SUBJECT: Enhancing prosecution authority over developers of colonias

COMMITTEE: Land and Resource Management — committee substitute recommended

VOTE: 6 ayes — Saunders, Mowery, Combs, Howard, Krusee, B. Turner

0 nays

3 absent — Alexander, Hamric, Hilderbran

WITNESSES: For — Ronald B. Rodenhaven

Against — None

On — Javier Guajardo, Office of the Attorney General

BACKGROUND: Colonias are residential subdivisions usually found in unincorporated areas of counties along the Texas-Mexico border. They often lack sewers, water, electric or gas services and paved roads, even though such services may have been promised to homeowners by a land developer. The unsanitary conditions have caused numerous health problems. As many as 340,000 people live in Texas colonias, by some estimates.

The Texas Water Development Board (TWDB) has been authorized to issue up to $250 million in general obligation bonds for the Economically Distressed Areas Program (EDAP). Voters authorized a $100-million bond program in 1989 and in 1991 approved an additional $150 million in bonds. The federal government has also set aside $150 million for infrastructure projects within the colonias area. Counties eligible for help include those bordering Mexico and those with a per capita income averaging 25 percent below, and an unemployment rate averaging 25 percent above, the state average for the prior three years.

The 1989 colonias legislation also called for the TWDB, the TNRCC, and the Texas Department of Health to develop Model Subdivision Rules (MSRs) under the Texas Water Code. An EDAP-eligible county must adopt these or similar rules before any entity in the county can apply for EDAP financial assistance to plan or build water and/or wastewater

facilities or for the Colonia Plumbing Loan Program (CPLP), which provides funding for utility connections and plumbing installation in residences. A city seeking funds must adopt the MSRs before applying for financial assistance from either program. Enforcement of the MSRs under the current law is the responsibility of the local county attorney and the attorney general.

The MSRs require landowners in border counties who wish to subdivide their property into residential lots of five acres or less to file a plat and provide a description of the water and wastewater facilities that will be constructed and the date they will be available. The MSRs also establish minimum standards for water and wastewater facilities in the subdivision and require that a licensed engineer certify that the proposed facilities comply with these standards. In addition, no more than one dwelling per lot is allowed, and criteria must be identified governing the distance that houses must be set back from the roads or property lines to ensure proper operation of water supply and sewer services.

The Attorney General's Office or county attorney may file a court action to rectify any reported violation. Generally, the case is tried in state district court and venue is set in the county in which the property is located.

DIGEST:

CSHB 1001 would give affected counties enforcement authority to regulate subdivisions in economically distressed areas, impose platting requirements and service requirements on persons selling property in economically distressed subdivisions and impose civil and criminal penalties for failure to comply. CSHB 1001 would also give regulatory authority to the Texas Natural Resource Conservation Commission (TNRCC) over counties offering utility services.

Local Government Code Chapter 232 would be divided into Subchapter A, provisions dealing with subdivisions generally, and a new Subchapter B for economically distressed subdivisions that would both codify the rules that the TWDB already imposes on subdivisions for EDAP funding and add new rules. The rules would:

• require a subdivider of land to have a plat prepared and filed with the county clerk for each subdivided portion, certified by a registered engineer, describing the land and including:

  • a description (in English and Spanish) of the water and sewer facilities or when those facilities will be available,
  • a registered engineer's certificate that the water and sewer facilities constructed or intended to be constructed are suitable for the land,
  • adequate drainage for the land;
  • certification that the water, sewer, gas, and electricity connections meet or will meet minimum state standards;

• require the subdivider to provide water, sewage, drainage, roads, and gas and electric utilities complying with state minimum standards;

• require that the plat filed by the subdivider be approved by the commissioners court of the county in which the land is located;

• prohibit a county commissioners court from certifying a plat located in a known floodplain unless there is a restrictive covenant prohibiting placing a residence on that subdivision or if the housing in that area qualified for Federal Emergency Management Agency insurance;

• require that before a county commissioners court approve a subdivision, the court must adopt reasonable specifications to provide adequate drainage and require any purchase contracts between a purchaser and subdivider include a statement describing how and when water, sewer, gas, and electric services will be provided to the subdivision;

• require the commissioners court to certify or deny certification to a plat upon a request by a subdivider, owner of a subdivided lot, or a utility, within 20 days of the request for certification;

• permit the connection of utilities in any subdivided land only if the commissioners court certified the plat;

• prohibit the sale or lease of subdivided property without a plat certified by the commissioners court;

