

BILL ANALYSIS

C.S.H.B. 3347
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Business & Industry
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Certain interested parties see a need for increased transparency in the operation of condominium unit owners' associations and property owners' associations and for more direct control on the part of association members in matters pertaining to their association. C.S.H.B. 3347 seeks to address these and other issues by revising and clarifying certain laws relating to the operation of property owners' associations.

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. 3347 amends the Property Code to authorize a condominium unit owners' association by resolution of the association's board of directors to borrow money unless prohibited by the declaration, certificate of formation, bylaws, or rules of the association. The bill authorizes the association, if the board approves the resolution, to assign the association's right to future income, including the right to receive common expense assessments and assign the association's lien rights, as collateral for the loan authorized by the resolution. The bill requires the association to comply with any member approval requirement in the association's declaration, certificate of formation, bylaws, or rules for borrowing money, except that not more than 67 percent of all outstanding votes are required to approve an authorization to borrow money. The bill removes a provision authorizing a condominium unit owners' association, through its board, to assign its right to future income, including the right to receive common expense assessments, but only to the extent the declaration so provides.

C.S.H.B. 3347 authorizes certain insurance policies carried by a condominium unit owners' association relating to property insurance on insurable common elements and to commercial general liability insurance to provide for deductibles as the board considers appropriate or necessary. The bill requires costs of repair or replacement incurred before any insurance proceeds are available that are within the association's deductible, or that are in excess of the insurance proceeds and reserves, to be paid as determined by resolution of the board of directors of the association. The bill requires such costs to be a common expense if the board does not approve a resolution and specifies that any such resolution is considered a dedicatory instrument and must be recorded in accordance with provisions governing an association's public records. The bill removes a provision establishing that the cost of repair or replacement in excess of the insurance proceeds and reserves is a common expense.

C.S.H.B. 3347 removes the specification, in provisions authorizing the owner of a unit purchased at a foreclosure sale of the association's lien for assessments to redeem the unit within a specified time period, that the unit be purchased by an association and used for residential purposes. The bill specifies that provisions of law requiring the owner of a unit, before the owner redeems the unit, to pay to the association certain expenses are applicable if the association is the purchaser

of a unit at a foreclosure sale of the association's lien for assessments. The bill provides that the costs incurred by the association in foreclosing the lien and that must be paid by the owner to the association refer to all such costs. The bill includes in those costs all costs related to the redemption process and provides that any reasonable cost incurred by the association as the owner of the unit includes costs of mortgage payments, taxes, and insurance. The bill requires the redeeming owner, if a party other than the association is the purchaser of the unit at the foreclosure sale, to pay to the purchaser an amount equal to the amount bid at the sale, interest on the bid amount computed from the date of the foreclosure sale to the date of redemption at the rate of six percent, any assessment paid by the purchaser after the date of foreclosure, and any reasonable costs incurred by the purchaser as the owner of the unit, including costs of maintenance, leasing, mortgage payments, taxes, and insurance. The bill requires the redeeming owner to also pay to the association all assessments that are due as of the date of the redemption and reasonable attorney's fees and all costs incurred by the association in foreclosing the lien.

C.S.H.B. 3347 expands the provisions of law requiring the association, upon redemption of a unit, to execute a deed to the redeeming unit owner to make those provisions applicable to the purchaser of the unit at the foreclosure sale, rather than the association, and provides that the deed executed is with special warranty to the redeeming unit owner. The bill makes conforming changes and redefines "declaration" for purposes of the Uniform Condominium Act to remove the specification that the term's meaning as an instrument, however denominated, that creates a condominium and any amendment to that instrument refers to a recorded instrument.

C.S.H.B. 3347 authorizes a property owners' association or another person with a right or duty to enforce a dedicatory instrument, in evaluating an alleged or potential violation of a restrictive covenant and notwithstanding any provision in a dedicatory instrument, to elect to not enforce the restrictive covenant if the board or other person, in the board's or other person's reasonable judgment, determines the following:

- the association's or other person'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 property owners' association's or other person's resources;
- enforcement of the provision is not in the association's or other person'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 election to not enforce the restrictive covenant.

C.S.H.B. 3347 prohibits an election to not enforce a restrictive covenant under provisions of law authorizing such enforcement from being considered a waiver of authority to enforce any dedicatory instrument provision in the future.

