

BILL ANALYSIS

C.S.H.B. 2869
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Business & Industry
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Certain master mixed-use property owners' associations, such as Las Colinas in Irving, Texas, have unique characteristics that set them apart from traditional property owners' associations. Such a master mixed-use property owners' association may include commercial properties like hotel and retail property in addition to incorporated residential or commercial property owners' associations and a mix of single-family and multifamily properties. Some observers express concern that traditional homeowners' association laws do not appropriately address the issues facing such a master mixed-use development. C.S.H.B. 2869 seeks to address those issues by enacting statutory provisions outlining board powers, proxy voting, and covenant enforcement for a master mixed-use property owners' association.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 2869 amends the Property Code to establish provisions relating to the powers and duties of certain master mixed-use property owners' associations that are applicable to a property owners' association having the following characteristics:

- includes commercial properties, including hotel and retail properties, that constitute at least 35 percent of the total appraised value of the mixed-use development governed by the association; single-family attached and detached properties that constitute at least 25 percent of the mixed-use development's total appraised property value; and multifamily properties that constitute at least 10 percent of the mixed-use development's total appraised property value;
- governs at least 6,000 acres of deed-restricted property;
- has at least 10 incorporated residential or commercial property owners' associations that are members of and subject to the dedicatory instruments of the master mixed-use property owners' association;
- has at least 3,400 platted and developed single-family residential properties and at least 400 separately platted commercial properties, including office, industrial, and retail properties, which together constitute at least 30 million square feet of building area available for rental; and
- participates in the maintenance of public space, including parks, medians, and lakefronts, owned by local, including county, or state governmental entities.

C.S.H.B. 2869 makes its provisions applicable to a property that is governed by a property owners' association described by the bill's provisions, located in a mixed-use development, and subject to a provision, including a restriction, in a declaration that requires mandatory membership in a property owners' association and authorizes the association to collect regular or

special assessments on all or a majority of the property in the development.

C.S.H.B. 2869 limits the application of its provisions to a master mixed-use property owners' association and not to the independent property owners' associations that are members of the master mixed-use property owners' association, except that its provisions prevail over a conflicting or inconsistent provision of law relating to independent property owners' associations. The bill makes certain provisions relating to the Texas Residential Property Owners Protection Act applicable only to single-family residential properties governed by a property owners' association subject to the bill's provisions.

C.S.H.B. 2869 authorizes a master mixed-use property owners' association, unless otherwise provided by the association's dedicatory instruments, acting through its board of directors, to do the following:

- adopt and amend bylaws;
- adopt and amend budgets for revenues, expenditures, and reserves and collect assessments for common expenses from property owners;
- adopt reasonable rules;
- hire and terminate managing agents and other agents, employees, and independent contractors;
- institute, defend, intervene in, settle, or compromise litigation or administrative proceedings on matters affecting a property governed by the association;
- make contracts and incur liabilities relating to the association's operation;
- regulate the use, maintenance, repair, replacement, modification, and appearance of the property governed by the association;
- make improvements to be included as part of the common area;
- acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property;
- purchase an investment property that is not part of the common area;
- grant easements, leases, licenses, and concessions through or over the common elements;
- impose and receive payments, fees, or charges for the use, rental, or operation of the common area and for services provided to property owners;
- impose interest, late charges, and, if applicable, returned check charges for late payments of regular or special assessments;
- charge costs to an owner's assessment account and collect the costs in any manner provided in the restrictions for the collection of assessments;
- adopt and amend rules regulating the collection of delinquent assessments;
- impose reasonable charges for preparing, recording, or copying amendments to resale certificates or statements of unpaid assessments;
- purchase insurance and fidelity bonds, including directors' and officers' liability insurance, that the board considers appropriate or necessary;
- indemnify an association director or officer who was, is, or may be made a named defendant or respondent in a proceeding because the person is or was a director or officer, subject to the requirements of the Texas Nonprofit Corporation Law;
- implement written architectural control guidelines for its own use, or record the guidelines in the real property records of the applicable county and modify the guidelines as the needs of the development change if the restrictions vest the architectural control authority in the association;

- exercise self-help with regard to property governed by the association;
- exercise other powers conferred by the dedicatory instruments;
- exercise other powers necessary and proper for the association's governance and operation; and
- exercise any other powers that may be exercised in Texas by a corporation of the same type as the association.

