SUBJECT: Revising colonias regulations

COMMITTEE: Land and Resource Management — committee substitute recommended

VOTE: 8 ayes — Walker, Crabb, Bosse, F. Brown, Hardcastle, Howard, Krusee, Mowery

0 nays

1 absent — B. Turner

SENATE VOTE: On final passage, April 22 — voice vote

WITNESSES: For — Tommy Duck, Texas Rural Water Association; Andrew Erben, Texas Association of Builders; Jesse Gutierrez, Mexican American Legal Defense and Education Fund; John Henneberger, Border Low Income Housing Coalition; Amy Johnson, Water Works; Blanca Juarez, Colonias Unidas; Ricardo Mireles, Colonia Sun Country Estates; Melissa G. Perez, Para Nuestros Hijos - Colonia Mile 4; Andrew Ramirez Robertson, Border Water Works; Jose R. Rodriquez, El Paso County and El Paso County Attorney's Office; Aurora Solis, Para Nuestros Hijos - 3½ Mile Colonia

Against — None

On — Craig D. Pedersen and Jonathan Steinberg, Texas Water Development Board

BACKGROUND: Colonias are low income communities in unincorporated subdivisions that lack paved roads and basic services such as water, wastewater treatment, and electricity. The Texas Water Development Board estimates that there are 1,500 colonias in Texas with an estimated population of 400,000.

In 1989, the Legislature enacted SB 2, creating the Economically Distressed Areas Program (EDAP) to fund water and wastewater service provision in colonias through general obligation bonds. Economically distressed areas must meet certain criteria to be eligible for funding, including a requirement that 80 percent of the dwellings in the area must have been occupied as of June 1, 1989, or 50 percent of the dwellings if EDAP-funded services are

provided through common or regional facilities. SB 2 also established guidelines for model subdivision rules to regulate rural residential development in counties with serious colonia problems. The model rule guidelines appear in Water Code, chapter 16, subchapter J.

In 1995, the Legislature enacted HB 1001, creating a new subchapter B under Local Government Code, chapter 232 to apply strict platting requirements to rural residential subdivisions in certain counties. "Subchapter B counties" must be located at least partially within 50 miles of an international border and must have per-capita income at least 25 percent below the state average and unemployment rates at least 25 percent above the state average. HB 1001 also prevented the hookup of utility services, including water, wastewater, gas, and electricity, in unplatted subdivision lots in Subchapter B counties.

In 1997, the Legislature enacted SB 570, creating a new subchapter C under Local Government Code, chapter 232 to apply platting requirements for rural residential subdivisions that are similar to but not as strict as subchapter B requirements. "Subchapter C counties" meet the income and unemployment criteria for subchapter B counties but are not located within 50 miles of an international border.

For additional background, see House Research Organization Focus Report Number 76-10, *Colonias Legislation: History and Results*, April 16, 1999.

DIGEST:

CSSB 1421 would make revisions concerning the provision of water and wastewater services to colonias, enforcement and compliance with laws to limit colonia proliferation, and coordination of colonia policies among state agencies and local governments.

Platting Exemptions

Variances from platting requirements. CSSB 1421 would authorize the commissioners court of a subchapter B county to grant a delay or variance to a subdivider of an unplatted subdivision or to a resident purchaser of an unplatted subdivision lot from compliance with the following subdivision requirements:

- a provision of and a description of drainage requirements;
- a right-of-way for main arterial roads of a subdivision of between 50 and

100 feet;

- a right-of-way for other subdivision roads of between 40 and 70 feet;
- a shoulder-to-shoulder width on main arterial roads of a subdivision of between 32 and 56 feet;
- a shoulder-to-shoulder width on other subdivision roads of between 25 and 35 feet;
- reasonable specifications for the construction of each road based on expected road usage and adequate road drainage requirements;
- solid waste disposal meeting minimum state standards;
- a sufficient and adequate number of roads;
- electric and natural gas services;
- flood management standards under the National Flood Insurance Act;
- model subdivision rule requirements for the distance that a structure must be set back from roads or property lines; and
- model subdivision rule requirements for the number of single-family, detached homes allowed per lot.

If the commissioners court found that the subdivider that created the subdivision no longer owned any subdivision property, the court could grant a delay or variance only if:

- a majority of the subdivision lots were sold before September 1, 1995;
- a majority of the resident purchasers in the subdivision signed a petition supporting the delay or variance;
- the person requesting the delay or variance submitted to the commissioners court a description of the water and wastewater facilities that would serve the subdivision, a statement specifying the date by which the facilities would be fully operational, and a statement signed by a licensed engineer certifying that the plans for the facilities would meet minimum state standards;
- the court found that compliance with the specific platting requirements for which a delay or variance was requested would be impractical or contrary to the health or safety of the subdivision residents at the time of the request; and
- the subdivider that created the unplatted subdivision had not violated federal, state, or local law in subdividing the land, if the subdivider was the person requesting the delay or variance.

