

By: West

S.B. No. 1235

A BILL TO BE ENTITLED

AN ACT

1  
2 relating to real property that is subject to restrictive covenants  
3 and the operation of property owners' associations of subdivisions  
4 that are subject to restrictive covenants.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

6 SECTION 1. Section 5.006(a), Property Code, is amended to  
7 read as follows:

8 (a) In an action based on breach of a restrictive covenant  
9 pertaining to real property or a statute pertaining to real  
10 property subject to a restrictive covenant or to restrictive  
11 covenants to which real property is subject, the court may [~~shall~~]  
12 allow to a prevailing party [~~who asserted the action~~] reasonable  
13 attorney's fees in addition to the party's costs and claim.

14 SECTION 2. Section 202.004, Property Code, is amended by  
15 adding Subsections (d), (e), and (f) to read as follows:

16 (d) In evaluating an alleged or potential violation of a  
17 restrictive covenant, a property owners' association board may,  
18 notwithstanding any provision in a dedicatory instrument, elect to  
19 not enforce the restrictive covenant if the board, in the board's  
20 reasonable judgment, determines:

21 (1) the property owners' association's position is not  
22 sufficiently strong to justify taking any action or further action;

23 (2) the provision alleged to have been violated may be  
24 inconsistent with applicable law;

1           (3) the alleged violation is not of such a material or  
2 visible nature as to be objectionable to a reasonable person or to  
3 justify expending the property owners' association's resources;

4           (4) enforcement of the provision is not in the  
5 association's best interests, based on hardship, expense, or other  
6 reasonable criteria; or

7           (5) the facts of the particular circumstances, such as  
8 topography of the owner's land or unforeseen circumstances unique  
9 to the particular owner, justify the board's election to not  
10 enforce the restrictive covenant.

11           (e) An election by the property owners' association board to  
12 not enforce a restrictive covenant under Subsection (d) may not be  
13 considered a waiver of the association's authority to enforce any  
14 dedicatory instrument provision in the future.

15           (f) A property owners' association board shall document  
16 each election by the board to not enforce a restrictive covenant  
17 under Subsection (d) by noting in the minutes of the board meeting  
18 at which the election was made:

19           (1) the person who was not subjected to enforcement of  
20 the covenant;

21           (2) the specific covenant the board did not enforce;  
22 and

23           (3) the board's rationale for not enforcing the  
24 covenant.

25           SECTION 3. Chapter 202, Property Code, is amended by adding  
26 Sections 202.011, 202.012, 202.013, 202.014, and 202.015 to read as  
27 follows:

1       Sec. 202.011. RIGHT OF FIRST REFUSAL PROHIBITED. (a) In  
2 this section, "development period" means a period stated in a  
3 declaration during which a declarant reserves:

4           (1) a right to facilitate the development,  
5 construction, and marketing of the subdivision; and

6           (2) a right to direct the size, shape, and composition  
7 of the subdivision.

8       (b) To the extent a restrictive covenant provides a right of  
9 first refusal for the sale or lease of a residential unit or  
10 residential lot in favor of the property owners' association or the  
11 association's members, the covenant is void.

12       (c) This section does not apply to a restrictive covenant  
13 that provides a right of first refusal in favor of a developer or  
14 builder during the development period.

15       Sec. 202.012. REGULATION OF SOLAR ENERGY DEVICES. (a) In  
16 this section, "solar energy device" has the meaning assigned by  
17 Section 171.107, Tax Code.

18       (b) Except as otherwise provided by this section, a property  
19 owners' association may not include or enforce a provision in a  
20 dedicatory instrument that prohibits or restricts a property owner  
21 from installing a solar energy device.

22       (c) A provision that violates Subsection (b) is void.

23       (d) This section does not prohibit the inclusion or  
24 enforcement of a provision in a dedicatory instrument that  
25 prohibits a solar energy device that:

26           (1) as adjudicated by a court:

27                   (A) threatens the public health or safety; or

1                   (B) violates a law;

2                   (2) is located on property owned or maintained by the  
3 property owners' association;

4                   (3) is located on property owned in common by the  
5 members of the property owners' association; or

6                   (4) is located in an area on the property owner's  
7 property other than:

8                   (A) on the roof of the home; or

9                   (B) in a fenced yard or patio maintained by the  
10 property owner.

11           Sec. 202.013. RENTAL RESTRICTIONS. (a) Except as provided  
12 by Subsection (b), a property owners' association may not amend a  
13 dedicatory instrument to prohibit or restrict the rental of  
14 property subject to the dedicatory instrument without the consent  
15 of at least 51 percent of the total votes allocated to property  
16 owners subject to the dedicatory instrument.

