

SUBJECT: Regulating property owners' associations in planned communities

COMMITTEE: Business and Industry — committee substitute recommended

VOTE: 7 ayes — Brimer, Dukes, George, Ritter, Siebert, Solomons, Woolley
0 nays
2 absent — Corte, Giddings

SENATE VOTE: On final passage, April 9 — voice vote

WITNESSES: For — Debbie Battaglia; Sandy Denton; Harvey Dunn; Michelle Firby; Linda Frey; Roy Hailey, Community Associations Institute, Greater Houston Chapter; Connie Heyer, Community Associations Institute, Austin Chapter; Susan Hill, Texas Neighborhoods Together; Patricia Ann Horrell; Robert Johnson, Windermere Homeowners Association and Pflugerville Council of Neighborhood Associations; Karen LeClair; Marjorie Jean Meyer, Community Associations Institute; Bruce Schimmel, Board Members Association; Johnathan Sykes; Jude Wiggins and Ray Zobel, Cypress Creek United Civic Association

Against — Harvella Jones and Johnnie Jones, The Homeowners' Advocate; Brenda McCoy; Sylvia Silva; Yvonne Silva; Steve Thomas Solich, Property Rights Foundation and Incorporating Texas Coalition of Homeowners Rights; Sharon Tucker

On — Ron Walker, Texas Association of Realtors

DIGEST: CSSB 699 would add the Texas Planned Community Act to Title 11 of the Property Code. The act would regulate property owners' associations that collect regular or special assessments on all or a majority of the property in a subdivision in which membership in the association is mandatory. The act would apply to an association regardless of whether it was designated as a "homeowners' association," "property owners' association," or any other name. It would not apply to condominium developments regulated by Property Code, chapter 82.

If an association were a nonprofit corporation, it would be governed by the provisions of the Texas Non-Profit Corporation Act (art. 1396-1.01 et seq., VTCS), except to the extent that those provisions conflicted with this act.

The bill would repeal existing provisions in the Property Code regarding the powers of property owners' associations.

Petition to amend or extend existing restrictions. CSSB 699 would allow the board of a property owners' association to circulate a petition relating to a change in existing restrictions. The association would not have to comply with Property Code, chapter 201, regarding amendments to restrictive covenants in some subdivisions.

The act would specify guidelines for information contained in a petition, the petition's expiration date, revocation of approval by a single owner, and final approval of the petition. An approved petition would be binding on all lots, or as applicable as stated in the petition. The bill would provide for notifying residents of an approved or defeated petition. An owner could challenge the validity of a restriction adopted by the association before the second anniversary of the date that the restriction was recorded.

Association management. CSSB 699 would allow an association to:

- ! adopt rules;
- ! form budgets;
- ! collect assessments;
- ! hire employees;
- ! participate in litigation or administrative proceedings;
- ! make contracts and incur liabilities;
- ! regulate the appearance and use of a subdivision;
- ! improve common areas;
- ! acquire and hold any interest in real property;
- ! grant easements, leases, licenses, and concessions over common areas;
- ! impose and receive payments, fees, or charges;
- ! impose returned check charges and interest and late charges;
- ! impose reasonable fines for violations, subject to approval of members;
- ! adopt rules relating to collection of amounts due and application of payments;
- ! impose charges for preparing statements of delinquent amounts;

- ! assign the association's right to future income;
- ! suspend the voting privileges and use of common areas by an owner delinquent for more than 30 days;
- ! purchase insurance and fidelity bonds;
- ! indemnify a director, officer, or committee member;
- ! implement written architectural control guidelines; and
- ! exercise powers conferred by the dedicatory instruments governing the association, powers available to similar corporations in the state, or other necessary powers.

A rule adopted or amended by an association would become effective 30 days after being delivered to owners, posted in a prominent public place, or published in a general circulation newspaper. An emergency rule adopted to protect health and safety would be effective immediately after notice was given to owners.

The bill would provide for removal of a director under a dedicatory instrument or the Texas Non-Profit Corporation Act.