If the commissioners court found that the subdivider that created the

subdivision still owned subdivision property, the court could grant a provisional delay or variance only if the conditions listed above were met. The court could issue a final delay or variance only if it had not received objections from the attorney general within 90 days of submitting to the attorney general the record of proceedings for consideration of the delay or variance.

The commissioners court would have to keep a record of the proceedings for consideration of a delay or variance, including documentation of the information submitted to meet the requirements for a delay or variance. The information would have to include any findings specifying the reasons why the court determined that compliance with current requirements would be impractical or contrary to the health or safety of subdivision residents.

The court would have to submit a copy of the record to the attorney general. The failure of the attorney general to comment on or object to a delay or variance could not be considered as a consent to the validity of the delay or variance granted. The authority to grant delays or variances would not affect any civil or criminal court cases against subdividers for violation of law nor any penalties imposed on subdividers.

Exceptions to prohibition of utility service. Municipalities and subchapter B counties could provide utility services to unplatted land if the land was not subdivided after September 1, 1995, and water service was available within 1,000 feet of the land, or if a water service provider operating more than 1,000 feet from the land determined that it would be feasible to extend service to the land. Under these conditions, utility services could be provided if the person requesting the services submitted an affidavit stating that the person did not obtain the land from a subdivider or a subdivider's agent after September 1, 1995.

Plumbing license exemptions. The bill would allow residential water supply or sewer connections for projects in subchapter B counties to be undertaken without a plumbing license if the work was performed by an organization certified by the Texas Natural Resource Conservation Commission (TNRCC) to provide self-help project assistance. The organization would have to provide the Texas State Board of Plumbing Examiners (TSBPE) with the specific project location, duration, and other information required by the

board at least 30 days before the date the project would begin in order to perform the work without a license.

If an organization failed to submit the required information, the permission to work without a license would be invalidated, and any unlicensed individual or entity performing such work would be subject to penalties for plumbing without a license. TSBPE could provide training to self-help organizations.

Administrative Reforms

Economically Distressed Area criteria. CSSB 1421 would remove the 80 percent and 50 percent dwelling occupancy requirements as of June 1, 1989, for EDAP eligibility. The bill would add a new requirement that an established residential subdivision, as determined by the Texas Water Development Board (TWDB), was located in the area as of June 1, 1989.

Certificates of convenience and necessity. TNRCC would have to consider the efforts of a public utility or water supply or sewer service corporation to enforce the model subdivision rules in determining whether to grant a certificate of public convenience and necessity to the utility or corporation. TNRCC would have to develop a standard method to determine which utility or corporation was the most capable under managerial, financial, and technical standards of providing continuous and adequate service among multiple applicants. If all other conditions were equal, TNRCC would have to award the certificate to the utility or corporation that was most capable of providing the service as determined under the standard method.

Review of EDAP engineering contracts. The executive administrator of TWDB would have to review and approve the selection process used by a political subdivision to procure engineering services for facility engineering in economically distressed areas. The executive administrator could help a political subdivision select an engineering service provider. TWDB would have to adopt rules for selecting engineering service providers by political subdivisions that received EDAP funding.

TWDB could terminate a contract between the board and a political subdivision for facility planning under an EDAP grant if the board determined that the planning activities of the subdivision were inadequate or not

completed in a timely manner. TWDB could perform or contract for the facility engineering itself, either on behalf of or in consultation with the political subdivision.

Nuisance to public health and safety. The Texas Department of Health (TDH), instead of TNRCC, would be responsible for determining if a nuisance to public health and safety was present in an area to be served by a project. The determination of a nuisance would allow TWDB to provide EDAP funds without requiring at least 50 percent repayment from the project applicant.

Design and construction grant applications. The application of a political subdivision for EDAP assistance would have to include a written determination by TNRCC of the managerial, financial, and technical capacity of the applicant to operate the system for which funding was requested, in addition to the other requirements listed in Water Code, sec. 17.927.

TWDB would have the following options after reviewing an EDAP project application, in addition to approving or denying the application outright:

- approve the plan and application subject to requirements for the applicant to obtain the managerial, financial, and technical capacity necessary to operate the project;
- deny the application and identify the requirements or steps the applicant would have to complete before the applicant could be reconsidered for financial assistance; or
- deny the application and issue a determination that a service provider other than the applicant was necessary or appropriate to undertake the proposed project, if the board found that the applicant could not obtain the needed managerial, financial, or technical capacity.