C.S.H.B. 2869 requires an annual meeting of members of a property owners' association to be conducted in accordance with the association's dedicatory instruments. The bill establishes that an annual meeting, unless otherwise provided by a dedicatory instrument, is open to association members and requires the meeting to be held in a county in which all or part of the property governed by the association is located or in a county adjacent to that county. The bill requires the board to give members notice of the date, time, place, and subject of an annual or special meeting by the members, unless otherwise provided by a dedicatory instrument, and establishes a time frame for the delivery of notice and requirements for the manner and location for posting such notice. The bill authorizes any number of the members to attend the meeting by use of videoconferencing or a similar telecommunication method for purposes of establishing full participation in the meeting, unless otherwise provided by a dedicatory instrument.

C.S.H.B. 2869 requires a meeting of the board of directors of a property owners' association to be conducted in accordance with the association's dedicatory instruments. The bill establishes that elected directors who represent the commercial and residential membership attend and conduct the business of the property owners' association at a board meeting, unless otherwise provided by a dedicatory instrument, and provides for the meaning of board meeting. The bill requires the board to keep a record of each regular, emergency, or special board meeting in the form of written minutes or an audio recording of the meeting, unless otherwise provided by a dedicatory instrument. The bill requires a record of the meeting to state the subject of each motion or inquiry and to indicate each vote, order, decision, or other action taken by the board. The bill requires the board to make meeting records available to a member for inspection and copying, at the member's expense, during the association's normal business hours on a written request to the board or the board's representative. The bill requires the board to approve the minutes of a board meeting not later than the next regular board meeting.

C.S.H.B. 2869 requires the board, before the board calls an executive session, to convene in a regular or special board meeting for which the required notice has been given, unless otherwise provided by a dedicatory instrument. The bill authorizes the presiding board member, during that board meeting, to call an executive session by announcing that an executive session will be held to deliberate a matter for which an executive session is authorized and by identifying that specific matter. The bill prohibits a vote or other action item from being taken in executive session and exempts an executive session from the bill's recordkeeping requirements.

C.S.H.B. 2869 authorizes a property owners' association board to meet in executive session, unless otherwise provided by a dedicatory instrument, to deliberate anticipated or pending litigation, settlement offers, or interpretations of the law with the association's legal counsel; complaints or charges against or issues regarding a board member or an agent, employee, contractor, or other representative of the association; financial matters concerning a specific property owner; a payment plan for an association member who has a financial obligation to the association; a foreclosure of a lien; an enforcement action against an association member; the purchase, exchange, lease, or value of real property, or business and financial issues relating to the negotiation of a contract, if the board determines in good faith that deliberation in an open board meeting may have a detrimental effect on the association's position; matters involving the invasion of privacy of an individual owner; an employee matter; and any other matter the board considers necessary or reasonable to further assist the association's operation.

C.S.H.B. 2869 establishes that the number of votes to which an individual or corporation who is a member of a property owners' association is entitled is determined by the association's dedicatory instruments. The bill authorizes each corporation or individual who is a member of the association to vote by proxy as provided for nonprofit organizations under Business Organizations Code provisions. The bill authorizes a member vote on any matter to be conducted by mail, facsimile transmission, e-mail, or any combination of those methods.

C.S.H.B. 2869 authorizes a property owners' association to enforce its restrictive covenants by exercising discretionary authority relating to a restrictive covenant unless a court has determined by a preponderance of the evidence that the exercise of discretionary authority was arbitrary, capricious, or discriminatory and by initiating, defending, or intervening in litigation or an administrative proceeding affecting the enforcement of a restrictive covenant or the protection, preservation, or operation of property subject to the association's dedicatory instruments. The bill authorizes the association to recover reasonable attorney's fees and costs incurred if the association prevails in an action to enforce restrictive covenants.

