

BILL ANALYSIS

C.S.H.B. 2075
By: Anchia
Business & Industry
Committee Report (Substituted)

BACKGROUND AND PURPOSE

According to interested parties, after Hurricane Ike struck the Texas Gulf Coast in 2008, a number of condominium associations discovered they were unable to borrow money to pay for the necessary repairs because their dedicatory instruments did not permit them to secure a loan by pledging assessment. The interested parties contend that, as a result, the associations had to increase fees to cover these repair costs. C.S.H.B. 2075 seeks to address this issue by amending the Uniform Condominium Act.

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. 2075 amends the Property Code to remove the general authorization for the unit owners' association of a condominium, acting through its board of directors, to assign its right to future income, including the right to receive common expense assessments, to the extent the declaration that created the condominium so provides. The bill amends the definition of "declaration" to remove the specification that the instrument be recorded. The bill instead authorizes the association by resolution of its board to borrow money and to assign as collateral for the loan the association's right to future income, including the right to receive assessments, and the association's lien rights. The bill requires the loan or assignment to be approved by a vote of the association's members if a vote is required by the dedicatory instrument to borrow money or assign the association's right to future income or the association's lien rights, and authorizes the board to determine whether a vote for that purpose may be cast electronically, by absentee ballot, in person or by proxy at a meeting called for that purpose, or by written consent. The bill establishes that approval requires the consent of owners holding 67 percent of all voting interests if a lower approval threshold is not provided by the dedicatory instrument. The bill defines "dedicatory instrument" to mean each document governing the establishment, maintenance, or operation of a condominium regime and establishes that the term includes restrictive covenants, bylaws, or similar instruments governing the administration or operation of a unit owners' association; properly adopted rules and regulations of the unit owners' association; or all lawful amendments to the covenants, bylaws, instruments, rules, or regulations.

C.S.H.B. 2075 authorizes the mandatory property and commercial general liability insurance policies maintained by the association to provide for commercially reasonable deductibles as the board determines appropriate or necessary. The bill authorizes each owner of a unit to vote, regardless of whether the owner's unit or limited common element has been damaged or destroyed. The bill authorizes a vote by the unit owners regarding the repair or replacement of any insured portion of the condominium that is damaged or destroyed to be cast electronically or by written ballot if a meeting is not held for that purpose, or in person or by proxy at a meeting called for that purpose.

C.S.H.B. 2075 specifies that the cost of repair or replacement in excess of the insurance proceeds, rather than in excess of insurance proceeds and reserves, is a common expense and authorizes the board to levy an assessment to pay the expenses in accordance with each owner's common expense liability. The bill specifies that if the entire condominium is not repaired or replaced, the remainder of the insurance proceeds are required to be distributed to all the unit owners in accordance with each owner's undivided interest in the common elements unless otherwise provided in the declaration, rather than as their interest may appear. The bill requires the party who would be responsible for the repair in the absence of insurance to pay the cost for the repair of the unit or common element if the cost to repair damage to a unit or common element covered by the association's insurance is less than the amount of the applicable insurance deductible. The bill specifies that the dedicatory instruments determine payment for the cost of the association's deductible and costs incurred before insurance proceeds are available if the association's insurance provides coverage for the loss and the cost to repair the damage to a unit or common element is more than the amount of the applicable insurance deductible. The bill requires the board by resolution to determine the payment of those costs if the dedicatory instruments are silent and establishes that the costs are a common expense if the board does not approve a resolution. The bill establishes that such a resolution is considered a dedicatory instrument and must be recorded in each location in which the declaration is recorded. The bill authorizes the association, if damage to a unit or the common elements is due wholly or partly to an act or omission of any unit owner or a guest or invitee of the unit owner, to assess the deductible expense and any other expense in excess of insurance proceeds against the owner and the owner's unit.

C.S.H.B. 2075, in a provision authorizing the owner of a unit purchased at a foreclosure sale of the association's lien for assessments to redeem the unit and setting out procedures for such redemption, removes the specification making the provision applicable only to a unit being used for residential purposes and sets out procedures for redeeming the unit if a party other than the association is the purchaser.

