

BILL ANALYSIS

C.S.H.B. 1976
By: Solomons
Business & Industry
Committee Report (Substituted)

BACKGROUND AND PURPOSE

An estimated 57 million Americans live in more than 200,000 community associations, which often exist in combination with one another and generally are grouped together in master planned communities. A property owners' association may be classified as a condominium association, a cooperative association, or a homeowners' association. In Texas, property owners' associations are regulated under the Property Code. As the popularity of property owners' associations increases, so do abuses by such associations. The bill addresses common abuses surrounding property owners' associations.

C.S.H.B. 1976 sets out provisions relating to the operation of property owners' associations.

RULEMAKING AUTHORITY

It is the committee's opinion that rulemaking authority is expressly granted to the Supreme Court of Texas in SECTIONS 12 and 19 of this bill.

ANALYSIS

C.S.H.B. 1976 amends provisions of the Property Code relating to the construction and enforcement of restrictive covenants to redefine "dedicatory instrument" to mean each document governing the establishment, maintenance, or operation of a residential subdivision, planned unit development, condominium, townhouse regime, or similar development. The bill expands the scope of the term to include bylaws, rules, regulations, or guidelines adopted by a property owners' association.

C.S.H.B. 1976 establishes that, with certain exceptions, a provision in a dedicatory instrument that provides a property owners' association the right or authority to enter onto an owner's private property to enforce or abate an alleged violation of a restrictive covenant is void. The bill makes this provision inapplicable to an association regulated under provisions for condominiums, a property owners' association that funds through assessments, insurance on residents, one or more utility payments for residents, or exterior maintenance of residences.

C.S.H.B. 1976 establishes that a provision in a dedicatory instrument that restricts or prohibits an owner from parking an operable, noncommercial, and personal automobile or truck on a public street or that restricts or prohibits an owner from parking the owner's operable, noncommercial, and personal automobile or truck in the owner's driveway is void. The bill defines "noncommercial automobile" and provides that, for purposes of this provision, a recreational vehicle, motor home, camper, all-terrain vehicle, trailer, or watercraft is not considered to be a personal automobile or truck. The bill makes these parking restrictions inapplicable to an association regulated under provisions governing condominiums, a property owners' association that funds through assessments, insurance on residences, one or more utility payments for residences, or exterior maintenance of residences.

C.S.H.B. 1976 establishes that, except for a restrictive covenant that provides a right of first refusal in favor of a developer or builder during the development period, a restrictive covenant is void to the extent that it provides a right of first refusal for the sale or lease of a residential unit or residential lot in favor of the property owners' association or the association's members. The bill defines "development period."

C.S.H.B. 1976, with certain exceptions, prohibits a property owners' association from including or enforcing a provision in a dedicatory instrument that prohibits or restricts a property owner from installing a solar energy device and establishes that a provision that violates that prohibition is void. The bill defines "solar energy device." The bill establishes that such provisions relating to a solar energy device do not prohibit the inclusion or enforcement of a provision in a dedicatory instrument that prohibits a solar energy device that threatens the public health or safety or violates a law, as adjudicated by a court. The bill establishes that such provisions do not prohibit the inclusion or enforcement of a provision in a dedicatory instrument that prohibits a solar energy device that is located on property owned or maintained by the property owners' association, is located on property owned in common by the members of the association, or is located in an area on the property owner's property other than on the roof of the home or in a fenced yard or patio maintained by the property owner.

C.S.H.B. 1976 prohibits, with certain exceptions, a property association from amending a dedicatory instrument to prohibit the rental of property subject to the dedicatory instrument without the consent of 67 percent of all property owners subject to the dedicatory instrument. The bill prohibits a dedicatory instrument from being amended to retroactively require a person who owns property subject to the dedicatory instrument at the time the amendment is adopted to make a capital improvement to the owner's property that is not required before the amendment and establishes the conditions under which a provision of a dedicatory instrument requiring such an improvement may be adopted. The bill defines "capital improvements."

