

SUBJECT: Preserving the mode of operation of an established commercial enterprise

COMMITTEE: Business and Industry — committee substitute recommended

VOTE: 8 ayes — Brimer, Dukes, Corte, J. Davis, Elkins, George, Solomons, Woolley
0 nays
1 absent — Giddings

WITNESSES: For — Linda Sickels, Trinity Industries
Against — None

BACKGROUND: Under common law, a person may sue a commercial enterprise that creates a public nuisance, such as a foul odor, loud noise, or pollution, to force that enterprise to reduce or eliminate the nuisance.

DIGEST: HB 1514 would amend the Business and Commerce Code to state that a commercial enterprise located in an area that was not used primarily for residential purposes at the time it was established and that had not changed its mode of operation substantially would not have to change its mode of operation or change the use of its mode of operation for any publicly known planned expansion. The bill would apply to a primarily non-residential area within a one-half-mile radius of a commercial enterprise in a city of more than 100,000, or within a one-mile radius of an enterprise in a city of 100,000 or less or in the unincorporated part of a county.

The bill would not restrict, prevent, or preempt the enforcement of any applicable state or federal law. It would apply to any commercial enterprise no matter when established.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2001.

SUPPORTERS
SAY:

CSHB 1514 would protect an established commercial enterprise in a previously non-residential area from complaints by citizens who moved into the area after the enterprise already had established its operations. As more and more people have built homes and neighborhoods in rural areas or in once commercial areas within cities, the new residents have pressured many of these enterprises to change their modes of operation, which may involve strong odors, heavy traffic, high levels of dust, bright nighttime lighting, or other nuisances. Residents who choose to move into an area where there is already an established commercial enterprise should not be able to force that enterprise to change its mode of operation. This bill would guarantee an enterprise the right to continue the operation that was in place at the time the residents moved in, as long as the enterprise did not change its mode of operation substantially.

The bill also would protect a commercial enterprise's planned expansion if that expansion was publicly known and if the expansion would not change the enterprise's mode of operation. Commercial enterprises such as malls or large plants often build their facilities in phases. These planned expansions are well-known, and enterprises should not be prevented from completing these expansions because new residents have moved into the area.

The bill would not limit a city's zoning authority because it would not exempt any planned expansion from complying with zoning laws. A commercial enterprise still would have to comply with all city and county ordinances, including requesting a variance for an expansion if that expansion would meet current zoning regulations.

CSHB 1514 would not affect a citizen's right to sue a commercial enterprise for nuisance. The bill would not limit a person's right to file in court against a company for nuisance or to request a hearing on the merits of the case. In these instances, a court is the best judge of whether a commercial enterprise's mode of operation has changed substantially.

OPPONENTS
SAY:

CSHB 1514 would restrict a municipality's zoning authority. Currently, if a city enacts a new zoning law that places a commercial enterprise in non-compliance, that business must apply to the city's planning and zoning board for a variance in order to expand. If the business is not granted the variance, it may appeal to the city's board of adjustment. Under this bill, however, a

business that had not changed its mode of operation substantially and that publicly announced an expansion could conduct that expansion without having to go before the city's planning and zoning board.

CSHB 1514 also could limit a citizen's legitimate right to sue a commercial enterprise that created a nuisance and to obtain a judgment forcing the enterprise to reduce that nuisance. By failing to define whether the term "mode of operation" would apply only to the product that a commercial enterprise produced or also to the process used to create that product, the bill could deny a citizen any recourse if a commercial enterprise decided to use a different, cheaper process that resulted in a greater nuisance. Even if the term did cover the process used, the bill still would protect a company if its mode of operation remained "substantially unchanged," too vague a term to enable an assessment of the degree to which an enterprise would have to change its operations for it to lose the protection that this bill would confer.

CSHB 1514 would remove a citizen's recourse in instances in which the company continued to use the same process to produce the same product as before but increased its production due to increased market demand, turning a formerly minor nuisance into an intolerable one. Although the bill technically would not remove a citizen's right to sue for nuisance, it would protect a company sued in these circumstances and thus effectively would remove the remedy sought by a citizen filing a suit.

CSHB 1514 also would limit a citizen's ability to protest and prevent the expansion of a commercial enterprise. Although a planned expansion would have to be publicly known to be protected under the bill, the expansion would not have to have been publicly known at the time a resident moved into the area. Under this bill, a commercial enterprise located in a formerly non-residential area could announce at any time that it intended to expand, and as long as its mode of operation did not change, the expanded site could not be forced to change its mode of operation. Although a citizen may have accepted the nuisance of living near a commercial enterprise, that person should not have to accept the increased nuisance due to the expansion. Furthermore, this bill would not require the expansion to take place on adjacent land or even land within the area defined by the bill as being formerly non-residential, meaning that citizens who did not consent to living near a commercial enterprise could find themselves next to an expanded

facility without the ability to require that enterprise to change its mode of operation if it created a nuisance.

NOTES:

The bill as filed would have required a person selling residential real estate to notify the buyer in writing of any commercial enterprise located within one mile of the residential property that a reasonable person would consider offensive. It would have required the seller to deliver the notice on or before the date the executory contract bound the purchaser to buy the property or else the purchaser could have terminated the contract. The filed version did not address the permitted operation of an established commercial enterprise, which was added by the committee substitute.

The companion bill, SB 775 by Harris, which mirrors the provisions of HB 1514 as filed, has been referred to the Senate Business and Commerce Committee.