C.S.H.B. 2075 requires the county clerk of each county in which a management certificate is required to be filed to record the management certificate in the real property records of the county and index the document as a "Condominium Association Management Certificate." The bill adds a temporary provision, set to expire January 1, 2015, to require each condominium unit owners' association that recorded a management certificate before September 1, 2013, to record a new management certificate on or before January 1, 2014, in order to ensure that all management certificates are recorded and indexed.

EFFECTIVE DATE

September 1, 2013.

COMPARISON OF ORIGINAL AND SUBSTITUTE

While C.S.H.B. 2075 may differ from the original in minor or nonsubstantive ways, the following comparison is organized and highlighted in a manner that indicates the substantial differences between the introduced and committee substitute versions of the bill.

INTRODUCED

SECTION 1. Section 82.002(c), Property Code, is amended to read as follows:

(c) This section and the following sections apply to a condominium in this state for which the declaration was recorded before January 1, 1994: Sections 82.005, 82.006,

HOUSE COMMITTEE SUBSTITUTE

SECTION 1. Section 82.002(c), Property Code, is amended to read as follows:

(c) This section and the following sections apply to a condominium in this state for which the declaration was recorded before January 1, 1994: Sections 82.005, 82.006,

82.007, 82.053, 82.054, 82.102(a)(1)-(7) and ~~(12)-(21)~~ [~~(12)-(22)~~], 82.108, 82.111, 82.113, 82.114, 82.116, 82.118, 82.157, and 82.161. The definitions prescribed by Section 82.003 apply to a condominium in this state for which the declaration was recorded before January 1, 1994, to the extent the definitions do not conflict with the declaration. The sections listed in this subsection apply only with respect to events and circumstances occurring on or after January 1, 1994, and do not invalidate existing provisions of the declaration, bylaws, or plats or plans of a condominium for which the declaration was recorded before January 1, 1994.

SECTION 2. Section 82.003(a), Property Code, is amended by adding Subdivision (11-a) to read as follows:

(11-a) "Dedictory instrument" means each document governing the establishment, maintenance, or operation of a condominium regime. The term includes a declaration or similar instrument subjecting real property to:
(A) restrictive covenants, bylaws, or similar instruments governing the administration or operation of a unit owners' association;
(B) properly adopted rules and regulations of the unit owners' association; or
(C) all lawful amendments to the covenants, bylaws, instruments, rules, or regulations.

SECTION 3. Section 82.102, Property Code, is amended by amending Subsection (a) and adding Subsections (f) and (g) to read as follows:

- (a) Unless otherwise provided by the declaration, the association, acting through its board, may:
- (1) adopt and amend bylaws;
 - (2) adopt and amend budgets for revenues, expenditures, and reserves, and collect assessments for common expenses from unit owners;
 - (3) hire and terminate managing agents and other employees, agents, and independent contractors;
 - (4) institute, defend, intervene in, settle, or

82.007, 82.053, 82.054, 82.102(a)(1)-(7), (a)(12)-(21), (f), and (g) [~~and (12)-(22)~~], 82.108, 82.111, 82.113, 82.114, 82.116, 82.118, 82.157, and 82.161. The definitions prescribed by Section 82.003 apply to a condominium in this state for which the declaration was recorded before January 1, 1994, to the extent the definitions do not conflict with the declaration. The sections listed in this subsection apply only with respect to events and circumstances occurring on or after January 1, 1994, and do not invalidate existing provisions of the declaration, bylaws, or plats or plans of a condominium for which the declaration was recorded before January 1, 1994.

SECTION 2. Section 82.003(a), Property Code, is amended by amending Subdivision (11) and adding Subdivision (11-a) to read as follows:

(11) "Declaration" means an ~~a recorded~~ instrument, however denominated, that creates a condominium, and any ~~recorded~~ amendment to that instrument.

