disclosure statement on approval by TREC.

(f) Requires a developer who offers a nonspecific timeshare interest in a multisite timeshare plan to disclose the information prescribed by Subsection (b) for each component site.

(g) Authorizes TREC, if the property of a timeshare plan is located wholly outside this state, to permit the developer to submit a timeshare disclosure statement the developer is currently providing purchasers or an equivalent timeshare disclosure statement filed for the timeshare plan in another state if the current statement or the equivalent statement substantially complies with the requirements of this subchapter. Provides that this subsection does not exempt the developer from other requirements of this chapter.

Amends Section 221.033(a), Property Code, to make a conforming change.

Amends Section 221.034, Property Code, as follows: Sec. 221.034. New heading: EXEMPT OFFERINGS AND DISPOSITIONS; COMMUNICATIONS. (a) Provides conditions under which an offering or disposition is exempt from this chapter.

(b) Provides that the offering or disposition of a timeshare interest by a developer to a person who has previously executed a contract for the purchase of or is the owner of a timeshare interest in a timeshare plan created by the developer is exempt from certain sections in under certain circumstances.

(c) Provides that certain communications are not advertisements under this chapter.

(d) Provides that certain communications are exempt from this subchapter.

Adds Section 221.036. PREPARATION AND COMPLETION OF DOCUMENTS. (a)

(b) a developer who completes a document described by Subsection (a) does not engage in the unauthorized or illegal practice of law if the form of the document completed is: (1) accepted by the commission for use in the type of transaction for which the document was completed; or (2) prepared by an attorney licensed to practice law in this state for use in the type of transaction for which the document was completed.

Amends Sections 221.041, 221.042, and 221.043, Property Code, as follows: Sec. 221.041. PURCHASER'S RIGHT TO CANCEL. (a) Authorizes a purchaser to cancel a purchase contract before the sixth day after the date the purchaser signs and receives a copy of the purchase contract or receives the required timeshare disclosure statement, whichever is later.

(b) Redesignated from existing Subsection (c). Deletes existing Subsection (b).

Sec. 221.042. NOTICE; REFUND. (a) Authorizes a purchaser, if a purchaser elects to cancel a purchase contract under Section 221.041, rather than 201.041, to do so by handdelivering notice of cancellation to the developer, by mailing notice by prepaid United States mail to the developer or to the developer's agent for service of process, or by providing notice by overnight common carrier delivery service to the developer or the developer's agent for service of process. Deletes all references to seller.

(b) Provides that cancellation is without penalty, and requires all payments made by the purchaser before cancellation to be refunded on or before the 30th, rather than the 21st, day after the date on which the developer receives a timely notice of cancellation or on or before the fifth day after the date the developer receives good funds from the purchaser, whichever is later. Makes a conforming change.

Sec. 221.043. CONTRACT REQUIREMENTS. (a) Requires each purchase contract to contain certain information.

(b) Requires a space to be reserved for the signature of the purchaser immediately following the required statements in Subsection (a). Deletes language requiring the seller to obtain the purchaser's signature on Exhibit A.

(c) Requires the purchase contract to include certain other information. (d) Authorizes the information required to be provided by this section to be provided in the purchase contract or in an exhibit to the purchase contract, or to be provided in part in both if all of the information is provided.

Amends Section 221.052, Property Code, to delete an exception and make a conforming change.

Amends Subchapter G, Property Code, by amending Sections 221.061, 221.062, and 221.063 and by adding Section 221.064, as follows: Sec. 221.061. New heading: ESCROW OR TRUST ACCOUNT REQUIRED. (a) Requires a developer or escrow agent of a timeshare planto deposit in an escrow or trust account in a federally insured depository 100 percent of all funds received during the purchaser's cancellation period.

(b) Provides that an escrow agent owes the purchaser a fiduciary duty.

(c) Requires the escrow agent and the developer to execute an agreement that includes a statement providing certain requirements.

(d) Requires the developer to continue to maintain all funds received from the purchaser under the purchase agreement in the escrow or trust account until construction of the building is completed, if a developer contracts to sell a timeshare interest and the construction of the building in which the timeshare interest is located has not been completed when the cancellationperiod expires. Provides the documentation required for evidence of completion of construction.

Sec. 221.062. Redesignated from Section 221.063. RELEASE OF ESCROW. (a) Authorizes the funds or property constituting the escrow or trust deposit to be released from escrow only in accordance with this section.