17           (b) An amendment to a dedicatory instrument may require:

18                   (1) an owner to:

19                   (A) exercise due diligence in not leasing to an  
20 occupant who is a registered sex offender or who has a history of  
21 violent crime; or

22                   (B) terminate the possessory right of any tenant  
23 or occupant who is a registered sex offender or who has a history of  
24 violent crime;

25                   (2) all leases to be subject to the dedicatory  
26 instruments of the property owners' association; or

27                   (3) a minimum lease term of not more than six months.

1       Sec. 202.014. RESTRICTIONS REQUIRING CAPITAL IMPROVEMENTS.

2       (a) A dedicatory instrument may not be amended to retroactively  
3 require a person who owns property subject to the dedicatory  
4 instrument at the time the amendment is adopted to make a capital  
5 improvement to the owner's property that is not required before the  
6 amendment. A provision of a dedicatory instrument requiring an  
7 owner to make a capital improvement to the owner's property may only  
8 be adopted by a vote of at least 67 percent of the total votes  
9 allocated to property owners subject to the dedicatory instrument  
10 and may be applicable only to owners purchasing property subject to  
11 the dedicatory instrument after the provision is adopted.

12       (b) For the purposes of this section, "capital improvement"  
13 means items such as additional tree plantings, additional sodding,  
14 fence construction, hardscape installation, new construction, or  
15 any similar capital improvement. The term does not include repair  
16 or maintenance of existing improvements or the removal of  
17 conditions that are in violation of a dedicatory instrument.

18       Sec. 202.015. INJUNCTION; DAMAGES. (a) If a property  
19 owners' association or other representative designated by the  
20 property owners' association has violated, is violating, or is  
21 threatening to violate this chapter, a member of the property  
22 owners' association may bring a civil action against the property  
23 owners' association but may not bring an action against an  
24 association's officer or board member individually.

25       (b) A member of a property owners' association bringing an  
26 action under this section may seek:

27               (1) injunctive relief;

1           (2) damages in an amount equal to the greater of:

2                   (A) actual damages arising from the violation; or

3                   (B) \$1,500 for each violation; or

4           (3) both injunctive relief and damages as provided in  
5 this subsection.

6           (c) The court may increase an award under Subsection (b)(2)  
7 to an amount not to exceed three times the amount awarded under  
8 Subsection (b)(2) if the court finds that violations have occurred  
9 with a frequency that constitutes a pattern or practice.

10           (d) Each day a violation continues is not considered a  
11 separate violation for purposes of an assessment of damages.

12           (e) The court may award damages to a property owners'  
13 association for an action brought by a member of the property  
14 owners' association that the court finds frivolous or groundless in  
15 an amount that is not more than the greater of:

16                   (1) three times the association's actual damages; or

17                   (2) \$4,500.

18           (f) On or before the 30th day before the date a person brings  
19 an action under this section, the person must provide notice to the  
20 other party of the person's intent to bring an action under this  
21 section. The notice must be sent certified mail, return receipt  
22 requested, or delivered by the United States Postal Service with  
23 signature confirmation service.

24           SECTION 4. Chapter 209, Property Code, is amended by adding  
25 Sections 209.0035 and 209.0041 to read as follows:

26           Sec. 209.0035. INJUNCTION; DAMAGES. (a) If a property  
27 owners' association or other representative designated by the

1 property owners' association has violated, is violating, or is  
2 threatening to violate this chapter, a member of the property  
3 owners' association may bring a civil action against the property  
4 owners' association but may not bring an action against an  
5 association's officer or board member individually.

6 (b) A member of a property owners' association bringing an  
7 action under this section may seek:

8 (1) injunctive relief;

9 (2) damages in an amount equal to the greater of:

10 (A) actual damages arising from the violation; or

11 (B) \$1,500 for each violation; or

12 (3) both injunctive relief and damages as provided in  
13 this subsection.

14 (c) The court may increase an award under Subsection (b)(2)  
15 to an amount not to exceed three times the amount awarded under  
16 Subsection (b)(2) if the court finds that violations have occurred  
17 with a frequency that constitutes a pattern or practice.

18 (d) Each day a violation continues is not considered a  
19 separate violation for purposes of assessment of damages.

20 (e) The court may award damages to a property owners'  
21 association for an action brought by a member of the property  
22 owners' association that the court finds frivolous or groundless in  
23 an amount that is not more than the greater of:

24 (1) three times the association's actual damages; or

25 (2) \$4,500.

26 (f) On or before the 30th day before the date a person brings  
27 an action under this section, the person must provide notice to the

1 other party of the person's intent to bring an action under this  
2 section. The notice must be sent certified mail, return receipt  
3 requested, or delivered by the United States Postal Service with  
4 signature confirmation service.