(11-a) "Dedictory instrument" means each document governing the establishment, maintenance, or operation of a condominium regime. The term includes a declaration or similar instrument subjecting real property to:
(A) restrictive covenants, bylaws, or similar instruments governing the administration or operation of a unit owners' association;
(B) properly adopted rules and regulations of the unit owners' association; or
(C) all lawful amendments to the covenants, bylaws, instruments, rules, or regulations.

SECTION 3. Section 82.102, Property Code, is amended by amending Subsection (a) and adding Subsections (f) and (g) to read as follows:

- (a) Unless otherwise provided by the declaration, the association, acting through its board, may:
- (1) adopt and amend bylaws;
 - (2) adopt and amend budgets for revenues, expenditures, and reserves, and collect assessments for common expenses from unit owners;
 - (3) hire and terminate managing agents and other employees, agents, and independent contractors;
 - (4) institute, defend, intervene in, settle, or

compromise litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium;

(5) make contracts and incur liabilities relating to the operation of the condominium;

(6) regulate the use, maintenance, repair, replacement, modification, and appearance of the condominium;

(7) adopt and amend rules regulating the use, occupancy, leasing or sale, maintenance, repair, modification, and appearance of units and common elements, to the extent the regulated actions affect common elements or other units;

(8) cause additional improvements to be made as a part of the common elements;

(9) acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property, except common elements of the condominium;

(10) grant easements, leases, licenses, and concessions through or over the common elements;

(11) impose and receive payments, fees, or charges for the use, rental, or operation of the common elements and for services provided to unit owners;

(12) impose interest and late charges for late payments of assessments, returned check charges, and, if notice and an opportunity to be heard are given in accordance with Subsection (d), reasonable fines for violations of the declaration, bylaws, and rules of the association;

(13) adopt and amend rules regulating the collection of delinquent assessments and the application of payments;

(14) adopt and amend rules regulating the termination of utility service to a unit, the owner of which is delinquent in the payment of an assessment that is used, in whole or in part, to pay the cost of that utility;

(15) impose reasonable charges for preparing, recording, or copying declaration amendments, resale certificates, or statements of unpaid assessments;

(16) enter a unit for bona fide emergency purposes when conditions present an imminent risk of harm or damage to the common elements, another unit, or the occupants;

(17) ~~assign its right to future income, including the right to receive common~~

compromise litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium;

(5) make contracts and incur liabilities relating to the operation of the condominium;

(6) regulate the use, maintenance, repair, replacement, modification, and appearance of the condominium;

(7) adopt and amend rules regulating the use, occupancy, leasing or sale, maintenance, repair, modification, and appearance of units and common elements, to the extent the regulated actions affect common elements or other units;

(8) cause additional improvements to be made as a part of the common elements;

(9) acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property, except common elements of the condominium;

(10) grant easements, leases, licenses, and concessions through or over the common elements;

(11) impose and receive payments, fees, or charges for the use, rental, or operation of the common elements and for services provided to unit owners;

(12) impose interest and late charges for late payments of assessments, returned check charges, and, if notice and an opportunity to be heard are given in accordance with Subsection (d), reasonable fines for violations of the declaration, bylaws, and rules of the association;

(13) adopt and amend rules regulating the collection of delinquent assessments and the application of payments;

(14) adopt and amend rules regulating the termination of utility service to a unit, the owner of which is delinquent in the payment of an assessment that is used, in whole or in part, to pay the cost of that utility;

(15) impose reasonable charges for preparing, recording, or copying declaration amendments, resale certificates, or statements of unpaid assessments;

(16) enter a unit for bona fide emergency purposes when conditions present an imminent risk of harm or damage to the common elements, another unit, or the occupants;

(17) ~~assign its right to future income, including the right to receive common~~

~~expense assessments, but only to the extent the declaration so provides;~~

~~[(18)] suspend the voting privileges of or the use of certain general common elements by an owner delinquent for more than 30 days in the payment of assessments;~~