Funding Provisions

Authorization for TNRCC grants. TNRCC could award grants for conservation or environmental protection. TNRCC would have to establish procedures for awarding a grant and for making grant payments. A grant could be awarded only for a purpose consistent with the purposes and

jurisdiction of TNRCC under law. Each activity funded by a grant would have to relate directly to a purpose specified in the grant.

The executive director of TNRCC would have to establish eligibility requirements for each grant and the method of selecting the recipient. Eligibility for grants would be limited to:

- state agencies or political subdivisions within any state of the United States;
- agencies of the federal government;
- state higher education institutions of any state; and
- persons authorized to develop or implement a comprehensive conservation and management plan under the Federal Water Pollution Control Act (33 U.S.C. Sec. 1330) for a national estuary plan in Texas.

TNRCC would have to solicit proposals or applications for a grant under the bill, unless the executive director determined that the solicitation of proposals or applications would not feasible and that the direct awarding of a grant would be in the best interests of the state. The executive director would have to specify the selection criteria for the grant, which would have to include evaluation and scoring of fiscal controls, project effectiveness and cost, and previous experience with grants and contracts, along with the possibility and method of making multiple awards.

If TNRCC solicited proposals for a partner to apply jointly for a federal grant, the executive director would not have to solicit again for making the pass-through grant to the partner if the commission and the partner were awarded the grant. The executive director would have to publish grant solicitation information on TNRCC's electronic business daily.

To fund a grant award, TNRCC could use state or federal funds appropriated for grants, federal money for making pass-through grants, and state or federal grant money appropriated for a purpose that was consistent with a purpose of a TNRCC grant, as determined by the executive director.

County bonds for water and sewer service. EDAP-eligible counties could issue bonds secured by a pledge of revenues derived from the operation of water or wastewater service systems. The bonds would have to be used for acquisition, construction, or repair of water and wastewater facilities.

Enforcement and Compliance

Subchapter B and C county regulations. The bill would apply Local Government Code, chapter 232, subchapter B to *any* county with part of its area located within 50 miles of an international border. The bill would remove the income and unemployment requirements to qualify for subchapter B regulations. The bill would apply subchapter B regulations to land that was subdivided into two or more lots, instead of four or more.

The bill would authorize subchapter B and C counties to enforce platting requirements in the extraterritorial jurisdiction (ETJ) of a municipality within the county. Persons who subdivided land in the ETJ of a municipality in a subchapter B or C county would have to file a plat with the municipality and the county if a plat was required by both governmental entities. If one of the entities did not require a plat, the subdivider would have to obtain a certificate from the non-requiring entity stating that the entity did not require a plat and would have to attach it to the plat filed with the other entity.

The bill would make a number of conforming changes to reflect changes in the definition of counties eligible for subchapter B or C regulation.

Enforcement of model subdivision rules. A person who violated a municipal or county rule adopted under Water Code, chapter 16, subchapter J or Local Government Code, chapter 232, subchapter B or C would be liable for a civil penalty of $500 to $1,000 for each violation and each day of violation, subject to a maximum penalty of $5,000 each day. The attorney general or an attorney representing the municipality or county could sue to collect penalties, which would have to be deposited in the municipal or county general fund.

The attorney general or a municipal or county attorney also could file an order or injunction to enjoin a violation, without the requirement of a bond or other financial guarantee, and also could apply for monetary damages to cover the cost of enforcing the rules under the eligible subchapters. A suit for injunctive relief or recovery of civil penalties or damages could be brought in Travis County, a district court of the county in which the defendant resided, or a district court of the county in which the alleged violation or threat of violation occurred.

TWDB would replace TNRCC as the agency responsible for preparing and adopting model subdivision rules. TWDB would have to consult with TNRCC and the attorney general in doing so.

County inspection fees. Subchapter B or C counties could impose a fee on a subdivider of property in the county for an inspection of the property to ensure compliance with applicable subdivision regulations. Any fees collected could be used only to fund inspections.

Prohibiting sale of property in subdivisions. CSSB 1421 would prohibit a person who purchased a lot through a contract for deed in a subchapter B county from reselling the lot if the lot lacked water and sewer services and had not been platted or replatted properly under subchapter B.

Limits to EDAP fund use. A political subdivision that received EDAP funding could not use funds collected from an EDAP-sponsored service project for purposes other than providing utility service. The annual financial statement prepared by a municipality, as required by Local Government Code, sec. 103.001, would have to include a report on compliance with this rule. The attorney general could sue to enjoin an actual or threatened violation of this rule.

