

BILL ANALYSIS

Senate Research Center

H.B. 1045
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Business & Commerce
5/6/2005
Engrossed

AUTHOR'S/SPONSOR'S STATEMENT OF INTENT

The Texas Timeshare Act was codified in the mid-1980s and was amended several times in the early 1990s. As such, the current Texas Timeshare Act is becoming outdated. H.B. 1045 provides greater opportunities and protections for purchasers, increases the Texas Real Estate Commission's flexibility in regulating the industry, and makes changes to the regulatory process.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the Texas Real Estate Commission in SECTION 4 (Sections 221.024 and 221.026, Property Code) of this bill.

Rulemaking authority previously granted to the Texas Real Estate Commission is modified in SECTION 4 (Section 221.024, Property Code), of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 221.002, Property Code, to redefine "accommodation," "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."

Defines "advertisement," "assessment," "association," "component site," "incidental use right," "multisite timeshare plan," "reservation system," "single-site timeshare plan," and "timeshare plan."

Deletes existing definitions of "advertising," "council of purchasers," "master deed," "master lease," "promotional disclosure statement," "seller," "substantially complete," "timeshare expenses," "timeshare liability," "timeshare regime," "timeshare unit," "timeshare fees," "owner," and "timeshare system." Renumbers subdivisions to reflect additions and deletions.

SECTION 2. Amends Section 221.003, Property Code, by adding Subsection (d) and (e), as follows:

(d) Provides 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.

(e) Provides that, if a person with a specific program that might otherwise be subject to this chapter received from the Texas Real Estate Commission (commission), before January 31, 2005, a written determination that the program is exempt from this chapter as the chapter existed when the determination was made, the program remains exempt from this chapter if certain circumstances apply.

SECTION 3. 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 a property to 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). Makes conforming changes.

(b) Makes conforming and nonsubstantive changes.

(c) Makes conforming and nonsubstantive changes.

Deletes existing text of Subsection (d), relating to a timeshare interest located wholly without this state.

Sec. 221.012. CONVEYANCE AND ENCUMBRANCE. Makes a conforming change.

Sec. 221.013. COMMON OWNERSHIP. (a) Creates 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. Deletes existing text relating to express permission stated by a declaration.

SECTION 4. Amends Subchapter C, Chapter 221, 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) Makes conforming changes.

(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) Makes conforming and nonsubstantive changes.

(d) Authorizes the commission, at the developer's request, to authorize the developer to conduct presales before a timeshare plan is registered if the registration application is administratively complete, as determined by the commission or as established by commission 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 obtain a presales authorization, to meet certain requirements.

(e) Sets forth requirements for a developer during the presales authorization period.

(f) Sets forth requirements for a developer after the final timeshare disclosure statement is approved by the commission.

(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 the commission. Requires the developer to notify the commission in writing when all of the timeshare interests of a timeshare plan have been disposed of.

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 (Amendment of Registration), rather than 201.033, recorded, rather than certified, copies of all timeshare instruments, and other information as may be required by the commission. Requires

recorded copies of the timeshare instruments, if the timeshare property is a newly developed property, to be provided promptly after recorded copies are available from the entity with which the instruments are recorded. 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) Makes a conforming change.
- (c) Authorizes the commission 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 certain circumstances apply.
- (e) Requires a developer filing an abbreviated application to provide certain information and documents.
- (f) Requires a foreign jurisdiction providing evidence of registration as provided by Subsection (e)(6) to have registration and disclosure requirements that are substantially similar to or stricter than the requirements of this chapter.
- (g) Redesignated from existing Subsection (c).

Sec. 221.023. AMENDMENT OF REGISTRATION. Requires the developer, rather than the developer or managing entity, to file amendments to the registration reporting to the commission any materially 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 the commission if the materially adverse change is disclosed to prospective purchasers.