~~(18) [(19)] purchase insurance and fidelity bonds it considers appropriate or necessary;~~

~~(19) [(20)] exercise any other powers conferred by the declaration or bylaws;~~

~~(20) [(21)] exercise any other powers that may be exercised in this state by a corporation of the same type as the association; and~~

~~(21) [(22)] exercise any other powers necessary and proper for the government and operation of the association.~~

~~(f) Except as provided by Subsection (g), the association by resolution of the board of directors may:~~

~~(1) borrow money; and~~

~~(2) assign as collateral for the loan authorized by the resolution:~~

~~(A) the association's right to future income, including the right to receive assessments; and~~

~~(B) the association's lien rights.~~

~~(g) If a dedicatory instrument requires a vote of members of the association to borrow money or assign the association's right to future income or the association's lien rights, the loan or assignment must be approved as provided by the dedicatory instrument. If the dedicatory instrument does not provide voting procedures, the board may determine whether a vote for that purpose may be cast electronically, by absentee ballot, in person or by proxy at a meeting called for that purpose, or by written consent. If votes are cast by written consent and a lower approval threshold is not provided by the dedicatory instrument, approval requires the consent of owners holding 67 percent of all voting interests. If votes are cast by another method and a lower approval threshold is not provided by the dedicatory instrument, approval requires 67 percent of all votes cast.~~

SECTION 4. Section 82.111, Property Code, is amended by amending Subsections (c), (i), and (j) and adding Subsections (k), (l), and (m) to read as follows:

(c) If the insurance described by Subsections (a) and (b) is not reasonably

~~expense assessments, but only to the extent the declaration so provides;~~

~~[(18)] suspend the voting privileges of or the use of certain general common elements by an owner delinquent for more than 30 days in the payment of assessments;~~

~~(18) [(19)] purchase insurance and fidelity bonds it considers appropriate or necessary;~~

~~(19) [(20)] exercise any other powers conferred by the declaration or bylaws;~~

~~(20) [(21)] exercise any other powers that may be exercised in this state by a corporation of the same type as the association; and~~

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~~(1) borrow money; and~~

~~(2) assign as collateral for the loan authorized by the resolution:~~

~~(A) the association's right to future income, including the right to receive assessments; and~~

~~(B) the association's lien rights.~~

~~(g) If a dedicatory instrument requires a vote of members of the association to borrow money or assign the association's right to future income or the association's lien rights, the loan or assignment must be approved as provided by the dedicatory instrument.~~

The board may determine whether a vote for that purpose may be cast electronically, by absentee ballot, in person or by proxy at a meeting called for that purpose, or by written consent. If a lower approval threshold is not provided by the dedicatory instrument, approval requires the consent of owners holding 67 percent of all voting interests.

SECTION 4. Section 82.111, Property Code, is amended by amending Subsections (c), (i), and (j) and adding Subsections (k), (l), and (m) to read as follows:

(c) If the insurance described by Subsections (a) and (b) is not reasonably

available, the association shall cause notice of that fact to be delivered or mailed to all unit owners and lienholders. The declaration may require the association to carry any other insurance, and the association in any event may carry any other insurance the board considers appropriate to protect the condominium, the association, or the unit owners. Insurance policies maintained under Subsection (a) may provide for commercially reasonable deductibles as the board determines appropriate or necessary. This section does not affect the right of a holder of a mortgage on a unit to require a unit owner to acquire insurance in addition to that provided by the association.