5 Sec. 209.0041. AMENDMENT OF DEDICATORY INSTRUMENTS. (a)  
6 This section applies to a residential subdivision in which property  
7 owners are subject to mandatory membership in a property owners'  
8 association.

9 (b) This section applies to all dedicatory instruments  
10 regardless of the date on which the dedicatory instruments were  
11 created.

12 (c) This section does not apply to the amendment of a  
13 dedicatory instrument during a development period, as defined by  
14 Section 202.011.

15 (d) To the extent of any conflict with another provision of  
16 this title, this section prevails.

17 (e) Except as provided by Subsection (f), a dedicatory  
18 instrument may be amended only by a vote of at least 51 percent of  
19 the total votes allocated to property owners in the property  
20 owners' association, in addition to any governmental approval  
21 required by law.

22 (f) A rule or guideline that affects land owned, leased,  
23 maintained, or otherwise controlled by the property owners'  
24 association may be adopted or amended by majority vote of the  
25 association board. A rule or guideline that impacts the use and  
26 enjoyment of personal or real property owned exclusively by the  
27 owner or that may result in a fine or loss of privilege of a member



1 of the association may be adopted or amended only by a vote of at  
2 least 51 percent of the total votes allocated to property owners who  
3 cast votes by any permissible method in an association-wide vote.

4 (g) A property owners' association board by majority vote  
5 may adopt ministerial, office-related procedural policies, such as  
6 payment plan guidelines, a collections policy, an enforcement  
7 policy, or other similar ministerial, office-related procedural  
8 policies. The policy may outline circumstances under which or the  
9 manner by which enforcement remedies may be carried out but may not  
10 otherwise impact the use and enjoyment of personal or real property  
11 owned exclusively by the owner. The policy may not:

12 (1) create a power to:

13 (A) levy a fine; or

14 (B) impose a loss of a privilege on a member of  
15 the association; or

16 (2) expand the association's powers beyond the powers  
17 granted by any other dedicatory instrument.

18 (h) All ballots cast in an election that results in an  
19 amendment to a dedicatory instrument under this section are records  
20 of the property owners' association for the purposes of Section  
21 209.005.

22 (i) This section supersedes any contrary requirement in a  
23 dedicatory instrument.

24 (j) This section does not apply to a property owners'  
25 association that is subject to Chapter 552, Government Code, by  
26 application of Section 552.0036, Government Code.

27 SECTION 5. Section 209.006, Property Code, is amended to

1 read as follows:

2 Sec. 209.006. NOTICE REQUIRED BEFORE ENFORCEMENT ACTION.

3 (a) Before a property owners' association may suspend an owner's  
4 right to use a common area, file a suit against an owner other than a  
5 suit to collect a regular or special assessment or foreclose under  
6 an association's lien, charge an owner for property damage, or levy  
7 a fine for a violation of the restrictions or bylaws or rules of the  
8 association, the association or its agent must send ~~give~~ written  
9 notice to the owner by certified mail, return receipt requested, or  
10 delivered by the United States Postal Service with signature  
11 confirmation service to the owner at the owner's last known address  
12 as shown on the association's records.

13 (b) The notice must:

14 (1) describe the violation or property damage that is  
15 the basis for the suspension action, charge, or fine and state any  
16 amount due the association from the owner; ~~and~~

17 (2) except as provided by Subsection (d), inform the  
18 owner that the owner:

19 (A) is entitled to a reasonable period to cure  
20 the violation and avoid the fine ~~[or suspension unless the owner was~~  
21 ~~given notice and a reasonable opportunity to cure a similar~~  
22 ~~violation within the preceding six months]; and~~

23 (B) may request a hearing under Section 209.007  
24 on or before the 30th day after the date notice was delivered to the  
25 owner;

26 (3) specify the date by which the owner must cure the  
27 violation if the violation is of a curable nature and does not pose

1 a threat to public health or safety;

2 (4) specify the dollar amount of any fine the  
3 association seeks to levy; and

4 (5) specify each provision of the dedicatory  
5 instrument the owner is alleged to have violated [~~receives the~~  
6 notice].

7 (c) The date specified in the notice under Subsection (b)(3)  
8 must provide a reasonable period of at least 30 days for the owner  
9 to cure the violation if the violation is of a curable nature and  
10 does not pose a threat to public health or safety.

11 (d) Subsections (a) and (b) do not apply to a violation for  
12 which the owner has been previously given notice under this section  
13 and the opportunity to exercise any rights available under this  
14 section in the preceding six months.

15 (e) If the property owner does not cure the violation in the  
16 time provided by Subsection (c) and does not request a hearing under  
17 Section 209.007 in the time provided by Subsection (b)(2)(B), the  
18 property owners' association may assess the fine and shall provide  
19 notice of the assessment to the owner. If the property owner cures  
20 the violation before the expiration period for cure specified under  
21 Subsection (c), any fine assessed for the violation is void.