Sec. 221.024. POWERS OF COMMISSION. (a) Authorizes the commission 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, rather than seller, place on probation the registration of a developer that has been suspended or revoked, reprimand a developer, impose an administrative penalty of not more than \$10,000, or take any other disciplinary action authorized by this chapter if, after notice and hearing, the commission determines that a developer has materially violated this chapter, the Deceptive Trade Practices-Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code), or the Contest and Gift Giveaway Act (Chapter 40, Business & Commerce Code). Deletes existing text authorizing the commission to bring suit in a district court of Travis County, Texas.

- (b) Authorizes, rather than requires, the commission to authorize specific employees to conduct hearings and issue final decisions in contested cases and establish reasonable fees for the filing or registration of documents required by this chapter.
- (c) Entitles a person, if the commission initiates a disciplinary proceeding under this chapter, to a hearing before the commission or a hearing officer appointed by the commission. Requires the commission, by rule, to adopt procedures to permit an appeal to the commission from a determination made by a hearing officer in a disciplinary action.
- (d) Requires the commission 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 Subchapter G (Contested Cases, Judicial Review), Chapter 2001, Government Code, and by trial de novo.

Sec. 221.025. New heading: EFFECT OF REGISTRATION ON OTHER LAWS: EXEMPTION FROM CERTAIN LAWS. (a) Creates subsection from existing text. Provides that a developer's compliance with this chapter exempts the developer's offer and disposition of timeshare interests subject to this chapter from securities and dealer registration under The Securities Act (Article 581-1 et seq., Vernon's Texas Civil Statutes).

(b) Provides that a timeshare plan created as a condominium regime before January 1, 1994, that complies with this chapter is exempt from the requirements of Section 81.112 relating to club membership.

(c) Provides that a timeshare plan subject to Chapter 82 that complies with this chapter is exempt from the requirements of Section 82.0675 relating to club membership.

(d) Provides that a developer's compliance with this chapter as to any timeshare plan exempts any company, as defined by Chapter 181, (Texas Trust Company Act), Finance Code, that holds title to the timeshare interests in the timeshare plan from compliance with the Texas Trust Company Act as to the company's activities relating to the holding of that title.

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.

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

(c) Requires 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 fee or late fee is a violation of this chapter.

SECTION 5. Amends Sections 221.031 and 221.032, Property Code, as follows:

Sec. 221.031. New heading: ADVERTISEMENTS AND PROMOTIONS. (a) Authorizes the commission, at any time, to request a developer to file for review by the commission 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 the commission makes the request. Requires the commission, if the commission determines that the advertisement violates this chapter or Chapter 40 (Contests and Gift Giveaways), Business & Commerce Code, to notify the developer in writing, stating the specific grounds for the commission's determination not later than the 15th day after the date the commission makes its determination. Authorizes

the commission to grant the developer provisional approval for the advertisement if the developer agrees to correct the deficiencies identified by the commission. Authorizes a developer, on its own initiative, to submit any proposed advertisement to the commission for review and approval by the commission.

(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 an advertisement that contains a promotion in connection with the offering of a timeshare interest, as provided by Subsections (d) and (e), to include certain information, in addition to any disclosures required under Chapter 40, Business & Commerce Code. Makes conforming and nonsubstantive changes.

(d) Requires an advertisement containing the disclosures required by Chapter 40, Business & Commerce Code, and Subsection (c) to be provided in writing or electronically at least once before a scheduled sales presentation and in a reasonable period before the scheduled sales presentation to ensure that the recipient receives the disclosures before leaving to attend the sales presentation.

(e) Provides that the developer is not required to provide the disclosures required by this section in every advertisement or other written, oral, or electronic communication provided or made to a recipient before a scheduled sales presentation.

Deletes existing text relating to information about the retail value of a prize contained in a promotional disclosure statement

Sec. 221.032. **TIMESHARE DISCLOSURE STATEMENT.** (a) Makes a conforming change.

(b) Sets forth modified requirements for information to be included in the timeshare disclosure statement for a single-site timeshare plan or a multisite timeshare plan that includes specific timeshare interest.