C.S.H.B. 2869 authorizes an association to use self-help to enforce its restrictive covenants against a residential or commercial property owner as necessary to prevent immediate harm to a person or property, or as otherwise reasonable. The bill establishes that an association is not required to provide a property owner with advance notice before the association implements self-help if the property owner commits a subsequent repeat violation of the restrictive covenants within 12 months of the initial violation. The bill establishes that an advance, annual notice of maintenance requirements is considered notice to the extent notice is required. The bill entitles the prevailing party in an action based on breach of a restrictive covenant to reasonable attorney's fees, costs, and actual damages.

C.S.H.B. 2869 authorizes a property owners' association to adopt reasonable rules regulating common areas. The bill requires an association to provide resale certificates only for residential properties and in the manner provided by provisions relating to the delivery of subdivision information to an owner.

C.S.H.B. 2869 requires a property owners' association to record in each county in which any portion of the development governed by the association is located a management certificate, signed and acknowledged by an officer of the association, stating the name of the development; the name of the association; the recording data for the declaration and all supplementary declarations to residential communities; the applicability of any supplementary declarations to residential communities; the association's name and mailing address; and other information the association considers appropriate. The bill requires a property owners' association to record an amended management certificate not later than the 30th day after the date the association has notice of a change in information in the recorded certificate. The bill establishes that the association and its officers, directors, employees, and agents are not liable to any person or corporation for delay in recording or failure to record a management certificate unless the delay or failure is willful or caused by gross negligence.

C.S.H.B. 2869 requires a payment received by a property owners' association from the owner, unless otherwise provided in writing by the property owner at the time payment is made, to be applied to the owner's debt in the following order of priority: any delinquent assessment; any current assessment; any attorney's fees incurred by the association associated solely with assessments or any other charge that could provide the basis for foreclosure; any fines assessed by the association; any attorney's fees incurred by the association; and any other amount owed to the association. The bill prohibits a property owners' association from foreclosing an association assessment lien unless the association first obtains a court order of sale.

C.S.H.B. 2869 defines "appraised value," "property owners' association" or "association," and "self-help" and provides for meaning of "dedicatory instrument" by reference.

EFFECTIVE DATE

September 1, 2011.

COMPARISON OF ORIGINAL AND SUBSTITUTE

C.S.H.B. 2869 contains a provision not included in the original defining "dedicatory instrument." The substitute differs from the original by referencing master mixed-use property owners' associations' dedicatory instruments, rather than governing documents, as in the original.

C.S.H.B. 2869 differs from the original, in the definition of "self-help," by defining the term to mean the process by which a property owners' association takes remedial action with regard to property governed by the association, whereas the original defines the term to mean the process by which a property owners' association takes such remedial action after the exhaustion of traditional enforcement efforts.

C.S.H.B. 2869 contains a provision not included in the original establishing that provisions relating to master mixed-use property owners' associations apply to a property that, among other criteria, is governed by a property owners' association described by the bill's provisions.

C.S.H.B. 2869 differs from the original, in establishing the applicability of its provisions to a property owners' association that meets certain criteria, by specifying a property owners' association having, among other characteristics, the following characteristics:

- a property owners' association that includes commercial properties that constitute at least 35 percent of the total appraised property value of the mixed-use development governed by the association, rather than at least 40 percent, as in the original;
- a property owners' association that has at least 10 incorporated residential or commercial property owners' associations that are members of and subject to the dedicatory instruments of the master mixed-use property owners' association, rather than an association having at least 10 residential or corporate commercial property owners' associations that are members of and subject to the governing documents of the master mixed-use property owners' association, as in the original; and
- a property owners' association that has at least 3,400 platted and developed single-family residential properties and at least 400 separately platted commercial properties, including office, industrial, hotel, and retail properties, which together constitute at least 30 million square feet of building area available for rental, rather than an association having at least 3,500 platted and developed single-family residential properties and at least 450 separately platted commercial properties together constituting at least 30 million square feet of available square footage, as in the original.