C.S.H.B. 1976 authorizes a court in an action based on breach of a restrictive covenant pertaining to real property or a statute pertaining to real property subject to a restrictive covenant or to restrictive covenants to which real property is subject to allow to any prevailing party reasonable attorney's fees in addition to the party's costs and claim and makes conforming changes.

C.S.H.B. 1976 amends provisions relating to the enforcement of a restrictive covenant to provide that, in evaluating an alleged violation of a restrictive covenant, the property owners' association or other representative designated by an owner of real property may not take action if:

- the association's position is not sufficiently strong to justify taking any action or further action;
- the provision alleged to have been violated may be inconsistent with applicable law;
- the alleged violation is not of such a material or visible nature as to be objectionable to a reasonable person or to justify expending the association's resources; or
- enforcement of the provision is not in the association's best interests, based on hardship, expense, or other reasonable criteria.

C.S.H.B. 1976 further amends provisions relating to the construction and enforcement of restrictive covenants to revise requirements relating to the filing of dedicatory instruments in the real property records of each county to which the instruments relate is located. The bill provides that a dedicatory instrument that is not filed in accordance with such provisions has no effect until filed and cannot be enforced against a property owner who purchased the property before the dedicatory instrument was filed unless the unfiled dedicatory instrument differs from a dedicatory instrument filed at the time of purchase only with respect to modifications or amendments necessary to comply with state or federal law.

C.S.H.B. 1976 authorizes a member of a property owners' association to bring a civil action against the association if the association or its designated representative has violated, is violating, or is threatening to violate provisions relating to the association's right of entry or relating to prohibited dedicatory instrument provisions. The bill prohibits a member of a property owners' association from bringing an action against an association's officer or board member individually. The bill authorizes a member of a property owners' association bringing such an action to seek injunctive relief, damages in an amount equal to the greater of actual damages arising from the violation or \$1,500 for each violation, or both injunctive relief and damages. The bill authorizes a court to increase an award to an amount not to exceed three times the amount awarded if the court finds that violations have occurred with a frequency that constitutes a pattern or practice. The bill provides that each day a violation continues is not considered a separate violation for purposes of an assessment of damages. The bill authorizes the court to award damages to a property owners' association for a suit brought by a member of the association that the court finds frivolous or groundless in an amount that is not more than the greater of three times the association's actual damages or \$4,500.

C.S.H.B. 1976 amends the Texas Residential Property Owners Protection Act to adopt provisions like those described above entitling a member of a property owners' association to bring a civil action against the association if the association or its designated representative has violated, is violating, or is threatening to violate that act.

C.S.H.B. 1976 amends the act to require certain property owners' associations to make their books and records open to and reasonably available for examination by an owner and makes conforming changes. The bill entitles an owner to copies of information contained in the books and records. The bill sets forth recordkeeping requirements, procedures for gaining access to books and records, and procedures for petitioning for access to books and records with the justice of the peace of a justice precinct in which all or part of the property that is governed by the association is located, if access is denied to a member of the association. The bill makes these provisions inapplicable to a property owners' association subject to general laws governing public information

C.S.H.B. 1976 authorizes a restrictive covenant or bylaw in a residential subdivision in which a property owner is subject to mandatory membership in a property owners' association to be amended only by a vote of 51 percent of the total votes allocated to property owners in a property owners' association if the amendment impacts the use and enjoyment of personal or real property or may result in a fine or loss of a privilege of a member of the association. The bill provides that all ballots cast in a vote that results in an amendment to a restrictive covenant or bylaw are records of the association subject to inspection. The bill makes this amendment provision applicable to a restrictive covenant or bylaw regardless of the date on which the covenant or bylaw was created, but makes it inapplicable to the amendment of a restrictive covenant or bylaw during a development period. The bill establishes that the provision prevails to the extent of any conflict with another provision relating to restrictive covenants.