(i) Except as provided by this section, any [Any] portion of the condominium for which insurance is required that is damaged or destroyed shall be promptly repaired or replaced by the association unless the condominium is terminated, repair or replacement would be illegal under any state or local health or safety statute or ordinance, or at least 80 percent of the unit owners[; including each owner of a unit or assigned limited common element that will not be rebuilt or repaired,] vote to not rebuild. Each owner of a unit may vote, regardless of whether the owner's unit or limited common element has been damaged or destroyed. A vote may be cast electronically or by written ballot, including an absentee ballot, if a meeting is not held for that purpose or in person or by proxy at a meeting called for that purpose. A vote to not rebuild does not increase an insurer's liability to loss payment obligation under a policy, and the vote does not cause a presumption of total loss. Except as provided by this section, the [The] cost of repair or replacement in excess of the insurance proceeds [and reserves] is a common expense, and the board may levy an assessment to pay the expenses in accordance with each owner's allocated interest. If the entire condominium is not repaired or replaced, any insurance proceeds attributable to the damaged common elements shall be used to restore the damaged area to a condition compatible with the remainder of the condominium, the insurance proceeds attributable to units and limited common elements that are not rebuilt shall be distributed to the owners of those units and the owners of the units to

available, the association shall cause notice of that fact to be delivered or mailed to all unit owners and lienholders. The declaration may require the association to carry any other insurance, and the association in any event may carry any other insurance the board considers appropriate to protect the condominium, the association, or the unit owners. Insurance policies maintained under Subsection (a) may provide for commercially reasonable deductibles as the board determines appropriate or necessary. This section does not affect the right of a holder of a mortgage on a unit to require a unit owner to acquire insurance in addition to that provided by the association.

(i) Except as provided by this section, any [Any] portion of the condominium for which insurance is required that is damaged or destroyed shall be promptly repaired or replaced by the association unless the condominium is terminated, repair or replacement would be illegal under any state or local health or safety statute or ordinance, or at least 80 percent of the unit owners[; including each owner of a unit or assigned limited common element that will not be rebuilt or repaired,] vote to not rebuild. Each owner of a unit may vote, regardless of whether the owner's unit or limited common element has been damaged or destroyed. A vote may be cast electronically or by written ballot if a meeting is not held for that purpose or in person or by proxy at a meeting called for that purpose. A vote to not rebuild does not increase an insurer's liability to loss payment obligation under a policy, and the vote does not cause a presumption of total loss. Except as provided by this section, the [The] cost of repair or replacement in excess of the insurance proceeds [and reserves] is a common expense, and the board may levy an assessment to pay the expenses in accordance with each owner's common expense liability. If the entire condominium is not repaired or replaced, any insurance proceeds attributable to the damaged common elements shall be used to restore the damaged area to a condition compatible with the remainder of the condominium, the insurance proceeds attributable to units and limited common elements that are not rebuilt shall be distributed to the owners of those units and the owners of the units to

which those limited common elements were assigned, or to their mortgagees, as their interests may appear, and the remainder of the proceeds shall be distributed to all the unit owners as their interests may appear. If the unit owners vote to not rebuild any unit, that unit's allocated interests shall be automatically reallocated on the vote as if the unit had been condemned, and the association shall prepare, execute, and record an amendment to the declaration reflecting the reallocation. Section 82.068 governs the distribution of insurance proceeds if the condominium is terminated.

(j) If the cost to repair damage to a unit or common element covered by the association's insurance is less than the amount of the applicable insurance deductible, the party who would be responsible for the repair in the absence of insurance shall pay the cost for the repair of the unit or common element.

(k) If the association's insurance provides coverage for the loss and the cost to repair the damage to a unit or common element is more than the amount of the applicable insurance deductible, the dedicatory instruments determine payment for the cost of the association's deductible and costs incurred before insurance proceeds are available. If the dedicatory instruments are silent, the board of directors of the association by resolution shall determine the payment of those costs, or if the board does not approve a resolution, the costs are a common expense. A resolution under this subsection is considered a dedicatory instrument and must be recorded in each location in which the declaration is recorded.

(l) If damage to a unit or the common elements is due wholly or partly to an act or omission of any unit owner or a guest or invitee of the unit owner, the association may assess the deductible expense and any other expense in excess of insurance proceeds against the owner and the owner's unit.