C.S.H.B. 3347 includes a purchaser of property in a subdivision or the purchaser's agent among the parties to whom a property owners' association is required to deliver certain subdivision information on written request from those parties. The bill changes the deadline for delivering such information from the 10th day after the date the written request is received to the 10th business day after that date. The bill authorizes the association, for a request from a purchaser of property in a subdivision or the purchaser's agent, to require the purchaser or purchaser's agent to provide to the association, before the association delivers requested information, reasonable evidence that the purchaser has a contractual or other right to acquire property in the subdivision.

C.S.H.B. 3347 expands requirements governing the appearance and contents of a resale certificate to require that the certificate be in writing and be issued, signed, and dated by an

officer or authorized agent of the property owners' association. The bill provides that the requirement that a resale certificate contain the statement of any right of first refusal does not apply to a right of first refusal that is prohibited by statute and that the amount of any special assessment included in the certificate refers to a special assessment that has been approved as of the date the resale certificate is prepared, rather than a special assessment that is due after that date. The bill provides that the requirement that a resale certificate contain the style and cause number of any pending lawsuit in which the property owners' association is a defendant does not apply to a lawsuit relating to unpaid property taxes of an individual member of the association. The bill includes among the items that must be contained in a resale certificate 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. 3347 provides that the person requesting a resale certificate or an update of a resale certificate is responsible for the payment of any fee charged for the document. The bill provides, in the requirement that a property owners' association deliver to certain parties on written request an update to a resale certificate as part of a request for certain subdivision information, that the request is received from a person entitled under provisions of law to request a resale certificate, rather than specifying that such a request is received from an owner, owner's agent, or title insurance company or its agent acting on behalf of the owner. The bill changes the deadline for delivering the update of the resale certificate from the seventh day to the seventh business day after the date the written request is received. The bill provides that the inapplicability of provisions of the Texas Residential Property Owners Protection Act to a condominium development governed by the Uniform Condominium Act refers to a condominium development governed wholly or partly by the Uniform Condominium Act. The bill establishes that the following provisions under the Texas Residential Property Owners Protection Act 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: provisions relating to a property owners' association's records, provisions relating to open board meetings; provisions requiring a notice before an enforcement action, and provisions relating to an alternate payment schedule for certain assessments.

C.S.H.B. 3347 defines "declarant," for purposes of the Texas Residential Property Owners Protection Act, as any person or group of persons acting in concert that, as part of a common promotional plan, offers to dispose of the person's or group's interest in a subdivision and that files a declaration and one or more successors to such a person or group to whom the person's or group's rights as a declarant under the declaration are transferred by a written instrument evidencing the transfer that is recorded in the real property records of each county in which the declaration is recorded. The bill redefines "declaration" to mean an instrument filed in the real property records of a county that creates the original restrictive covenants for a subdivision, as amended or supplemented, rather than an instrument filed in such records that includes restrictive covenants governing a residential subdivision. The bill redefines "lot" to remove the specification that its meaning as a designated parcel of land refers to land located in a residential subdivision. The bill redefines "residential subdivision" or "subdivision" to specify that the term refers to certain planned developments in which all land has been divided into two or more lots, rather than two or more parts, and is subject to certain restrictions.

C.S.H.B. 3347 authorizes a declaration of a property owners' association and any subsequently enacted declarations, subject to the authority of an association to amend a dedicatory instrument, to be amended at any time on a vote of at least 67 percent of the total votes entitled to be cast with respect to the declaration amendment. The bill specifies that if the declaration provides a lower percentage, the percentage in the declaration controls and specifies that, during the development period, amendments to the declaration require the joinder of the developer. The bill makes its provisions relating to the amendment of a declaration applicable only to a residential subdivision, or a mixed-use subdivision that contains residential units, in which property owners are subject to mandatory regular or special assessments and specifies that its provisions apply to

a declaration regardless of the date on which the declaration was created. The bill makes its provision relating to the amendment of a declaration inapplicable to the amendment of a declaration during a development period and defines "development period" for the purposes of the bill's provisions as a period stated in a declaration during which a declarant reserves a right to facilitate the development, construction, and marketing of the subdivision and a right to direct the size, shape, and composition of the subdivision. The bill specifies that its provisions relating to the amendment of a declaration do not preclude amendment of a declaration under other statutory authority.

