

## **BILL ANALYSIS**

S.B. 237  
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Business & Industry  
Committee Report (Unamended)

### **BACKGROUND AND PURPOSE**

Property owners' associations are intended to maintain common areas in residential neighborhoods and to protect homeowners' investments in their properties by enforcing certain aesthetic guidelines. In recent years, however, many homeowners have become dissatisfied with the operation of their associations. Many homeowners lack confidence in the conduct of board elections. Additionally, some property owners' associations operate under extremely cumbersome provisions for the amendment of their declarations. This bill attempts to restore confidence in the property owners' association election process and to provide a uniform standard for amending a declaration.

S.B. 237 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 15 and 22 of this bill.

### **ANALYSIS**

S.B. 237 amends the Property Code to authorize 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.

S.B. 237 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 processing 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.

S.B. 237 redefines "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.

S.B. 237 amends provisions relating to the enforcement of a restrictive covenant to provide that, in evaluating an alleged or potential violation of a restrictive covenant, a property owners' association or other representative designated by an owner of real property is authorized to grant a variance and, in doing so, not enforce the restrictive covenant if the association board determines, in the board's reasonable judgment:

- 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;
- enforcement of the provision is not in the association's best interests, based on hardship, expense, or other reasonable criteria; or
- the facts of the particular circumstances, such as topography of the owner's land or unforeseen circumstances unique to the particular owner, justify the variance.

The bill prohibits such a determination from being considered a waiver of the association's ability to enforce any dedicatory instrument provision in the future.

S.B. 237 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 in which property 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. The bill requires each property owners' association to present for recording with the county clerk certain dedicatory instruments not later than January 1, 2010.

S.B. 237 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 as against public policy except for certain entry. The bill makes this provision inapplicable to an association regulated under provisions for condominiums, to an association that funds insurance on residents, one or more utility payments for residents, or exterior maintenance of residences through assessments, and to an association that is a mixed use master association that existed before January 1, 1974, and that does not have the authority under a dedicatory instrument or other governing document to impose fees. The bill establishes that this provision does not prohibit a dedicatory instrument allowing a property owners' association a right of entry that is limited to a dedicated access or other easement contained in a final plat or an easement filed of record.

S.B. 237 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, a tow truck, cement mixer, or other similar commercial vehicle, or a vehicle that is more than 30 feet long 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 or a property owners' association that funds insurance on residences, one or more utility payments for residences, or exterior maintenance of residences through assessments.

S.B. 237 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."

S.B. 237, 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.

S.B. 237 prohibits, with certain exceptions, a property owners' association from amending a dedicatory instrument to prohibit or restrict the rental of property subject to the dedicatory instrument without the consent of at least 51 percent of the total votes allocated to property owners subject to the dedicatory instrument. The bill authorizes an amendment to a dedicatory instrument to require an owner to exercise due diligence in not leasing to an occupant who is a registered sex offender or who has a history of violent crime or to terminate the possessory right of any such tenant or occupant, to require all leases to be subject to the association's dedicatory instruments, or to require a minimum lease term of not more than six months. 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 improvement."

S.B. 237 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 construction and enforcement of restrictive covenants, and prohibits a member of an association from bringing an action against an association's officer or board member individually. The bill authorizes a member 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 specifies 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 that the court finds frivolous or groundless brought by a member of the association in an amount that is not more than the greater of three times the association's actual damages or \$4,500. The bill requires a person, on or before the 30th day before the date the person files such a suit, to provide notice to the other party of the person's intent to file suit and requires such notice to be sent by certified mail, return receipt requested, or delivered by the U.S. Postal Service with signature confirmation service.

S.B. 237 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.

S.B. 237 specifies that the requirement that a resale certificate delivered by a property owners' association to an owner, the owner's agent, or the title insurance company or its agent contain a statement of a right of first refusal excludes a right of first refusal that is prohibited by statute. The bill requires a resale certificate 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.

S.B. 237 specifies that provisions of the act relating to association records and elections, curing violations, an alternative payment schedule for certain assessments, and prohibiting restrictions on ownership do not apply to a property owners' association that is a mixed use master association that existed before January 1, 1974, and that does not have the authority under a dedicatory instrument or other governing document to impose fines.