An association could not amend a dedicatory instrument to impose restrictions on one declarant that were more restrictive than those imposed on others, unless the association had the declarant's consent.

CSSB 699 would specify that an association must deliver written notice before an association could suspend an owner's right to use a common area, file suit against an owner for a reason other than foreclosure, charge an owner for property damage, or levy a fine for a violation. The association also would have to give the owner a reasonable period to cure the violation and avoid a fine or suspension, unless the owner had received notice on a similar violation during the preceding year. The owner could request a hearing to discuss and verify facts to resolve the matter. If the hearing were held before a committee, the owner could appeal the decision to the association board.

The bill would provide for the method of delivery and the content of the notice, hearing procedures, postponements, suits, temporary suspension of use of common areas, attorneys' fees, alternative dispute resolution, and appeal procedures. It also would provide for an association's collection of reimbursement for attorney's fees and other costs resulting from enforcing restrictions.

Assessments. An association could impose and increase regular and special assessments as provided by the association's dedicatory instrument. The bill would provide for the determination of regular assessments by a vote of the property owners, notice of a proposed increase, and ballots by mail.

Architectural control committee. The bill would provide for creation and operation of an architectural control committee that would have the power to approve or deny applications for the proposed original construction or modification of a building, structure, or improvement. An association board could serve as the committee, unless otherwise noted in the dedicatory instrument.

The bill would specify conditions under which the architectural control authority automatically would vest in the association. It also would define the authority to enforce a restrictive covenant.

Meetings. CSSB 699 would require a property owners' association to hold a general meeting at least once a year. A special meeting could be called by the presiding board officer, a majority of the board, or at least 10 percent of property owners, unless the dedicatory instrument was less restrictive. The bill would provide for notice of meetings, confidentiality of information, and methods of communication.

The bill would authorize a board to act without a meeting by unanimous written consent of all directors if the meeting did not involve a vote on certain issues and if a record of the meeting were filed.

The bill would specify rules on voting, proxies, and cumulative voting.

Association records. The act would outline requirements for record-keeping and accounting services by an association. An association would have to furnish copies of rules and bylaws on written request of a property owner. The bill would provide for delivery, charges, delay of information, and civil penalties for failure to provide the information.

Financial reports. CSSB 699 would require an association to obtain an annual audit or review of the association's financial records by a certified public accountant, unless members voted against the audit or review.

Management certificates. An association would have to record a management certificate in each county in which any part of the subdivision was located. The bill would specify information regarding the management of the association that the certificate would have to contain. It also would provide for amending a management certificate.

Board member education. The bill would specify requirements for the education and experience of board members, without which a board member could not vote. A board member whose right to vote had lapsed because of noncompliance with education or experience requirements would be able to vote when compliant.

Owners' obligations. A property owner would not be held personally liable for assessments that accrued before title to a lot was transferred to the owner or after the owner transferred a lot to another person. A lot owner would be liable only for assessments accruing while the owner held a title on the lot.

The bill would specify that an association holds a lien against a lot. The association could foreclose on the lien only if the restrictive covenant granted it authority to do so. A lien would be perfected by recording the restrictions in the real property records of the appropriate county. No other notice would be required, unless specified in the restrictive covenant.

By acquiring a property in a subdivision governed by a dedicatory instrument that expressly allowed foreclosure, a lot owner would grant to the association power of sale in connection with a lien foreclosure. An association could appoint an officer to exercise the power of sale.

The bill would authorize a lienholder to furnish information regarding an owner's debt to an association upon written request. It would authorize the association upon request of the lienholder to furnish information about the owner's property and obligation. If a lot owner defaulted on monetary obligations, the association could notify the other lienholders of the default and of the association's intent to foreclose its lien.

Foreclosure. CSSB 699 would authorize an association to foreclose its lien on a lot if the dedicatory instrument provided for a lien, granted foreclosure authority, and was recorded at the time the owner acquired title to the lot. The

association also could obtain a court order allowing foreclosure. Before foreclosing, the association would have to notify the owner. An association could not foreclose a lien for an assessment consisting only of fines or attorney's fees. The bill would specify the details of the notification.

