SUBJECT: Revised standards for suits against maintaining a common nuisance

COMMITTEE: Civil Practices — committee substitute recommended

VOTE: 6 ayes — Nixon, P. King, Madden, Raymond, Strama, Woolley

0 nays

3 absent — Rose, Martinez Fischer, Talton

WITNESSES: For — James Brown, South Dallas Business Organization; Dale Davenport; Freddy Davenport; David Mintz, Texas Apartment Association; Chuck Space, Southwest Texas Car Wash Association

Against — Jay Harvey, Texas Trial Lawyers Assoc.; Jennifer Richie, City of Dallas

BACKGROUND: Civil Practice and Remedies Code, sec. 125.0015 establishes the elements of a claim against another person for maintaining a common nuisance. A person who knowingly maintains a place where people habitually go for the following purposes maintains a common nuisance:

- discharge or reckless discharge of a firearm in a public place;
- engaging in organized criminal activity;
- delivery, possession, manufacture, or use of a controlled substance;
- gambling;
- prostitution or compelling of prostitution; or
- commercial manufacture, distribution, or exhibition of obscene material.

A person who knowingly maintains a multiunit residential property where people habitually go for the following purposes maintains a common nuisance if the person has failed to make reasonable attempts to abate such acts:

- aggravated assault;
- sexual assault or aggravated sexual assault;
- robbery or aggravated robbery;

- unlawfully carrying a weapon; or
- murder or capital murder.

Sec. 125.001 defines a multiunit residential property as improved real property with at least three dwelling units. The term includes an apartment building, condominium, hotel, or motel, but does not include a property in which each dwelling unit is occupied by the owner of the property or a single-family home or duplex.

Sec. 125.002 authorizes an individual, the attorney general, or the attorney of a district, county, or city to file suit to abate a common nuisance. Suit may be filed against any person who maintains, owns, or uses a place that is a common nuisance as described in sec. 125.0015.

Sec. 125.004 establishes the evidence necessary and admissible to prove that the defendant knowingly maintained a common nuisance. Proof that an activity described in sec. 125.0015 is frequently committed at the place involved is *prima facie* evidence that the defendant knowingly permitted the activity. Evidence that people have been arrested or convicted of activities described in sec. 125.0015 at the place involved is admissible to show that the defendant knew the acts occurred.

Sec. 125.042 states that the voters of an election precinct in which a common nuisance is alleged to exist may request the district, city, or county attorney authorize a meeting at which interested people may voice their complaints about the matter. Sec. 125.044 states that after such a meeting, if the district, city, or county attorney who authorized the meeting finds that a common nuisance exists, that official may initiate proceedings against the person responsible for the property. In a proceeding begun under this section, proof that acts creating a common nuisance are committed frequently at the place involved is *prima facie* evidence that the owner knowingly permitted the activity. Evidence that people have been arrested or convicted of activities constituting a common nuisance at the place involved is admissible to show that the defendant knew the acts occurred.

DIGEST:

CSHB 1690 would amend sec. 125.0015 to require that person who maintained a place or a multiunit residential property considered a common nuisance would have to have knowingly tolerated activities that occurred there. The bill also would add the following actions, which currently apply only to a multiunit residential property, to the list of those

for which a place could be considered a common nuisance:

- aggravated assault,
- sexual assault or aggravated sexual assault,
- robbery or aggravated robbery,
- unlawfully carrying a weapon, or
- murder or capital murder.

The bill would make two changes affecting condominiums. First, it would amend language in sec. 125.001 so that condominiums no longer were excluded from the definition of a multiunit residential unit. Second, it would add that a council of owners of a condominium (which includes all the apartment owners in a condominium project) or a unit owners' association of a condominium could be sued for maintaining a common nuisance if the council or association maintained, owned, or used the common areas of the condominium for purposes constituting a nuisance.

Proof of the frequent commission of activities described in sec. 125.0015 would be *prima facie* evidence that the defendant tolerated, rather than permitted, the activity. However, evidence that the defendant or another person called the police in reference to the activity would not be sufficient to show that the defendant tolerated the activity. Finally, in a suit brought after a meeting to air complaints about a alleged common nuisance, evidence that the defendant or another person called the police in reference to the activity would not be admissible to show that the defendant tolerated the activity.

The bill includes a statement of legislative intent that if HB 1690 was enacted and another bill that repealed Civil Practice and Remedies Code, ch. 125, including HB 2086 by Hochberg, also was enacted, the provisions in HB 1690 would prevail if differences between the two bills could not be reconciled.

The bill would take effect September 1, 2005, and would apply to any cause of action that accrued on or after that date.

SUPPORTERS SAY:

CSHB 1690 would protect property owners who attempted to stop the commission of illegal activities on their property from being prosecuted for maintaining a common nuisance. Under current law, a plaintiff must show only that a person "knowingly maintains" a property where certain actions occur to prove that the person maintains a common nuisance. As a

result, courts can interpret this to mean that a person need not tolerate the activity, but simply must know that it occurs. Thus even if a person takes steps to stop the activity, such as hiring a security guard or calling the police, a court still can find that the person maintained a common nuisance. By clarifying that the person would have to knowingly tolerate the activity, in addition to merely maintaining the property where such activity occurred, the bill clearly would establish the specific culpability required. It also would make clear that calls to police to report illegal activity on the person's property could not be used against him to show that the person tolerated the activity.

By adding aggravated assault, sexual assault, robbery, unlawfully carrying a weapon, and murder to the list of activities for which a common nuisance action could be brought against a place that is not a multiunit property, claims could be brought against places such as nightclubs at which these activities habitually occur. This would help police and district, county, and city attorneys curb unlawful activities at clubs by giving them a tool with which they could penalize the club owner and deter the owner from tolerating such activities on the owner's property.

OPPONENTS SAY:

CSHB 1690 would not allow evidence that the defendant *or another person* requested law enforcement assistance to be used to prove that the defendant knowingly tolerated activity that could constitute a common nuisance. By excluding evidence that people other than the defendant made calls to the police about activity on the property, the bill would exclude calls for police assistance made by individuals or businesses that neighbor the property in question or calls made by a victim of a crime on the property. Calls by these other people do not show that the defendant was taking action to remedy the situation, but rather tend to show that the defendant was *not* taking action to stop the activity.

If the Legislature intends to make all the activities listed under sec. 125.0015(a) applicable to multiunit residential units in sec. 125.0015(b), then these two sections should be combined into one section. Judges currently allow the activities in sec. 125.0015(a) (any place) to be used to establish a common nuisance for a multiunit residential complex under sec. 125.0015(b). Included in these activities are gambling, prostitution, and drug possession. However, by adding aggravated assault, sexual assault, robbery, and murder to the activities that would constitute a common nuisance if they habitually occurred at a *place*, judges might view the activities listed under sec. 125.0015(b) as an exclusive list of the

activities for which a common nuisance action may be brought against a *multiunit residential property*. This could mean that the habitual recurrence of activities such as gambling, prostitution, and drug possession on a multiunit residential complex would not constitute a common nuisance.

NOTES:

The substitute made four major changes to the bill as introduced. It would require that a property owner knowingly "tolerate" activities associated with a common nuisance. It also would include a condominium in the definition of "multiunit residential property" and would allow condominium owners to be sued for maintaining a common nuisance. Finally, the substitute would not permit evidence that the defendant or another person called the police in reference to an illegal activity to show that the defendant tolerated the activity.

HB 2086 by Hochberg, which would add a chapter on nuisances to the Civil Practice and Remedies Code and repeal chapter 25, is pending in the Civil Practices Committee.