C.S.H.B. 1976 sets forth provisions relating to open meetings of a property owners' association board by providing for the keeping of records, notices of meetings, notices of an election or association vote, the tabulation of votes, ballot requirements, proxy voting, board membership, and the voting rights of a property owner,

C.S.H.B. 1976 requires the notice given by a property owners' association to an owner before taking an enforcement action against the owner to inform the owner that the owner may request a hearing on or before the 30th day after the date notice was delivered to the owner, rather than after the date the owner receives the notice. The bill requires the notice to specify the date by which the owner must cure the violation if the violation is of a curable nature and does not pose a threat to public health or safety, specify the dollar amount of any fine the association seeks to levy, specify each provision of the dedicatory instrument the owner is alleged to have violated and requires such a date to provide a reasonable period of at least 30 days for the owner to cure

the violation if the violation is of a curable nature and does not pose a threat to public health or safety. The bill requires the notice to be sent by certified mail with a return receipt requested or delivered by the United States Postal Service with signature confirmation service to the owner at the owner's last known address as shown on the association's records.

C.S.H.B. 1976 makes provisions requiring notification of a fine to a property owner before an enforcement action inapplicable to an owner who has previously been given notice and the opportunity to exercise any rights available in the preceding six months. The bill sets forth provisions relating to the assessment of a fee on a property owner who does not cure a violation for which the owner received notification and provides for the contesting of the fine by an owner who believes a violation has not occurred. The bill requires a property owners' association to file suit within a certain timeframe to uphold and enforce a fine assessed on a property owner who contests a violation on or before the 30th day after the date the owner receives notice of the fine but does not cure the violation within the same 30-day period and provides that the association's right to collect the fine is considered waived if the association does not file suit within the time prescribed. The bill sets forth provisions regarding an evidentiary hearing required to be held by a court on a suit filed by an association.

C.S.H.B. 1976 requires a fine assessed by a property owners' association 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. The bill requires the association, if it allows fines for a continuing violation to accumulate against a lot or an owner, to establish a reasonable maximum fine amount for a continuing violation at which point the total fine amount is capped. The bill authorizes the association, if a lot occupant other than the owner violates a provision of the dedicatory instrument, to assess a fine directly against the nonowner occupant in the same manner as it would assess a fine against an owner, but prohibits the association from requiring payment from both the owner and a nonowner occupant for the same violation. The bill applies notice and hearing provisions to a nonowner occupant in the same manner as those provisions apply to an owner.

C.S.H.B. 1976 requires a property owners' association to adopt reasonable guidelines to establish an alternative payment schedule by which an owner may make partial payments to the association for delinquent regular or special assessments or any other amount owed to the association without accruing additional monetary penalties. The bill provides that monetary penalties do not include reasonable costs associated with administering the payment plan or interest. The bill requires a property owners' association, for any approved special assessment in an amount greater than the equivalent of the sum of all regular assessments payable in the year the special assessment is approved, to allow partial payments of the special assessment for 12 months unless the property owner requests a shorter payment period in writing at the time the owner requests an alternative payment plan. The bill authorizes a property owners' association to offer a reasonable discount for an owner making a one-time lump sum payment of the special assessment. The bill requires a property owners' association, for any approved special assessment in an amount greater than the equivalent of one-half the sum of all regular assessments payable in the year the special assessment is approved, to allow partial payments of the special assessment for six months unless the property owner requests a shorter payment period in writing at the time the property owner requests an alternative payment plan.

C.S.H.B. 1976 provides that a property owners' association is not required to allow a payment plan for any amount that extends more than 12 months from the date of the owner's request for a payment plan or to enter into a payment plan with an owner who failed to honor the terms of a previous payment plan during the five years following an owner's default under a previous payment plan. The bill requires a property owners' association to file the association's related guidelines in the real property records of each county in which the subdivision is located. The bill provides that an association's failure to file the guidelines as required does not prohibit a property owner from receiving an alternative payment schedule by which the owner may make partial payments to the association for delinquent regular or special assessments or any other

amount owed to the association without accruing additional monetary penalties. The bill establishes an order of priority to which a payment received by a property owners' association from the owner is required to be applied.