• require the county to adopt the MSRs developed by the TWDB and prohibit variance from those rules except as authorized within the bill;

• allow the commissioners court to grant an extension of time for providing water and sewer service to an area whose plat had been approved, but only if the extension would not result in an occupied residence being without sewer or water service;

• require the commissioners court to require a subdivider of land to execute a bond or cash deposit in an amount that the commissioners court determines is reasonable for the amount of land covered subject to forfeit if the water and sewer facilities required by the MSRs are not installed within the time stated on the plat or any extension of time;

• make it a Class A misdemeanor, maximum penalty of one year in jail and a $4,000 fine, to knowingly or intentionally make a misrepresentation or fail to accurately describe the availability of water and sewage facilities or electric and gas utilities in any advertisement related to the subdivided land, or for a subdivider to knowingly fail to file a plat or fail to timely comply with the requirements of the plat for the installation of water and sewer facilities. If at the time of trial it was shown that the subdivider caused five or more residences to be inhabited that had not been platted or whose plats had not been complied with, the offense would be a state jail felony, maximum penalty of two years in jail and/or a $10,000 fine;

• establish conflict-of-interest rules prohibiting a member of the commissioners court with an interest in subdivided land from voting on the certification of a plat of subdivided land and make it a Class A misdemeanor to fail to comply with the conflict-of-interest provisions;

• subject a subdivider of land who allowed the sale of subdivided land that had not been platted or whose plat had not been certified to civil penalties of $10,000 - $15,000 for each lot conveyed and for those lots whose plats had been certified, but the subdivider had not followed, $500-$1000 per violation per day, up to $5,000 per day;

• allow the attorney general, or the district, criminal district or county attorney to take action on behalf of the county to enjoin the violation or

threatened violation of these provisions, assess civil or criminal penalties for the violation of these provisions, or require replatting;

• waive governmental immunity for any civil or criminal actions brought for violation of these provisions so long as the attorney general, commissioners court, and the subdivider of the land at issue are given 90 days notice before an action is commenced;

• allow a private person to bring a civil suit to declare the sale of property void and recover the value of improvements, costs of transporting potable water and medical costs caused by the lack of water or sewage from the seller. The plaintiff in such a suit could recover exemplary damages and could be awarded court costs and reasonable attorney's fees;

• require that any subdivision in an affected county that does not have water and sewer facilities or gas and electric utilities or has never been platted must be replatted in accordance with these provisions unless a plat meeting all applicable state and local standards was filed and approved by the commissioners court and the subdivision meets all current state minimum standards for water and sewer services;

• not apply if the subdivision of land was incident to the conveyance of the land as a gift;

• allow the commissioners court to grant variance from these provisions, including a delay of two years for the installation of utilities, if the attorney general was notified of the variance and the subdivider of the land provides at no cost five gallons of potable water per day per resident and portable sanitary wastewater disposal facilities until water and sewer facilities that meet state standards were operational;

CSHB 1001 would allow counties that provide water service and utilities to operate under the same rules as municipal utilities districts (MUDs). Rules relating to MUDs are in Chapter 402 of the Local Government Code.

CSHB 1001 would allow residents of economically distressed subdivisions to appeal to the TNRCC rate decisions that adversely affect them.

TWDB would have to consult with the Office of the Attorney General when adopting new rules for the EDAP.

CSHB 1001 would prohibit the dispersal of federal funds to counties not complying with the MSRs. It would require the TWDB to make a quarterly report to the state updating the actions in these areas for the previous quarter.

A political subdivision holding a certificate of convenience and necessity for water and wastewater service could charge for service to economically distressed areas higher rates than for those in the current service area. The rates could be the higher of the cost of service or 15 percent higher than the rates currently charged other customers.

CSHB 1001 would raise the civil penalties for violation of a rule adopted by a county or municipality from $50-$1,000 for each violation but not more than $5,000 per day to $1,000-$10,000 per violation but not more than $50,000 per day. It would also make knowing or intentional violation of the rules a Class A, instead of a Class B, misdemeanor.

CSHB 1001 would set venue for civil actions involving violations of the provisions included in the bill. Venue for such actions would be proper in the county of the defendant’s residence, the county in which the violation occurred, or in Travis County. Venue for criminal actions resulting from the violations of these provisions would be the county in which an element of the violation took place or Travis County.

The Office of the Attorney General could inform the TNRCC executive director of possible violations of the MSRs, which TNRCC could investigate. The attorney general could institute a civil suit for injunctive relief or civil penalties for violations or threatened violations of the EDAP rules of the Water Code.