An owner could request in writing a hearing after receiving notice and before the association could institute foreclosure proceedings. The bill would specify the request process, as well as provisions for postponing the hearing. An owner would not be liable for attorney's fees occurring before the conclusion of a hearing or, if no hearing was requested, before the deadline for requesting a hearing.

The act would provide for alternative dispute resolution services, mediation, avoidance of foreclosure, purchase of a foreclosed property by the association, and refund of excess sale proceeds to an owner.

A foreclosure of a tax lien under Tax Code, chapter 32, would not discharge an association's lien for an assessment.

Right to redeem a property. An association would have to notify an owner of the foreclosure sale of the owner's property, as well as the owner's right to redeem the property. The bill would provide for the method and timing of the notice.

An owner would have 90 days after receiving written notice to redeem a foreclosed property. During that 90 days, the buyer could not transfer ownership to anyone other than the redeeming owner. To recover the property, the owner would have to pay to the association or other purchaser all amounts due to the association at the time of foreclosure, interest on the amounts due, costs incurred by the association, assessments levied after foreclosure, and the purchase price paid by the association less remaining amounts due. If an owner made partial payment of amounts due to the association but failed to repay the full amount due during the redemption period, the association would have to refund the payments.

The bill would provide for transfer of the property to the redeeming owner and reimbursement of excess sale or rental proceeds during the redemption period. Redeemed property would remain subject to all liens and encumbrances present before foreclosure. A lease executed by the purchaser

would be subject to the owner's immediate right to occupy the property after redemption.

Association violations. CSSB 699 would specify that an association is liable to an owner if the owner notifies the association of an alleged material violation and the association fails to comply within 30 days. Violations would include failure to provide a resale certificate, failure to furnish required documents, and open meeting violations. The owner could seek one or a combination of:

- ! a court order directing the association to furnish the required information;
- ! a judgment against the association for not more than \$500;
- ! a judgment for attorney's fees and court costs; or
- ! a judgment authorizing the owner or agent to deduct awarded amounts from future assessments.

If the association could not comply within 30 days, an owner could not seek a court order directing compliance.

An association or lot owner adversely affected by a violation could seek judicial enforcement of a dedicatory instrument. The attorney general could file a suit on behalf of the owner. In addition, an owner could recover a civil penalty of not more than \$1,000 if the association filed a suit against an owner in bad faith.

Notice of obligated membership. The seller of a property subject to membership in an association would have to give the purchaser a written notice of mandated membership in an association. The bill would provide for the content, delivery, and exceptions to the notice. If a contract were entered into without the seller providing notice, the purchaser's exclusive remedy would be to terminate the contract. The bill would specify the timing of the termination.

This bill would take effect January 1, 2000, and would apply only to property for which an assessment became due on or after that date. Provisions on the education of board members would take effect July 1, 2000.

SUPPORTERS
SAY:

Although homeowners' associations are privately operated, they often function as *de facto* governments of planned communities. These associations assess fees, provide services, and mandate membership. However, no state agency regulates them, and they are subject to very few statutory restrictions. Some associations have been secretive, abusive, and uncooperative with property owners. The only recourse an owner has now is to hire a private lawyer.

Homeowners need to be able to take action against an association. CSSB 699 would authorize the attorney general to file a suit on behalf of an owner to enforce this chapter. In addition to other remedies provided by law, CSSB 699 would provide owners with remedies and the ability to recover a civil penalty.

Restrictive covenants in older communities often are poorly drafted. As a result, some associations go bankrupt or lack power to enforce restrictions or to curb violations by indifferent or rebellious homeowners.

CSSB 699 would offer clear guidelines. It would protect good owners from bad associations and good associations from bad owners. The bill would provide much-needed regulations on foreclosures, assessments, and the powers and responsibilities of homeowners' associations.

Currently, association boards and homeowners are not encouraged to communicate about restriction violations and to work through differences. CSSB 699 would encourage parties to use alternative dispute resolution services. It also would allow either party to compel mediation. These provisions could reduce lawsuits and costs to all involved.