C.S.H.B. 1976 requires a property owners' association to bring suit or otherwise initiate against an owner a collection action authorized by dedicatory instruments or other law on or before the 10th anniversary of the date on which the cause of action for collection accrues. The bill makes state laws relating to the four-year limitations period for certain personal actions inapplicable to the collection of a debt owed by an owner to a property owners' association. The bill prohibits a property owners' association from foreclosing an assessment lien unless the association first obtains a court order in an application for expedited foreclosure under rules adopted by the Supreme Court of Texas. The bill requires the supreme court, not later than January 1, 2010, to adopt rules establishing expedited foreclosure proceedings for use by a property owners' association in foreclosing an assessment lien of the association and requires those rules to be substantially similar to the rules adopted under the Texas Constitution regarding expedited foreclosure proceedings. The bill provides, however, that expedited foreclosure is not required if the owner of the property that is subject to foreclosure agrees in writing at the time the foreclosure is sought to waive judicial foreclosure and prohibits a waiver from being required as a condition of the transfer of title to real property. The bill requires a property owners' association that conducts a foreclosure sale of an owner's lot to send to the lot owner not later than the 30th day after the date of the foreclosure sale a copy of provisions relating to right to redemption after foreclosure.

C.S.H.B. 1976 prohibits bylaws adopted by the board of a property owners' association from expanding powers of the association beyond those powers specifically granted in the declaration that is filed in the real property records of a county that includes restrictive covenants governing a residential subdivision. The bill provides that to the extent of any conflict between the bylaws and any declaration, the declaration prevails. The bill prohibits a property owners' association from including or enforcing a provision in a dedicatory instrument that restricts the number of properties within the subdivision that an individual may own.

C.S.H.B. 1976 makes Chapter 211, Property Code, relating to the amendment and enforcement of restrictions in certain subdivisions applicable only to a residential real estate subdivision or any unit or parcel of a subdivision to which another chapter in Title 11 that provides a procedure under which a subdivision's restriction may be amended does not apply. The bill removes language making such provisions applicable to a subdivision located in whole or in part within an unincorporated area of a county if the county has a population of less than 65,000.

C.S.H.B. 1976 requires a seller of residential real property that is subject to membership in a property owners' association, and that comprises not more than one dwelling unit located in Texas, to include, in the written notice the seller is currently required to give to the purchaser of the property, certain information relating to an owner's right to receive copies of any document that governs the establishment, maintenance, or operation of a subdivision. The bill makes the requirement applicable but not limited to restrictions, bylaws, rules and regulations, and a resale certificate from a property owners' association. The bill requires the seller, on the purchaser's request for a resale certificate, to promptly deliver a copy of a current resale certificate if one has been issued for the property or, if the seller does not have a current resale certificate, to request the property owners' association or its agent to issue a resale certificate and to promptly deliver a copy of the resale certificate to the purchaser on receipt of the resale certificate from the association or its agents. The bill requires the seller or the purchaser, as agreed to by the parties, to pay the fee to the association or its agent for issuing the resale certificate. The bill prohibits the property owners' association from requiring payment for a resale certificate requested under provisions providing for the disclosure of information by the association until the certificate is available for delivery and from charging a fee if the certificate is not provided in the prescribed time frame.

C.S.H.B. 1976 requires a resale certificate delivered by a property owners' association to an owner, the owner's agent, or the title insurance company or its agent, to contain the purpose of any special assessment that is due after the date the resale certificate is prepared. The bill requires the resale certificate to contain the style and cause number of any pending lawsuit in which the property owners' association is a party, other than a lawsuit relating to unpaid property taxes of an individual member of the association, rather than only a lawsuit in which the association is a defendant. The bill requires the resale certificate to contain a statement of all fees associated with the transfer of ownership, including a description of each fee, to whom each fee is paid, and the amount of each fee.