(b) Requires the funds to be paid to the purchaser or the developer if the purchaser's funds have been refunded previously by the developer, if the purchaser cancels the purchase contract as provided by the contract.

(c) Provides that if the purchaser defaults in the performance of obligations under the terms of the purchase contract, the funds are required to be paid to the developer. Deletes language requiring the application for release of the escrow deposit to be verified and to include certain information.

(d) Requires the funds to be paid to the purchaser, if the developer defaults in the performance of obligations under the purchase contract.

(e) Authorizes the funds to be disbursed to the developer by the escrow or trust agent if acceptable evidence of completion of construction is provided, if the funds of the purchaser have not been disbursed previously as provided by Subsections (a)-(d).

(f) Requires the agent to maintain the funds in the account until the agent receives written directions agreed to and signed by all parties or a civil action relating to the disputed funds is filed, if there is a dispute relating to the funds in the escrow or trust account.

(g) Requires, if a civil action is filed under Subsection (f)(2), the escrow or trust account agent to deposit the funds with the court in which the action is filed.

Sec. 221.063. ALTERNATIVE TO ESCROW OR TRUST ACCOUNT: FINANCIAL ASSURANCE.

(a) Authorizes TREC to accept from the developer a surety bond, irrevocable letter of credit, or other form of financial assurance, including financial assurance posted in another state or jurisdiction, instead of depositing funds in an escrow or trust account as provided by Section 221.061.

(b) Requires that the amount of the financial assurance provided under this section be an amount equal to or more than the amount of funds that would otherwise be placed in an escrow or trust account under Section 221.061(a).

(c) Requires the amount of the financial assurance provided under this section for timeshare property under construction as provided by Section 221.061(d) to be the lesser of an amount equal to or more than the amount of funds that would otherwise be placed in an escrow or trust account under that subsection or the amount necessary to assure completion of the building in which the timeshare interest is located.

Sec. 221.064. DOCUMENTATION REQUIRED. Requires the escrow or trust account agent or developer to make documents related to the escrow or trust account or the financial assurance provided available to TREC at TREC's request. Deletes text relating to the release of the escrow deposit.

Amends Section 221.071, Property Code, by amending Subsection (a) and adding Subsection (c), as follows: (a) Makes conforming changes and removes an exception.

(c) Provides that if a developer has substantially complied with this chapter in good faith, a nonmaterial error or omission is not actionable. Provides that a nonmaterial error or omission alone is not sufficient to permit a purchaser to cancel a purchase contract after the period provided for cancellation expires under this chapter.

Amends Section 221.072, Property Code, to include a managing entity in reference to maintaining certain insurance with respect to the timeshare property. Adds "full" in front of the word replacement in reference to the cost of the accommodations and amenities of the timeshare property.

Amends Sections 221.073(a) and (b), Property Code, to make conforming changes.

Amends Section 221.074, Property Code, as follows: Sec. 221.074. ANNUAL TIMESHARE FEE AND EXPENSE STATEMENT. (a) Requires the managing entity to make a written annual accounting of the operation of the timeshare properties managed by the managing entity to each purchaser who requests an accounting not later than five months, rather than the 60th day, after the last day of each fiscal year, notwithstanding any contrary provision of the required timeshare disclosure statement, project instrument, timeshare instrument, or bylaws adopted pursuant to a timeshare instrument. Requires the statement to fairly and accurately represent the collection and expenditure of assessments and include certain items.

(b) Requires the managing entity of the timeshare plan to provide the owner with the name and address of each member of the board of directors of the owners' association, if one exists, on the request of an owner.

(c) Requires a developer or managing entity to have an annual independent audit of the financial statements of the timeshare plan or timeshare properties managed by the managing entity performed by a certified public accountant or an accounting firm. Requires the audit to meet certain requirements. Deletes the requirement that the statement be delivered to certain persons.

(d) Provides that knowingly furnishing false information in the annual timeshare fee and expense statement is a violation of the Deceptive Trade Practices Consumer Protection Act (Section 17.41 et seq., Business & Commerce Code).