C.S.H.B. 3347 requires a property owners' association to make its books and records open to and reasonably available for examination by an owner, a person designated in a writing signed by the owner as the owner's agent, or an owner's attorney or certified public accountant, in accordance with provisions of law relating to association records. The bill entitles an owner to obtain from the association copies of information contained in the books and records and removes a provision requiring an association to make its books and records available to an owner in accordance with the Texas Non-Profit Corporation Act. The bill removes a statutory provision requiring a property owners' association subject to the state's open records law to make its books and records available to any person requesting access to the books or records. The bill requires a document, if the document in an attorney's files and records relating to the association would be responsive to a legally authorized request to inspect or copy association documents, to be produced by using the copy from the attorney's files and records if the association has not maintained a separate copy of the document and specifies that this requirement does not require production of a document that constitutes attorney work product or that is privileged as an attorney-client communication. The bill specifies that provisions of law relating to association records apply to all property owners' associations and control over other law not specifically applicable to a property owners' association, with the exception of an association that is subject to the state's open records law.

C.S.H.B. 3347 requires an owner or the owner's authorized representative to submit a written request for access or information with regard to certain association records by certified mail, with sufficient detail describing the association's books and records requested, to the mailing address of the association or authorized representative as reflected on the most current management certificate. The bill requires the request to contain certain information and meet specified requirements and establishes procedures for the inspection, release, and reproduction of the association's books and records. The bill requires a property owners' association composed of more than 14 lots to adopt and comply with a document retention policy that includes, at a minimum, certain requirements specified under the bill's provisions. The bill authorizes a member of a property owners' association who is denied access to or copies of association books or records to which the member is entitled to file a petition 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 requesting relief. The bill sets out remedies the justice of the peace is authorized to grant upon finding that the member is entitled to access to or copies of the records. The bill entitles the association, if the association prevails in the action brought by the member, to a judgment for court costs and attorney's fees incurred by the association in connection with the action. The bill requires a person who brings an action against a property owners' association to send written notice to the association of the person's intent to bring the action on or before the 10th business day before the date the person brings the action and sets out content and delivery requirements for the notice. The bill defines "business day" for purposes of these provisions.

C.S.H.B. 3347 requires regular and special board meetings of a property owners' association to be open to owners, subject to the right of the board to adjourn a board meeting and reconvene in closed executive session to consider certain actions. The bill sets out other requirements and procedures regarding board decisions made in closed executive session, meeting location, recordkeeping, deadlines for notice and posting requirements, and other provisions regarding the conduct of meetings. The bill specifies that its provisions relating to open board meetings do not apply to a property owners' association that is subject to statutory provisions relating to open

meetings. The bill makes these provisions applicable to a meeting of a property owners' association board during the development period only if the meeting is conducted for the purpose of adopting or amending the governing documents, increasing the amount of regular assessments or adopting or increasing a special assessment, electing non-developer board members of the association or establishing a process by which those members are elected, or changing the voting rights of members of the association. The bill specifies that an action taken by a board at a meeting held in violation of its provisions is voidable. The bill defines "board meeting."

C.S.H.B. 3347 sets out provisions for appointing and removing members of the board and the officers of the property owners' association by the declarant and for the election of at least one-third of the board members. The bill sets out provisions relating the voting rights of an owner, the casting of an absentee or electronic ballot by an owner, and the solicitation for votes by absentee or electronic ballot. The bill requires ballots, including any written or printed evidence of any vote cast or given, to be preserved until the period for requesting a recount has expired. The bill requires notice to be provided to each owner that contains instructions on obtaining access to the posting on the website if an electronic ballot is posted on an Internet website and provides that the association board has the sole authority to prescribe or cause to be prescribed all proxy and ballot forms. The bill establishes that its provisions governing the voting of owners supersede any contrary provision in a dedicatory instrument, establishes that those provisions apply to all property owners' associations and control over other law not specifically applicable to a property owners' association, and exempts from those provisions a property owners' association subject to the state's open records law. The bill defines "electronic ballot."

C.S.H.B. 3347 authorizes an owner, not later than the 15th day after the date of the meeting at which the election was held, to require a recount of the votes. The bill sets out the required procedure for submitting a demand for a recount. The bill requires a property owners' association, at the expense of the owner requesting the recount, to retain for the purpose of performing the recount, the services of a person qualified to tabulate votes and sets out the qualifications for such a person. The bill provides a deadline by which any recount must be performed and requires the association, if the recount changes the results of the election, to reimburse the requesting owner for the cost of the recount. The bill requires the association to provide the results of a recount to the owner requesting the recount and specifies that any action taken by the board in the period between the initial election vote tally and the completion of the recount is not affected by any recount. The bill exempts from its provisions relating to recounting votes a property owners' association subject to the state's open records law.