S.B. 237 authorizes a dedicatory instrument 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 at least 51 percent of the total votes allocated to property owners in the association, in addition to any governmental approval required by law. The bill authorizes a rule or guideline that affects land owned, leased, maintained, or otherwise controlled by an association to be adopted or amended by a majority vote of the association board, and authorizes a rule or guideline that impacts the use and enjoyment of personal or real property owned exclusively by the owner or that may result in a fine or loss of a privilege of a member of the association to be adopted or amended only by a vote of at least 51 percent of the total votes allocated to property owners who cast votes by any permissible method in an association-wide vote. The bill authorizes an association board by majority vote to adopt ministerial, office-related procedural policies, and authorizes such a policy to outline circumstances under which or the manner by which enforcement remedies may be carried out but may not otherwise impact the use and enjoyment of personal or real property owned exclusively by the owner. The bill prohibits a policy from creating a power to levy a fine or impose a loss of privilege on a member of the association or expanding the association's powers beyond the powers granted by any other dedicatory instrument. The bill provides that all ballots cast in a vote that results in an amendment to a restrictive covenant, bylaw, or rule are records of the association subject to inspection. The bill makes these provisions applicable to all dedicatory instruments regardless of the date on which the instruments were created, and makes these provisions inapplicable to the amendment of a dedicatory instrument during a development period or to a property owners' association subject to Texas public information laws. The bill establishes that these provisions prevail to the extent of any conflict with another provision relating to restrictive covenants and supersede any contract requirement in a dedicatory instrument.

S.B. 237 requires 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 obtain from an association 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 Texas public information laws.

S.B. 237 sets forth provisions relating to open meetings of a property owners' association board by providing for the keeping of records, notices of meetings, executive sessions closed to association members, notices of an election or association vote, the tabulation of votes and opportunity for recount, ballot requirements, proxy voting, and board membership. The bill sets

forth provisions relating to the voting rights of a property owner and the establishment of a quorum, specifies that these provisions supersede any contrary requirement in a dedicatory instrument, and makes these provisions inapplicable to a property owners' association subject to Texas public information laws.

S.B. 237 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 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 specify the dollar amount of any fine the association seeks to levy and each provision of the dedicatory instrument the owner is alleged to have violated. The bill requires the notice to be sent by certified mail with a return receipt requested or delivered by the U.S. Postal Service with signature confirmation service to the owner at the owner's last known address as shown on the association's records.

S.B. 237 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 fine on a property owner who does not cure a violation for which the owner received notification and does not request a hearing to discuss and verify facts and resolve the matter in issue, and makes any assessed fine void if a property owner cures the violation before the expiration of the period provided for that purpose. The bill 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.

S.B. 237 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.

S.B. 237 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.

S.B. 237 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.

S.B. 237 requires a written request submitted by an owner for a hearing before the board of a property owners' association or a committee appointed by the board to resolve a matter relating to a violation to contain a statement of the grounds on which the owner believes the owner is not in violation and citations of the dedicatory instrument for each violation alleged. The bill requires the association, if the parties fail to reach agreement in or after the hearing, to file suit to uphold and enforce any fine sought to be assessed and sets forth provisions relating to the evidentiary hearing and decisions of the court in such a suit.

S.B. 237 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 and authorizes an association to use this procedure to foreclose any lien described by the association's dedicatory instrument. 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 authorizes the removal of a provision granting a right to foreclose a lien on real property for unpaid amounts due to an association from a dedicatory instrument, or the adoption of such a provision in a dedicatory instrument, by a vote of at least 51 percent of the total votes allocated to property owners in the association, and authorizes property owners holding at least 10 percent of all voting interests in the association to petition the association and require a special meeting to be called for the purpose of taking a vote to remove or adopt such a right to foreclosure. 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.

S.B. 237 prohibits a property owners' association from prohibiting an owner from owning multiple properties governed by the association if the cumulative voting rights of all that owner's properties are 25 percent or less of all voting interests in the association. The bill makes this provision inapplicable during a development period.

S.B. 237 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.

S.B. 237 applies a provision authorizing a property owners' association to assess civil damages in an amount not to exceed \$200 for each day of a violation of a restrictive covenant to an association that is a mixed use master association that existed before January 1, 1974, and that does not have the authority under a dedicatory instrument or other governing document to impose fines.

S.B. 237 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.

**EFFECTIVE DATE**

January 1, 2010.