Meetings of association boards sometimes are held without notice and therefore without members attending. Also, some associations do not keep detailed records, or they may prevent access to those records by association members. CSSB 699 would address these problems by requiring an association to hold a general meeting at least once each year, allowing 10 percent of the property owners to call a special meeting of the association to address owner concerns, and requiring an association to keep sufficiently detailed financial records. It also would provide civil penalties if the board violated the open records or open meetings sections.

Homeowners sometimes are subjected to extensive attorney's fees, fines, and other charges with little notice. CSSB 699 would require the association to send written notice of a violation to the owner. It would give the owner an opportunity for a hearing before the board and would provide a cure period for the violation. It also would prevent accrual of attorney's fees until conclusion of a hearing or expiration of the 20-day period in which an owner could request a hearing. These provisions would protect homeowners from the rash actions of an association.

Some homeowners have experienced problems with foreclosure proceedings by an association for unpaid fines. This bill would prohibit foreclosure based solely upon fines or attorney's fees associated with those fines. It would prohibit foreclosure unless the association was granted that authority in the dedicatory instrument and would require the association to send written notice to the owner and provide an opportunity for a hearing before the association could begin foreclosure proceedings. It also would provide a 90-day redemption period for the owner of a foreclosed home.

Assessments levied by the associations are contractual obligations that an owner accepts when buying a house in a particular community. Foreclosure is the best protection for the association and the other homeowners to maintain the community. The Federal Housing Authority, Veterans Administration, and Department of Housing and Urban Development will not lend money to buy a home unless the association has lien and foreclosure power.

**OPPONENTS
SAY:**

CSSB 699 does not offer sufficient protection to homeowners. Foreclosure of a person's home is one of the most serious actions that can be taken against that person. Under this bill, associations could foreclose for simple, innocent violations committed by an owner. Owners who had fallen into arrears for as little as several hundred dollars could lose their homes.

Homeowners' associations should not be granted foreclosure powers without a constitutional amendment approved by voters. Even without the threat of foreclosure, honest homeowners will pay fees owed if given enough time.

As an alternative to foreclosure, associations could be granted authority to garnish wages or rescind certain rights. They also have the option of injunctive relief or fining instead of foreclosing.

The bill should place a cap on attorney's fees for which an owner could be liable. Under this bill, when an owner went into arrears for several hundred dollars, a homeowners' association could charge the owner for legal bills of tens of thousands of dollars.

If associations are going to act as political subdivisions, they should be accountable to the state. Associations now have no oversight from any agency. Board members can act against owners' wishes without fear of reprisal.

CSSB 699 should specify that arbitrary rules enacted by an association could be challenged and are not enforceable. This would protect owners against capricious acts of the association.

NOTES:

The House committee substitute would:

- ! apply only to associations now collecting assessments and mandating membership;
- ! amend the requirements for circulating and voting on a petition to amend restrictive covenants;
- ! provide that a challenge to the validity of a restriction would have to be brought by the second anniversary of its inception;
- ! amend the functions and powers of the association board;
- ! delete a provision in the Senate bill stating that an arbitrary rule would not be enforceable;
- ! change requirements for providing notice of suspension of an owner's right to use common areas;
- ! add an opportunity to cure the violation;
- ! amend the process for requesting and conducting a hearing;
- ! provide that an owner is not responsible for attorney's fees incurred before the conclusion of a hearing;
- ! provide that restrictions governing the subdivision prevail over provisions of the property owners' association;
- ! delete a fee increase if the dedicatory instrument limited increases;
- ! authorize a majority of lot owners voting to set a maximum amount for assessments;
- ! provide that during a period of declarant control, consent of the declarant would be required to waive an audit or review;
- ! specify information in a resale certificate;

- ! amend requirements for delivering required information and notices;
- ! add information regarding owners' obligations and lien requirements;
- ! delete a provision that would have authorized an association to foreclose only in a manner elected by the owner;
- ! specify recording of notice with a county;
- ! provide that an association would be liable to an owner for material violations; and
- ! entitle an owner to certain remedies.