Governmental Reforms

Planning commissions. The county commissioners court of a subchapter B or C county could establish planning commissions to regulate subdivisions, including reviewing and approving subdivision plat applications and household requests for utility services. Planning commissions also could be authorized to enforce other laws delegated to counties, including provisions related to land use, health and safety, and planning and development. Planning commissions could not regulate the use of property for which a permit was issued to engage in a federally licensed activity.

The planning commission would have 60 days to review plat applications. If the commission received an incomplete application, it would have to notify the applicant of all missing information within 15 days and allow the applicant to submit the information in a timely manner. The 60-day limit could be extended for a reasonable period if requested by the applicant or for

60 additional days if the county had to perform a “takings” impact assessment in connection with the application. The planning commission could not compel an applicant to waive the time limits prescribed under the bill.

If the commission had not approved or denied the application within 60 days, the applicant could apply for a mandamus order from a district court in the county where the land was located. A commission subject to a mandamus order would have 20 more days to approve or deny the application before the applicant could sue for damages. If the commission approved the plat within the 20 days after the original deadline, it would have to refund to the applicant 50 percent of or the unexpended portion of the plat application fee and deposit, whichever was greater.

The commissioners court would have to review a plat approved by the planning commission within 30 days after the commission voted to approve the plat if requested by a county commissioner. The court could disapprove the plat if it failed to comply with state law or with rules adopted by the county or the planning commission. If the court took no action within 30 days, the decision of the planning commission would be final. If the planning commission rejected an application before or after the 60-day time limit, it would have to provide notice specifying why the application was rejected.

The five members of the planning commission would be appointed by the county commissioners for staggered two-year terms, with no limit to the number of terms a member could serve. Members would have to be U.S. citizens and residents of the county that the planning commission represented. They would have to swear in writing to promote the interest of the county as a whole in fulfilling their duties.

Planning commission members would have to file a financial disclosure report in the same manner required for county officers. The meetings of planning commissions would be subject to open meetings and open records requirements under Government Code, chapters 551 and 552, and the minutes of their meetings would have to be filed with the county clerk as a matter of public record.

Coordination of colonia initiatives. The governor could designate an agency to coordinate the state’s colonia initiatives among state agencies and local officials. The coordinating agency also would have to identify nonprofit self-

help groups to assist with colonia initiatives, to set goals for each state fiscal year for colonia initiatives for addressing easement problems and household water and wastewater connections, and to ensure that the goals were met each fiscal year.

The Office of the Attorney General, TNRCC, TWDB, TDH, and the Texas Department of Housing and Community Affairs each would have to designate an officer or employee to serve as a liaison for colonia initiatives by November 1, 1999. Each liaison representative would have to be a deputy executive director or a person of equivalent or higher authority at the agency. The bill would not authorize the creation of a new position at any agency for colonia coordination.

The coordinating agency could appoint a colonia ombudsman in each of the six border counties with the highest population of colonia residents, as determined by the coordinating agency.

Effective Dates

CSSB 1421 would take effect September 1, 1999. The changes in the bill would apply to the following items only if they were initiated on or after the effective date of the bill:

- applications for new certificates of public convenience and necessity;
- applications for EDAP assistance;
- grants made by TNRCC;
- contracts between TWDB and local entities for EDAP research and planning grants; and
- violations of state, municipal, or county regulations based on the model subdivision rules.

Political subdivisions would have to submit a compliance report to demonstrate the proper use of EDAP funds beginning on the first day of the political subdivision’s fiscal year that began on or after the effective date of the bill.

SUPPORTERS SAY:

The Legislature has made significant efforts over the past 10 years to improve the lives of colonia residents and to stop the proliferation of substandard colonia developments. Government officials and colonia advocates have learned several important lessons from these efforts. CSSB 1421 would incorporate these lessons into legislative policy to improve the lives of colonia residents further.

The strict platting requirements in subchapter B counties are important for limiting colonia proliferation, but they inadvertently have prevented colonia residents from receiving utility services if they live on lots that are not platted properly. The variances and other platting exemptions that this bill would authorize are necessary to allow residents to receive basic services, including water, gas, and electricity, that most Texas residents take for granted. Platting restrictions that were meant to prevent unscrupulous development should not prevent colonia residents from obtaining such services.