C.S.H.B. 1976 provides that any action taken on an unfiled dedicatory instrument before the effective date of the bill is not invalidated by the provisions set forth by the bill. The bill makes provisions relating to judicial foreclosures applicable to a foreclosure sale that occurs after January 1, 2010.

C.S.H.B. 1976 repeals Section 202.004(c), Property Code, relating to allowing a court to assess civil damages for the violation of a restrictive covenant.

EFFECTIVE DATE

January 1, 2010.

COMPARISON OF ORIGINAL AND SUBSTITUTE

C.S.H.B. 1976 differs from the original by including an action based on a breach of a statute pertaining to real property subject to a restrictive covenant or to restrictive covenants to which real property is subject among the actions for which a court is authorized to allow to a prevailing party reasonable attorney's fees in addition to the party's costs and claim. The substitute adds a provision not in the original to prohibit a property owners' association from requiring payment for a resale certificate until the certificate is available for delivery and from charging a fee if the certificate is not provided in the prescribed time. The substitute removes a provision in the original that includes other documents that govern the rights, duties, and responsibilities of a property owners' association or the association's members in the term "dedicatory instrument."

C.S.H.B. 1976 differs from the original by exempting an unfiled dedicatory instrument that differs from the dedicatory instrument filed at the time of the purchase only with respect to modifications or amendments necessary to comply with state or federal law from provisions stating that a dedicatory instrument that is not filed in accordance with certain provisions has no effect until filed and cannot be enforced against a property owner who purchased the property before the dedicatory instrument was filed. The substitute adds a provision not in the original to provide an exemption to provisions regarding an association's right of entry for circumstances in which it is reasonably determined the property has been abandoned and not maintained for more than 30 days, and to specify that this exemption does not apply to an entry for a forced mow or to remove trash or debris if the dedicatory instrument allows entry for that purpose. The substitute includes a provision not in the original to make provisions relating to an association's right of entry inapplicable to certain condominium associations, and property owners' associations funded through certain assessments.

C.S.H.B. 1976 differs from the original by making certain parking restrictions applicable to an owner's operable, noncommercial, and personal automobile or truck and by defining "noncommercial automobile," whereas the original makes such restrictions applicable to an owner's personal, noncommercial vehicle. The substitute differs from the original by making provisions relating to parking restrictions inapplicable to certain condominium associations, and property owners' associations funded through certain assessments.

C.S.H.B. 1976 adds provisions not included in the original regarding restrictions on rentals and restrictions on requiring capital improvements. The substitute adds language not in the original to prohibit a property owners' association from bringing an action against an association's officer or board member individually. The substitute removes a provision in the original that entitles a member of a property owners' association to recover reasonable attorney's fees and court costs if a member of the association prevails in an action and adds a provision not in the original to authorize the court to award damages to a property owners' association for a suit brought by a member of the association that the court finds frivolous or groundless, and makes conforming changes. The bill restores provisions struck in the original relating to the content of a resale certificate.

C.S.H.B. 1976, in added provisions that treat the same general subject matter, differs from the original by adding provisions relating to the amendment of restrictive covenants and bylaws, rather than the amendment of dedicatory instruments as in the original. The substitute adds a qualification not in the original authorizing an amendment of a restrictive covenant or bylaw if the amendment impacts the use and enjoyment of personal or real property or may result in a fine or loss of a privilege of a member of the association. The bill adds a provision not in the original to provide that all ballots cast in a vote that results in an amendment to a restrictive covenant or bylaw are records of the association subject to inspection.