22 (f) For purposes of this section, a violation is considered  
23 a threat to public health or safety if the violation could  
24 materially affect the physical health or safety of an ordinary  
25 resident.

26 SECTION 6. Chapter 209, Property Code, is amended by adding  
27 Section 209.0061 to read as follows:

1       Sec. 209.0061. ASSESSMENT OF FINES. (a) A fine assessed by  
2 the property owners' association must be reasonable in the context  
3 of the nature and frequency of the violation and the effect of the  
4 violation on the subdivision as a whole. If the association allows  
5 finest for a continuing violation to accumulate against a lot or an  
6 owner, the association must establish a reasonable maximum fine  
7 amount for a continuing violation at which point the total fine  
8 amount is capped.

9       (b) If a lot occupant other than the owner violates a  
10 provision of the dedicatory instrument, the property owners'  
11 association, in addition to exercising any of the association's  
12 powers against the owner, may assess a fine directly against the  
13 nonowner occupant in the same manner as provided for an owner but  
14 may not require payment from both the owner and a nonowner occupant  
15 for the same violation.

16       (c) If the property owners' association assesses a fine  
17 against a nonowner occupant under this section, the notice  
18 provisions of Section 209.006 and the hearing provisions of Section  
19 209.007 apply to the nonowner occupant in the same manner as those  
20 provisions apply to an owner.

21       SECTION 7. Section 209.007, Property Code, is amended by  
22 amending Subsection (a) and adding Subsections (f), (g), (h), (i),  
23 and (j) to read as follows:

24       (a) If the owner is entitled to an opportunity to cure the  
25 violation, the owner has the right to submit a written request for a  
26 hearing to discuss and verify facts and resolve the matter in issue  
27 before a committee appointed by the board of the property owners'

1 association or before the board if the board does not appoint a  
2 committee. The written request must contain a statement of the  
3 grounds on which the owner believes the owner is not in violation  
4 and citations of the dedicatory instrument for each violation  
5 alleged.

6 (f) If the parties fail to reach agreement in or after the  
7 hearing described by this section, the property owners' association  
8 must file suit to uphold and enforce any fine sought to be assessed.  
9 The suit must be filed in a justice court or small claims court not  
10 later than the 180th day after the date of the hearing described by  
11 this section or an appeal under Subsection (b), whichever is later.  
12 The complaint must list each violation and be accompanied by  
13 citation of the dedicatory instrument for each violation. If the  
14 property owners' association does not file suit within the time  
15 prescribed by this subsection, the association's right to collect  
16 the fine is considered waived.

17 (g) Not later than the 30th day after the date a suit is  
18 filed under Subsection (f), the court shall hold an evidentiary  
19 hearing on the matter. The parties are not entitled to any  
20 discovery.

21 (h) At the evidentiary hearing, the property owners'  
22 association has the burden of proving by a preponderance of the  
23 evidence that the property owner has violated a restrictive  
24 covenant.

25 (i) The court shall determine whether a violation has  
26 occurred and, if so, whether the fine for the violation is  
27 reasonable considering the type, duration, and severity of the

1 violation.

2 (j) If the court finds that the position taken by either  
3 party is groundless or is taken in bad faith, the court may award  
4 the prevailing party's attorney's fees.

5 SECTION 8. (a) Section 5.006(a), Property Code, as amended  
6 by this Act, applies only to an action filed on or after the  
7 effective date of this Act. An action filed before the effective  
8 date of this Act is governed by the law in effect immediately before  
9 the effective date of this Act, and that law is continued in effect  
10 for that purpose.

11 (b) Sections 202.011 and 202.012, Property Code, as added by  
12 this Act, apply to a provision in a dedicatory instrument or a  
13 restrictive covenant enacted before, on, or after the effective  
14 date of this Act.

15 (c) Sections 202.015 and 209.0035, Property Code, as added  
16 by this Act, apply only to a cause of action that accrues on or after  
17 the effective date of this Act. A cause of action that accrues  
18 before the effective date of this Act is governed by the law in  
19 effect immediately before the effective date of this Act, and that  
20 law is continued in effect for that purpose.

21 (d) Sections 209.006 and 209.007, Property Code, as amended  
22 by this Act, apply only to an enforcement action initiated by a  
23 property owners' association on or after the effective date of this  
24 Act. An enforcement action initiated before the effective date of  
25 this Act is governed by the law in effect immediately before the  
26 effective date of this Act, and that law is continued in effect for  
27 that purpose.

1 SECTION 9. This Act takes effect January 1, 2012.