(c) Requires a developer who offers a specific timeshare interest in a multisite timeshare plan to also fully disclose certain information in written, graphic, or tabular form.

(d) Requires a developer who offers a nonspecific timeshare interest in a multisite timeshare plan to disclose certain information in written, graphic, or tabular form.

(e) Authorizes a developer to include any other information in a timeshare disclosure statement required by this section on approval by the commission.

(f) Authorizes the commission, if 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.

SECTION 6. Amends Section 221.033(a), Property Code, to make a conforming change.

SECTION 7. Amends Section 221.034, Property Code, as follows:

Sec. 221.034. New heading: **EXEMPT OFFERINGS AND DISPOSITIONS; COMMUNICATIONS.** (a) Provides that an offering is exempt from this chapter if it meets certain modified requirements.

(b) Authorizes a developer, if the developer has a timeshare plan registered under this chapter and is subject to Section 221.024, to offer or dispose of an interest in a timeshare plan that is not registered under this chapter to a person who is the owner of a timeshare interest in a timeshare plan created by the developer. Provides that a developer under this subsection is exempt from certain statutes if the developer permits the purchaser to cancel the purchase contract before the sixth day after the date the contract is signed and provides the purchaser all timeshare disclosure documents required by law to be provided in the jurisdiction in which the timeshare property is located.

(c) Sets forth communications that are not considered advertisements under this chapter.

(d) Sets forth communications that are exempt from this chapter if they are delivered to a person who has previously executed a contract for the purchase of or is an owner of a timeshare interest in a timeshare plan.

SECTION 8. 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, rather than a contract to purchase a timeshare interest, 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) Redesignates text of existing Subsection (c). Deletes existing text of Subsection (b) relating to a purchaser who does not receive a copy of a contract. Makes a nonsubstantive change.

Sec. 221.042. NOTICE; REFUND. (a) Authorizes a purchaser who elects to cancel a purchase contract to do so by providing notice by overnight common carrier delivery service to the developer or the developer's agent for service of process. Makes conforming changes.

(b) Requires cancellation to be without penalty, and 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.

Sec. 221.043. CONTRACT REQUIREMENTS. (a) Requires each purchase contract to contain certain information. Requires the statements required by this subsection and Subsection (c)(8) to be proved in a conspicuous manner and in the exact language set forth in this section with the developer's name and address, the date of the last day of the fiscal year, and the address of the managing entity inserted where indicated. Sets forth language to be included in the purchase contract. Deletes existing text relating to a timeshare fee disclosure statement. Makes conforming and nonsubstantive changes.

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

(c) Requires the purchase contract to also include certain modified 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.

SECTION 9. Amends Section 221.052, Property Code, as follows:

Sec. 221.052. New heading: LIABILITY OF DEVELOPER AND EXCHANGE COMPANY. (a) Creates subsection from existing text. Makes conforming changes.

(b) Prohibits an exchange company from having any liability with respect to any violation under this chapter arising out of the use by a developer of information relating to an exchange program other than that provided to the developer by the exchange company.

(c) Provides that an exchange company that denies exchange privileges to an owner whose use of accommodations in the owner's timeshare plan is denied is not liable to any member of the exchange company or exchange program or any third party because of the denial of the owner's exchange privileges.

SECTION 10. Amends Subchapter G, Chapter 221, Property Code, by amending Sections 221.061, 221.062, and 221.063, and adding Section 221.064, as follows:

Sec. 221.061. New heading: ESCROW OR TRUST ACCOUNT REQUIRED. (a) Creates subsection from existing text. Requires a developer or escrow agent of a timeshare plan to deposit in, rather than establish, an escrow or trust account in a federally insured depository 100 percent of all funds received during the purchaser's cancellation period. Deletes existing text relating to establishing an escrow account for the purpose of protecting deposits.

(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 containing certain provisions.

(d) Requires a developer, if the 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 cancellation period expires, 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. Provides that the documentation required for evidence of completion of construction includes certain certificates and evidence.