(e) Requires the managing entity of any accommodation located in this state to post prominently in the registration area of the accommodations the following notice, with the date of the last day of the current fiscal year and the address of the managing entity inserted where indicated: "AS A TIMESHARE OWNER YOU HAVE A RIGHT TO REQUEST A WRITTEN ANNUAL TIMESHARE FEE AND EXPENSE STATEMENT. THIS STATEMENT IS PREPARED ANNUALLY BY THE MANAGING ENTITY AND WILL BE AVAILABLE NO LATER THAN THE FIVE MONTHS FOLLOWING (INSERT THE DATE OF THE LAST DAY OF THE CURRENT FISCAL YEAR). YOU MAY REQUEST THE STATEMENT, BY WRITING TO (INSERT ADDRESS OF THE MANAGING ENTITY)." Makes a conforming change and deletes Subsections (e) and (f) regarding requests for the statement and annual timeshare fee and expense statements.

Amends Sections 221.075(a) and (d), Property Code, as follows: (a) Adds "receipt of" in front of "a written request" filed with the commission by a managing entity.

(d) Prohibits a managing entity from assessing against or collecting from the purchasers, rather than owners, of a timeshare property the amount of a penalty incurred under this section.

Amends Sections 221.076 and 221.077, Property Code, as follows: Sec. 221.076. New heading: MANAGING ENTITIES THAT MANAGE MORE THAN ONE TIMESHARE PROPERTY. (a) Authorizes, rather than prohibits, a managing entity that manages two or more single-site timeshare plans to commingle the assessments collected from purchasers of one timeshare plan with the assessments collected from purchasers of any other single-site plan for which it is the managing entity only if the practice is disclosed in the timeshare disclosure statement for each timeshare property and the appropriate statement is included in the declaration for each timeshare property as required by Subchapter B. Makes conforming changes.

(b) Creates this subsection from former Subsection (c) while deleting language from former Subsection (b) regarding the commingling of timeshare fees. Makes conforming changes.

(c) Provides that nothing in this section shall be construed to allow a managing entity to commingle assessments of a multisite timeshare plan with the assessments of a separate multisite timeshare plan or a timeshare plan that is not a part of the multisite timeshare plan.

Sec. 221.077. AVAILABILITY OF BOOKS AND RECORDS. (a) Creates subsection from existing text. Makes conforming changes.

(b) Requires a developer or managing entity to maintain in its records a copy of each purchase contract for an accommodation sold by the developer for a timeshare period unless the contract has been canceled. Requires the developer to retain a copy of the contract until a deed of conveyance, agreement for deed, or lease is recorded in the real property records of the county in which the timeshare property is located, if a sale of the timeshare estate is pending.

EFFECTIVE DATE

September 1, 2003.

Provides that if a timeshare property is registered with TREC before January 1, 2004, the registration expires 24 months after the last anniversary of the date the property was last registered, and a developer may renew the registration as provided by Section 221.026, Property Code, as added by this Act.

COMPARISON OF ORIGINAL TO SUBSTITUTE

The substitute differs from the Senate Engrossed version in that on page 1 it adds, “is affixed to real property”, “designed for occupancy or use by one or more individuals” and “part of a timeshare plan” to the definition of accommodation.

On page 3, the substitute adds “accountant” as a type of escrow agent responsible for receipt and disbursement of funds.

On page 12, the term “person” is substituted for the undefined term “anyone”.

On page 14, the word “immediately” is replaced by the term “promptly” in reference to the availability of recorded copies of timeshare instruments.

On page 16, the substitute adds that a developer filing an abbreviated application must also provide the name and address of the developer’s authorized or registered agent for service of process in this state.

On page 20, the substitute differs from the original in that it adds language to show that failure to pay a renewal or late fee is also a violation of the chapter.

On page 24, the substitute clarifies that the current “annual” budget is to be included in the timeshare disclosure statement.

On page 34, the substitute differs from the original in that it adds a new section 221.036 to clarify under what circumstances a developer may charge a fee for completion of timeshare documents.

On page 35, the word “good” is inserted before funds to describe the type of funds the developer must receive from the purchaser.

On page 47, “each timeshare property” is amended to read “timeshare properties” in reference to the annual written accounting of the timeshare operation.

On page 53, the registration expiration date is changed to “expire 24 months after” the last anniversary of the date the property was registered instead of “on the second anniversary”.

There are several occurrences in the substitute where the term “multistate” has been amended to appropriately read “multisite”.

There are several occurrences in the substitute where the term “timeshare” has been amended to read “timeshare plan”.