C.S.H.B. 1976 removes a provision in the original that requires an association to make the books and records of the association available on or before the 30th day after the date a property owners' association receives a written request for the information. The substitute differs from the original by making provisions that require a property owners' association to make the books and records of the association available for examination inapplicable to an association subject to laws governing public information and making conforming changes, and by entitling a property owner to copies of information contained in the books and records. The substitute removes a provision in the original that authorizes an owner to seek certain remedies if an association fails to make its books and records available to the owner.

C.S.H.B. 1976 adds provisions not in the original that set forth recordkeeping requirements, procedures for gaining access to books and records, and procedures for petitioning for access to books and records with the justice of the peace of a justice precinct in which all or part of the property that is governed by the association is located, if access is denied to a member of the association.

C.S.H.B. 1976 adds provisions not in the original relating to open meetings to make these open meeting provisions inapplicable to certain property owners' associations, defines "board," expands notice provisions, and provides for emergency board meetings and executive sessions. The substitute differs from the original by expanding places in which notice must be posted and removing language in the original specifying the content of the agenda.

C.S.H.B. 1976 adds provisions not in the original making provisions of this bill relating tabulation of votes inapplicable to certain property owners' associations, whereas the original has no such applicability provision. The substitute and original both address with whom an association may enter a contract to tabulate votes, but set out different requirements for who is acceptable. The substitute and original both address ballots for a vote cast in an election, but set forth different requirements for preservation of the voted ballots. The substitute differs from the original by adding a specific provision relating to voting.

C.S.H.B. 1976 removes language not removed in the original relating to information contained in the notice informing an owner of the owner's entitlement to a reasonable period to cure a violation. The substitute adds a provision not in the original that requires a notice of enforcement to specify the date by which the owner must cure a violation if the violation is of a curable nature and does not pose a threat to public health or safety, specify the dollar amount of any fine the association seeks to levy, and specify each provision of the dedicatory instrument the owner is

alleged to have violated. The substitute differs from the original by clarifying that the date specified in the notice of enforcement that is required to provide a reasonable period of at least 30 days for the owner to cure the violation is required if the violation is of a curable nature and does not pose a threat to public health or safety. The substitute adds provisions not included in the original setting forth procedures for the assessment of fines on a property owner, the contest of a violation, and provisions relating to a suit filed by the association to uphold and enforce a fine.

C.S.H.B. 1976 adds provisions not in the original relating to monetary penalties and an approved special assessment. The substitute adds provisions not in the original authorizing an association to offer a reasonable discount for an owner making a one-time lump sum payment of the special assessment. The substitute adds language not in the original to specify that a provision establishing that a property owners' association is not required to allow certain payment plans applies to a plan for any amount and that a provision establishing that an association is not required to enter into a payment plan with an owner who failed to honor the terms of a previous payment plan applies to the owner's failure to honor such a plan during the five years following the owner's default under a previous payment plan.

C.S.H.B. 1976 differs from the original by prohibiting an association from foreclosing an assessment lien unless the association first obtains a court order in an application for expedited foreclosure under rules adopted by the supreme court, whereas the original prohibits a foreclosure unless the association first obtains a court judgment foreclosing the lien and providing for issuance of an order sale. The substitute adds a provision not in the original that requires the supreme court to adopt rules establishing expedited foreclosure proceedings and prohibiting a waiver from being required as a condition of the transfer of title to real property.

C.S.H.B. 1976 omits a provision included in the original that requires a vote by the owners of property in an association on certain assessments. The substitute adds a provision not in the original that prohibits a property owners' association from including or enforcing a provision in a dedicatory instrument that restricts the number of properties within the subdivision an individual is authorized to own.

C.S.H.B. 1976 includes a transition provision not included in the original providing that any action taken on an unfiled dedicatory instrument before the effective date of the substitute is not invalidated by the provisions set forth by the bill. The substitute adds a provision not in the original that requires the supreme court to adopt rules relating to an expedited foreclosure not later than January 1, 2010.