CSHB 1001 would also make a number of conforming amendments to the Local Government Code and the Water Code and add the phrase "affected county" to in provisions for municipalities and other political subdivisions subject to review by the TNRCC. CSHB would repeal those sections of the Local Government Code that repeat or conflict with new sections.

The bill would take effect September 1, 1995.

SUPPORTERS SAY:

The colonia regions of Texas are some of the United States' poorest communities, with conditions that are the closest thing to the Third World in this country. Colonias developers purchase very cheap land, sometimes in flood plains, and use their political connections to resell that land to immigrants from Mexico. The developers can make a huge return on their investment because they fail to provide many of the services that are taken for granted in other parts of Texas. The lack of such things as paved roads, water and sewer facilities and gas and electric utilities substantially cut the cost of the land to the developer and even to the purchaser, but leave hundreds of thousands of people living in squalor.

In 1989 the Legislature heard horror stories of children in these settlements with numerous medical problems caused by the unsanitary conditions such as raw sewage in open drains. The 71st Legislature enacted SB 2, which provided funding to establish the needed services to these areas and also set the original development restrictions. While this law took a strong stand and brought this problem to the attention of the nation, the developers have continued to sell undeveloped land and as many as 67,000 people have moved into colonias regions in the past three years. CSHB 1001 proposes dramatic steps to stop further expansion of these colonias.

One part of this legislation is the codification of the model rules. CSHB 1001 requires these rules to be adopted before any funds may be dispersed to the county. These rules would limit any additional undeveloped subdivisions and would require those subdivisions that are not developed to be have basic facilities established.

While the rules are important, it is essential to ensure that violations of such rules will be punished. This legislation would give the attorney general or the county attorney the ability to impose substantial criminal and civil penalties on violators of these rules. It would also give the purchaser of such land the right to recover their damages from the seller.

CSHB 1001 would clearly place colonias under the regulatory authority of various state agencies and the attorney general. In some situations more regulation might seem to be more government intervention, but the

absolutely deplorable conditions in these communities justify stricter standards.

About 1,400 colonias now cover hundreds of square miles. The counties that contain more than 94 percent of the total colonia population have adopted rules, but the counties that have the greatest potential for colonia growth have not. Broadening enforcement authority could help prevent further colonia growth in undeveloped areas.

The bill would severely limit the ability of a county to give a variance or get around these rules. This aspect of the legislation is essential because of the possibility of that county-level abuse and corruption could continue. However, CSHB 1001 would create enough flexibility to work around these restrictions for property that has adequate water and sewage facilities. Once those are completed, property would not be subject to any more restrictions than in other areas.

OPPONENTS SAY:

One problem reported with the MSRs as they are now being enforced is that they adversely affect people who do not live in colonias but lack utility service. When these people, who often have lived on parcels of land for many years, try to put in utility service they are now required to file a certified plat of the land and have that plat approved by the commissioners court in order to have any utilities hooked up. This process can be quite expensive and often deters the owner of the land from having utilities hooked up. The commissioners courts need variance authority for such situations.

NOTES:

The committee substitute to HB 1001 added the provisions reorganizing Chapter 232 and also added the following provisions:

• prohibition from building in a floodplain;

• a number of references to persons are changed to subdividers to affect only colonia developers;

• authorizing a private person to sue the subdivider for damages; and

• authorizing political subdivisions to charge cost of service rates for service to economically distressed areas.

Several provisions were removed from the substitute, including:

• placing advertising action under the Deceptive Trade Practices Act;

• altering the Property Code to change the law regarding contracts for deed;

• mandatory language to be included in any conveyance of property; and

• certain changes to the Tax Code.

Among related bills, SB 542 by Rosson, which passed the Senate on March 8 by 29-0 and was referred to the House Land and Resource Management Committee, would require land developers to acquire a new permit from the county commissioners court before they develop land subdivided before the state's model subdivision law was enacted. SB 336 by Rosson and Truan, which passed the Senate on March 13 and referred to the House Business and Industry Committee, would require real estate developers to record contracts of deed (the usual instrument used to convey colonia properties) at the county courthouse. HB 1824 by Pickett, which passed the House on second reading yesterday, would authorize the El Paso Water Utilities Public Service Board (PSB) to charge residents in the greater Canutillo service area water and sewer rates higher than those paid by residents of the city of El Paso. HB 1824 would set a ceiling of 115 percent of in-city rates for the first three years of water and sewer service.