SECTION 221.062. New heading: RELEASE OF ESCROW. Redesignates text from existing Section 221.063. Deletes existing text of Section 221.062 relating to the escrow amount. (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) Creates subsection from existing text. Requires the funds to be paid to the developer if the purchaser defaults in the performance of obligations under the terms of the purchase contract. Deletes existing text relating to an application for release of the escrow deposit.

(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, if there is a dispute relating to the funds in the escrow or trust account, 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.

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

Sec. 221.063. ALTERNATIVE TO ESCROW OR TRUST ACCOUNT: FINANCIAL ASSURANCE. (a) Authorizes the commission, instead of the deposit of funds in an escrow or trust account as provided by Section 221.061, 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.

(b) Requires the amount of the financial assurance provided under this section to 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 certain amounts.

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 the commission at the commission's request. Deletes existing text authorizing an escrow agent to release the escrow deposit to the applicant.

SECTION 11. Amends Section 221.071, Property Code, by amending Subsection (a) and adding Subsections (c) and (d), as follows:

(a) Includes exceeding a one-to-one purchaser-to-accommodation ratio for a timeshare plan during a consecutive 12-month period, as determined under Subsection (c), amongst the actions that constitute a false, misleading, or deceptive practice. Deletes existing text relating to an exemption from this section and false information included in an annual timeshare fee and expense statement. Makes conforming changes.

(c) Provides that a developer complies with the one-to-one purchaser-to-accommodation ratio referred to in Subsection (a)(9) if the total number of purchasers eligible to use the accommodations of the timeshare plan during a consecutive 12-month period never exceeds the total number of accommodations available for use in the timeshare plan during that same period. Sets forth guidelines for computing the purchaser-to-accommodation ratio.

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

SECTION 12. Amends Section 221.072, Property Code, to require the developer, as well as the managing entity, to maintain certain insurance with respect to the timeshare property before the disposition of any timeshare interest, including the full replacement cost of the accommodations and amenities of the timeshare property.

SECTION 13. Amends Section 221.073(a) and (b), Property Code, to make conforming changes.

SECTION 14. Amends Section 221.074, Property Code, as follows:

Sec. 221.074. ANNUAL TIMESHARE FEE AND EXPENSE STATEMENT. (a) Requires the managing entity, notwithstanding any contrary provision of the required timeshare, rather than promotional, disclosure statement, project instrument, timeshare instrument, or bylaws adopted pursuant to a timeshare instrument, 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. Requires the statement to fairly and accurately represent the collection and expenditure of assessments and include certain modified documents.

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

(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. Sets forth requirements for the audit. Deletes existing text of Subsection (c) relating to delivery of the fee statement.

(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) Redesignated from existing Subsection (d). Requires the managing entity of any accommodation located in this state to post prominently in the registration area of the accommodations, rather than each timeshare property, a notice, with the date of the last day of the current fiscal year and the address of the managing entity inserted where indicated. Sets forth required language for the notice. Deletes existing text relating to requesting and providing a fee statement.

SECTION 15. Amends Sections 221.075(a) and (d), Property Code, to make conforming changes.

SECTION 16. 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. Makes conforming changes.

Sec. 221.077. New heading: AVAILABILITY OF BOOKS AND RECORDS; RECORDS RETENTION. (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, if a sale of the timeshare estate is pending, 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.

SECTION 17. Makes application of this Act prospective.

SECTION 18. Provides that, if a timeshare plan is registered with the commission before January 15, 2006, the registration expires 24 months after the last anniversary of the date the timeshare plan was registered; the developer is authorized to renew the registration as provided by Section 221.023, Property Code, as amended by this Act; and the developer is authorized to continue to use the timeshare disclosure statement for the timeshare plan as approved by the commission prior to January 15, 2006, so long as the registration is amended from time to time to disclose any materially adverse changes as required by Section 221.023, Property Code, as amended by this Act.

SECTION 19. Effective date: January 15, 2006.