The administrative reforms in the bill also would improve service provision for colonia residents. The new procedures for choosing among applicants for certificates of public convenience and necessity would allow TNRCC to improve efficiency in awarding such certificates through a clear and objective process. The inability to resolve conflicts among potential service providers has delayed service provision significantly for many colonia residents, as has the lack of timeliness or competence of engineering contractors for EDAP projects. TWDB needs the ability to review, approve, and cancel engineering contracts between companies and EDAP applicants to ensure that projects are implemented in a competent and timely manner.

Current law gives TNRCC no specific authority to provide grants directly to local governments for environmental projects, nor may TNRCC participate directly in federal programs through pass-through grants. CSSB 1421 would grant such authority to TNRCC to improve its ability to fund projects related to colonias and other needs as determined by the commission. The bill would not appropriate any new funds for such grants.

The bill would clarify and strengthen the authority of the attorney general and local governments to enforce platting requirements and other regulations adopted under the guidelines for model subdivision rules. Unscrupulous developers have attempted to use loopholes in previous enforcement statutes to avoid prosecution for violating these regulations. This bill’s enforcement

provisions would provide the direct authority necessary to prevent future attempts to avoid responsibility for substandard developments.

County planning commissions could improve the efficiency and quality of the review process for plat applications and requests for utility services. Planning commissions could improve the rate of providing services to colonia residents and could create a stronger check against substandard colonia developments. The time limits for review and approval of plats would assist developers who need timely responses to their plat applications.

Colonia policies across the state have suffered from a lack of coordination among state agencies and local governments. Colonia residents have not had a means to communicate directly with state and local policymakers to share their concerns. This bill would provide for colonia ombudsmen to meet with colonia residents and to bring their concerns to government officials. It also would ensure that colonia policies across the state are implemented in a coordinated and efficient manner.

OPPONENTS SAY:

The deadlines for planning commissions to review and approve plat applications under the bill may be too strict. Planning commissioners might not have enough time to review carefully a large number of plat applications at any given time. This could have a detrimental effect on a commission's ability to prevent substandard colonia developments.

NOTES:

The House committee substitute made many changes throughout the Senate bill, as outlined below.

Exceptions to prohibition of utility services. The committee substitute increased the maximum distance that unplatted land could be from existing water service to 1,000 feet, instead of 500 feet, to allow a county to provide utility services if the unplatted land was not subdivided after September 1, 1995.

Variance from platting requirements. The committee substitute removed language that would have required the county commissioners court to file a lien on the property in a subdivision owned by the subdivider in order to grant any delay or variance for that property.

Planning commissions. The committee substitute added language to deny a commissioners court or planning commission the authority to regulate the use of property for a which a permit had been issued to engage in a federally licensed activity. The substitute would allow an applicant to seek a mandamus order from a district court, instead of a district court injunction, to address a planning commission's delay in acting on a plat application. The substitute also changed the following deadlines:

- a planning commission would have to notify an applicant of an incomplete plat application within 15 days, instead of 30 days;
- a planning commission would have to take final action on a plat application within 60 days, instead of 120 days; and
- the additional period for a planning commission to perform a "takings" impact assessment before taking final action would be 60 days, instead of 120 days.

Certificates of convenience and necessity. The committee substitute removed language that would have required a utility or service corporation to file a motion for rehearing if it wanted to appeal a denial of a certificate, instead of being entitled to a right to judicial review.

Enforcement of model subdivision rules. The committee substitute would authorize the municipal attorney of a municipality to apply for monetary damages to cover the cost of enforcing these rules.

Nuisance to public health and safety. The committee substitute added language that would require TDH, instead of TNRCC, to be responsible for determining if a nuisance to public health and safety was present in an area to be served by a project, in order to allow TWDB to provide EDAP funds without requiring at least 50 percent repayment from the project applicant.

Plumbing license exemptions. The committee substitute added language that would invalidate the permission to work without a license and would subject an unlicensed individual or organization to penalties for plumbing without a license if the individual or organization did not submit the required information to TNRCC or TSBPE. The substitute added the provision that would authorize TSBPE to provide training to self-help organizations.

Two bills with similar content were considered in the House earlier in the session.

HB 52 by Cuellar would give subchapter B counties the opportunity to establish planning commissions and would change the definition of counties regulated under subchapter B in the same manner as CSSB 1421. HB 52 passed the House on March 23, but the Senate Border Affairs Committee took no action.

HB 3234 by Najera would allow a municipality to provide utility services to unplatted land if the land was not subdivided after September 1, 1995, and water service was available within 500 feet of the land, or if a water service provider operating more than 500 feet from the land determined that it would be feasible to extend service to the land. HB 3234 passed the House on April 28. The Senate Border Affairs Committee reported the bill favorably as amended on May 7 and recommended it for the Local and Uncontested Calendar.