

SUBJECT: Payment of attorney's fees in cases of adverse possession of real property

COMMITTEE: Judiciary and Civil Jurisprudence — committee substitute recommended

VOTE: 6 ayes — Hunter, Alonzo, Branch, Jackson, Martinez, Woolley

2 nays — Hartnett, Madden

3 absent — Hughes, Leibowitz, Lewis

WITNESSES: For — (*On original version*) Larry Grigg; Ed Small; (*Registered, but did not testify*): Daniel Gonzalez, Texas Association of Realtors; Pat Grigg; (*On committee substitute*: Al Allred)

Against — None

BACKGROUND: Civil Practice and Remedies Code, sec. 16.021 defines “adverse possession” as the open and consistent appropriation of real property under a claim of right that is inconsistent with and hostile to the property claim of another person. In order to prevent a person from acquiring title to real property by adverse possession, a party claiming a right to the property must file suit within the applicable statute of limitations to recover the property. The limitations period varies from three to 25 years depending upon the circumstances underlying the claim of adverse possession.

In a suit for possession of real property between a party claiming adverse possession and a party claiming possession under record title, Civil Practice and Remedies Code, sec. 16.034 allows, but does not require, a court to award reasonable attorney’s fees and costs to the prevailing party if the other party was unlawfully in actual possession of the real property in dispute. In order to recover attorney fees, before filing suit, a party seeking possession must first deliver to the person in possession a written demand by registered or certified mail that that the person vacate the property’s premises within 10 days. The demand also must notify the person in adverse possession that a court may enter a judgment against the person in unlawful actual possession for reasonable attorney’s fees and costs.

DIGEST: CSHB 556 would require a court to award reasonable attorney's fees and costs to the prevailing party in a suit for possession of real property if the losing party was found by the court to have been in unlawful actual possession of the property.

The bill would apply only to a suit for possession of real property filed on or before the bill's September 1, 2009 effective date.

SUPPORTERS SAY: CSHB 556 would ensure adequate compensation for real property owners who incur attorney's fees and court costs in the course of defending their property rights against parties who claim adverse possession. Current law authorizes, but does not require, a court to award these costs, which can become expensive as litigation draws out for months or even years. Requiring attorney's fees and costs for the prevailing party would deter the small number of unscrupulous persons who use aggressive and sometimes malicious measures to acquire title to real property by adverse possession.

CSHB 556 would not curtail the use of adverse possession for its historically-beneficial purpose of promoting the alienability of unused and unimproved land. A party who mistakenly or intentionally developed and improved long-abandoned property would likely not be the subject of a lawsuit, due to the relatively short statute of limitations period for most adverse possession cases. The bill would act primarily as a deterrent against the predatory few who consciously abuse the adverse possession process to acquire real property.

OPPONENTS SAY: CSHB 556 would discourage the legitimate and historically sanctioned use of adverse possession to develop and improve long-abandoned real property. The principle of alienability of property — the capacity for a piece of property or a property right to be sold or otherwise transferred from one party to another — has been a central principle of property law for centuries, and is reflected in the Property Code's current allowance for judicial discretion in awarding attorney's fees in costs in adverse possession cases. This discretionary authority provides rightful property owners with sufficient protection in the rare instances where a party deliberately and maliciously seeks to acquire real property by adverse possession.

NOTES: The committee substitute would require a court to award reasonable attorney's fees and costs to the prevailing party in an adverse possession case that recovers possession of real property from a party with unlawful

actual possession of the property, while the original bill would have required the person who claimed adverse possession to pay the fees and costs of the other party regardless of which party prevailed.