C.S.H.B. 3347 specifies, in provisions relating to the notice a property owners' association is required to send to an owner before taking an enforcement action against the owner, that a suit filed against the owner is a suit to enforce a nonmonetary obligation and removes a provision specifying a suit other than a suit to collect a regular or special assessment or foreclose under an association's lien. The bill removes a provision specifying that the owner's entitlement to a reasonable period to cure the violation includes the avoidance of suspension unless the owner was given notice and a reasonable opportunity to cure a similar violation within the preceding six months. The bill requires the notice to inform the owner that the owner is authorized to request a hearing before the board on or before the 30th day after the date notice was mailed to the owner, rather than the 30th day after the date the owner receives the notice, and expands the information that must be included in the notice to include the date by which the owner is required 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 date specified on the notice 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 specifies that a shorter notice is permitted in the case of a threat to public health or safety. The bill makes the notice requirements inapplicable to a violation for which the owner has been previously given notice and the opportunity to exercise any rights available under this section in the preceding six months or a violation that is not of a curable nature.

C.S.H.B. 3347 authorizes a property owners' association, if the owner does not cure the violation

in the time provided and does not request a hearing before the board in the time provided, to assess a fine and requires the association to provide notice of the assessment to the owner. The bill makes any fine assessed void if the violation is of a curable nature and the property owner cures the violation before the specified expiration period for cure. The bill specifies that a violation is considered a threat to public health or safety, for purposes of required notice before enforcement action, if the violation could materially affect the physical health or safety of an ordinary resident. The bill requires a property owners' association or the association's agent, before the association may file a suit against an owner to collect a regular or special assessment or foreclose the association's lien on the owner's property, to send written notice to the owner by certified mail, return receipt requested, that describes the amount that is due the association and must be paid to avoid further collection actions and that specifies a date not earlier than the 30th day after the date the notice is sent by which the owner must cure the delinquency to avoid further collection actions. The bill requires a fine assessed by the 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 to establish a maximum fine amount for a continuing violation at which point the total fine amount is capped if the association allows fines for a continuing violation to accumulate against a lot or an owner. The bill authorizes a fine to be collected in the same manner as assessments under the dedicatory instrument. The bill requires a property owners' association composed of more than 15 lots 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 and sets out requirements for establishing such a schedule. The bill makes conforming and nonsubstantive changes.

C.S.H.B. 3347 makes certain statutory hearing provisions entitling an owner to request a hearing regarding the curing of a violation inapplicable if the association files a suit against an owner to collect a regular or special assessment or foreclose the association's lien on an owner's property.

C.S.H.B. 3347 prohibits a property owners' association from foreclosing the association's assessment lien if the debt securing the lien consists solely of amounts added to the owner's account to reimburse the association when the actual costs of compiling, producing, and reproducing information requested by the owner, as shown on a final invoice, exceed the association's estimated costs for which it required advanced payment and the owner does not pay the invoice by a specified date.

C.S.H.B. 3347 makes its provisions relating to board representation applicable only to a property owners' association created on or after January 1, 2012.

EFFECTIVE DATE

January 1, 2012.

COMPARISON OF ORIGINAL AND SUBSTITUTE

C.S.H.B. 3347 contains a provision not included in the original exempting 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 from certain provisions under the Texas Residential Property Owners Protection Act relating to association records, open board meetings, giving notice before an enforcement action, and alternate payment schedules for certain assessments.

C.S.H.B. 3347 contains a provision not included in the original making its provisions relating to the amendment of a property owners' association's declaration and any subsequently enacted declarations applicable to a mixed-use subdivision that contains residential units in which property owners are subject to mandatory regular or special assessments.

C.S.S.B. 3347 contains a provision not included in the original requiring a property owners' association to make its books and records open to and available for examination by a person designated in a writing signed by an owner as the owner's agent. The substitute differs from the original by removing a statutory provision retained in the original requiring a property owners' association subject to the state's open records law to make its books and records available to any person requesting access to the books or records. The substitute contains a provision not included in the original requiring a document, if the document would be responsive to a legally authorized request to inspect or copy association records, to be produced by using the copy from an attorney's files and records if the association has not maintained a separate copy of the document and specifying that this requirement does not require production of a document that constitutes attorney work product or that is privileged as an attorney-client communication.

C.S.H.B. 3347 differs from the original by requiring an owner or the owner's authorized representative to submit a request for access or information to certain association records by certified mail, whereas the original imposes that requirement on an owner or the owner's attorney or certified public accountant.