C.S.H.B. 2869 differs from the original, in a provision making provisions relating to master mixed-use property owners' associations applicable to a property owners' association that participates in the maintenance of public space owned by local or state governmental entities, by specifying that public space owned by local governmental entities includes public space owned by counties, whereas the original does not specifically mention a county with respect to the maintenance of public space owned by local or state governmental entities.

C.S.H.B. 2869 differs from the original by including provisions of the Texas Residential Property Owners Protection Act relating to attorney's fees and restrictive covenants granting easements to certain property owners' associations among the laws applicable only to single-family residential properties governed by a property owners' association subject to the bill's provisions, whereas the original includes provisions of that act relating to the requirement of a notice before enforcement action and notice after a foreclosure sale among the list of laws applicable only to such single family residential properties.

C.S.H.B. 2869 differs from the original, in a provision setting out the powers of the board of directors of a master mixed-use property owners' association, by establishing that those powers are in addition to any other powers provided by applicable law and by the bill's provisions for master mixed-use property owners' associations, whereas the original establishes that those board powers are in addition to any other powers provided by the bill's provisions for master mixed-use property owners' associations.

C.S.H.B. 2869 contains provisions not included in the original setting out requirements for an annual meeting of members of a property owners' association. The substitute differs from the original in providing for board meetings, whereas the original provides for open board meetings.

C.S.H.B. 2869 contains provisions not included in the original requiring a board meeting to be in accordance with the association's dedicatory instruments and establishing that elected directors who represent the commercial and residential membership attend and conduct the business of the property owners' association at a board meeting.

C.S.H.B. 2869 differs from the original by defining board meeting as having the meaning assigned by a dedicatory instrument, whereas the original defines "board meeting" to mean a deliberation between a quorum of the voting board of the property owners' association, or between a quorum of the voting board and another person, during which association business or policy over which the board has responsibility is discussed or considered, or during which the board takes formal action. The substitute differs from the original, in a provision excluding certain gatherings of a quorum of the board from the term board meeting, by specifying such gatherings at any other venue.

C.S.H.B. 2869 omits provisions contained in the original establishing that a board meeting is open to association members, requiring a board meeting to be held in a county in which all or part of the property governed by the association is located or a county adjacent to that county, and setting out related notice requirements for a board meeting.

C.S.H.B. 2869 differs from the original, in provisions relating to board meeting records, by applying those provisions unless otherwise provided by a dedicatory instrument and by specifying that board meeting records, including approved minutes, made available to a member for inspection and copy are available for copying at the member's expense.

C.S.H.B. 2869 differs from the original, in provisions relating to convening a regular or special board meeting before calling an executive session, by applying those provisions unless otherwise provided by a dedicatory instrument.

C.S.H.B. 2869 differs from the original, in a provision setting out the matters on which a property owners' association board meeting in executive session may deliberate, by applying those provisions unless otherwise provided by a dedicatory instrument, whereas the original specifies that the executive session is one to which the members do not have access. The substitute differs from the original, in a provision authorizing a property owners' association board to meet in executive session to deliberate on a payment plan for an association member, by specifying a member who has a financial obligation to the association, whereas the original specifies a member who is delinquent in the payment of a financial obligation to the association. The substitute contains a provision not included in the original authorizing a property owners' association board meeting in executive session to deliberate on any other matter the board considers necessary or reasonable to further assist the association's operation.

C.S.H.B. 2869 differs from the original by authorizing an association to use self-help to enforce its restrictive covenants against a residential or commercial property owner as necessary to prevent immediate harm to a person or property, or as otherwise reasonable, whereas the original authorizes the use of such self-help on the condition that it is not otherwise prohibited or restricted by municipal ordinance or county code.