(m) The provisions of this section may be varied or waived if all the units in a condominium are restricted to nonresidential use.

which those limited common elements were assigned, or to their mortgagees, as their interests may appear, and the remainder of the proceeds shall be distributed to all the unit owners in accordance with each owner's undivided interest in the common elements unless otherwise provided in the declaration ~~[as their interests may appear]~~. If the unit owners vote to not rebuild any unit, that unit's allocated interests shall be automatically reallocated on the vote as if the unit had been condemned, and the association shall prepare, execute, and record an amendment to the declaration reflecting the reallocation. Section 82.068 governs the distribution of insurance proceeds if the condominium is terminated.

(j) If the cost to repair damage to a unit or common element covered by the association's insurance is less than the amount of the applicable insurance deductible, the party who would be responsible for the repair in the absence of insurance shall pay the cost for the repair of the unit or common element.

(k) If the association's insurance provides coverage for the loss and the cost to repair the damage to a unit or common element is more than the amount of the applicable insurance deductible, the dedicatory instruments determine payment for the cost of the association's deductible and costs incurred before insurance proceeds are available. If the dedicatory instruments are silent, the board of directors of the association by resolution shall determine the payment of those costs, or if the board does not approve a resolution, the costs are a common expense. A resolution under this subsection is considered a dedicatory instrument and must be recorded in each location in which the declaration is recorded.

(l) If damage to a unit or the common elements is due wholly or partly to an act or omission of any unit owner or a guest or invitee of the unit owner, the association may assess the deductible expense and any other expense in excess of insurance proceeds against the owner and the owner's unit.

(m) The provisions of this section may be varied or waived if all the units in a condominium are restricted to nonresidential use.

SECTION 5. Section 82.113(g), Property Code, is amended.

SECTION 6. Section 82.116, Property Code, is amended by adding Subsection (a-1) to read as follows:

(a-1) The county clerk shall file a management certificate in the real property records of the county under the label "Condominium Association Management Certificate" and organize the certificates in a manner that is easily accessible and searchable by the public.

SECTION 7. (a) The change in law made by this Act to Section 82.111, Property Code, applies only to payment of costs incurred on or after the effective date of this Act. Payment of costs incurred before the effective date of this Act is governed by the law in effect immediately before the effective date of this Act, and that law is continued in effect for that purpose.

(b) Section 82.113(g), Property Code, as amended by this Act, applies only to a condominium unit sold at a foreclosure sale on or after the effective date of this Act. A unit sold at a foreclosure sale before the effective date of this Act is subject to the law in effect immediately before the effective date of this Act, and that law is continued in effect for that purpose.

(c) Each condominium unit owners' association that recorded a management certificate under Section 82.116, Property Code, before the effective date of this Act shall record a new management certificate under that section on or before January 1, 2014.

SECTION 8. This Act takes effect September 1, 2013.

SECTION 5. Same as introduced version.

SECTION 6. Section 82.116, Property Code, is amended by adding Subsections (a-1) and (a-2) to read as follows:

(a-1) The county clerk of each county in which a management certificate is filed as required by this section shall record the management certificate in the real property records of the county and index the document as a "Condominium Association Management Certificate."

(See Subdivision (a-2) below.)

SECTION 7. (a) The change in law made by this Act to Section 82.111, Property Code, applies only to payment of costs incurred on or after the effective date of this Act. Payment of costs incurred before the effective date of this Act is governed by the law in effect immediately before the effective date of this Act, and that law is continued in effect for that purpose.

(b) Section 82.113(g), Property Code, as amended by this Act, applies only to a condominium unit sold at a foreclosure sale on or after the effective date of this Act. A unit sold at a foreclosure sale before the effective date of this Act is subject to the law in effect immediately before the effective date of this Act, and that law is continued in effect for that purpose.

(a-2) To ensure that all management certificates are recorded and indexed as provided by Subsection (a-1), each condominium unit owners' association that recorded a management certificate under this section before September 1, 2013, shall record a new management certificate on or before January 1, 2014. This subsection expires January 1, 2015.

SECTION 8. Same as introduced version.