C.S.H.B. 3347, in provisions relating to a request for access to or information about a property owners' association's records and establishing procedures for the inspection, release, and reproduction of the association's books and records, differs from the original by the following:

- requiring the association to provide to a requestor of information a notice that states a date by which the information will be sent or made available that is not later than the 15th business day after the date the notice requesting the information is given, whereas the original sets a deadline of not later than the 30th business day after the date the notice is given;
- omitting a provision included in the original making an owner responsible for costs related to the compilation and reproduction of the requested information;
- containing a provision not included in the original requiring an association's board to adopt a records production and copying policy prescribing the costs the association will charge for compiling, producing, and reproducing the requested information;
- containing provisions not included in the original authorizing the inclusion of the costs of materials, labor, and overhead in those charges and establishing a cap on such costs;
- containing a provision not included in the original requiring the records production and copying policy to be recorded as a dedicatory instrument;
- containing a provision not included in the original prohibiting the association from charging for the information requested unless the policy has been recorded in accordance with the substitute's provisions;
- containing a provision not included in the original making an owner responsible for costs related to the requested information in the amounts prescribed by the policy; and
- containing a provision not included in the original requiring an association to estimate costs using amounts prescribed by the policy.

C.S.H.B. 3347 differs from the original by requiring a property owners' association composed of more than 14 lots to adopt and comply with a document retention policy that includes certain specified minimum requirements, whereas the original authorizes an association composed of more than 12 lots to adopt a document retention policy that supersedes the requirements otherwise specified and requires the retention of books and records on the schedule specified in the absence of the adoption of such a policy.

C.S.H.B. 3347 contains provisions not included in the original authorizing a member of a property owners' association who is denied access to or copies of association books or records to file a petition with the appropriate justice of the peace; specifying the remedies the justice of the

peace is authorized to grant upon finding in the member's favor; entitling the association to a judgment for court costs and attorney's fees if the association prevails in the action; setting a deadline for the member to provide notice to the association of the member's intent to bring the action; and defining "business day" for purposes of this provision.

C.S.H.B. 3347, in provisions governing open board meetings, differs from the original by setting out provisions relating to the definition of "board meeting," decisions made in the executive session, the location of board meetings, recordkeeping, notice requirements and posting deadlines, provision of notice by e-mail, posting requirements applicable to the continuance of a meeting on separate days, and the limited applicability of the substitute's provisions of a meeting during the development period of an association under certain circumstances, whereas the original sets out provisions relating to the general nature of any business to be considered in executive session, the time and place of the next meeting, and the inapplicability of these provisions to meetings of a board during a development period. The substitute differs from the original by setting out provisions relating to the method of communication for holding an open board meeting and for actions authorized by unanimous consent without a hearing that are different from those set out in the original. The substitute contains a provision not included in the original specifying that its provisions relating to open board meetings do not apply to an association that is subject to the state's open records law. The substitute contains a provision not included in the original specifying that an action taken by a board at a meeting held in violation of its provisions is voidable.

C.S.H.B. 3347 contains a provision not included in the original requiring ballots to be preserved until the period for requesting a recount has expired.

C.S.H.B. 3347 contains provisions not included in the original authorizing an owner to require a recount of votes after the election of a property owners' association, establishing requirements for the delivery of such demand, the retention of a qualified person to tabulate the votes in the recount, setting deadlines for the conduct of the recount, and the effect of the possible outcomes of the recount.

C.S.H.B. 3347 contains a provision not included in the original specifying, in provisions relating to the notice a property owners' association is required to send to an owner before taking an enforcement action against the owner, that a suit filed against the owner is a suit to enforce a nonmonetary obligation and removing a provision specifying a suit other than a suit to collect a regular or special assessment or foreclose under an association's lien. The substitute contains a provision not included in the original requiring that notice be sent to an owner before the association may file a suit to collect an assessment or foreclose the association's lien and establishing content and deadline requirements for that notice.

C.S.H.B. 3347 differs from the original by requiring a property owners' association composed of more than 15 lots to adopt an alternative payment schedule for an owner's payments for delinquent regular or special assessments or any other amount owed to the association without accruing additional penalties, whereas the original applies that requirement to an association composed of more than 12 lots.

C.S.H.B. 3347 contains a provision not included in the original making certain statutory hearing provisions inapplicable if the association files a suit against an owner to collect a regular or special assessment or foreclose the association's lien on an owner's property.

C.S.H.B. 3347 contains a provision not included in the original prohibiting a property owners' association from foreclosing the association's assessment lien if the debt securing the lien consists solely of amounts added to the owner's account when the association's actual costs of complying with the owner's information request, as provided on a final invoice, exceed the association's estimated costs for which it required advanced payment and the owner does not pay the invoice by a specified date.