SUBJECT: Revising regulations for colonias and certain economically distressed areas

COMMITTEE: Land and Resource Management — committee substitute recommended

VOTE: 5 ayes — Deshotel, Frank, Goldman, Paddie, Simpson

1 nay — Herrero

3 absent — Walle, Parker, Springer

WITNESSES: For — Kyndel Bennett, Scot Campbell, Buddy Garcia, Anthony Gray, Jack McClelland and Richard Ruppert, Texas Land Developers Association; Donald Lee, Texas Conference of Urban Counties (*Registered, but did not testify:* Jim Allison, County Judges and Commissioners Association of Texas; Shanna Igo, Texas Municipal League; Scott Norman, Texas Association of Builders)

Against — Emily Rickers, Alliance for Texas Families; Raul Sesin, Hidalgo County; Carlos Yescas, Las Lomitas; Manuela Luna; Francisco Martinez; Ira Parker (*Registered, but did not testify:* Deena Perkins, Texas Association of Community Development Corporations)

On — David Preister, Office of the Attorney General; Cyrus Reed, Lone Star Chapter, Sierra Club; Marlene Chavez; (*Registered, but did not testify*: Joe Reynolds, Texas Water Development Board)

BACKGROUND: Colonias are low-income communities in unincorporated subdivisions along the Texas-Mexico border that lack paved roads and basic services such as water, wastewater treatment, and electricity. The Office of the Attorney General identifies more than 2,000 colonias in 31 border-area counties, and state and federal entities estimate their population at roughly 400,000.

Local Government Code, ch. 232, subch. B contains requirements for subdividing, advertising, selling, and connecting utilities to residential subdivision lots in counties that are within 50 miles of the border, as well as Nueces County. Under subch. B, a subdivider may not sell or lease land in a subdivision unless a plat is first approved by the county commissioners court. Subdivisions with lots 10 acres or more are exempt

from the requirements.

Subchapter C contains platting requirements for residential subdivisions that are defined as economically distressed under the Water Code but are not located within 50 miles of the border.

DIGEST:

CSHB 611 would modify requirements governing subdivision development in counties covered under subchs. B and C of Local Government Code, ch. 232, as well as economically distressed areas under the Water Code.

Earnest money. CSHB 611 would permit property owners and buyers to enter into an earnest-money contract of up to $250 for the sale of land under subchapter B before the plat was finally approved and recorded. The seller or subdivider would have to be licensed, registered, or otherwise credentialed as a residential mortgage loan originator under applicable state and federal law and the Nationwide Mortgage Licensing System and Registry. An earnest-money contract would have to contain a specific statement laid out in the bill and other warnings specified in current law.

An earnest-money contract would be void if the plat for the land had not been finally approved and recorded within 90 days of when the contract was signed, unless the buyer agreed to extend the period. Only one extension would be permissible. A seller would have to refund all earnest money paid for a voided contract within 30 days. A seller who did not refund the money would be subject to legal action for damages up to three times the earnest money amount plus reasonable attorney's fees. Prior to entering into an earnest-money contract, written notice with specific information about the contract would have to be provided to the attorney general and the local government responsible for approving the plat.

Cure provisions. The bill would require that before a civil action could be filed against a subdivider, the subdivider would have to be notified in writing about the alleged violation and given 90 days to cure the defect before enforcement action could proceed. This would not apply to civil enforcement actions brought by the attorney general, district attorney, or county attorney if:

- the alleged violation or threatened violation posed a threat to a consumer or to the health and safety of any person; or
- delay in bringing the enforcement action could cause a financial

loss or increased costs to any person, including the county.

The cure provision would not apply in cases of repeat violations and would not apply to an action filed by a private individual. It would apply in counties covered under subchapters B and C, and to other economically distressed counties designated by the Water Code, ch. 16 subch. J.

Advertising property. CSHB 611 would repeal Local Government Code, sec. 232.021(9), which includes "offer to sell" in the definition of "sell." The bill would require that any advertising for platting of a subchapter B property that was not finally approved include notice that:

- no contract for deed, other than the $250 earnest-money contract allowed by the bill, could be accepted until the plat was approved; and
- the land could not be possessed or occupied until it received final approval from the county commissioners court and all water and sewer service facilities for the lot were connected or installed according to the Water Code.

Other provisions. CSHB 611 would amend both subchapter B and C to require platting for subdivisions that created at least one lot of five acres or less and would give county commissioners courts the option of requiring plats where at least one lot was more than five acres but no more than 10 acres.

A person in a county covered under subch. C who purchased a lot without water and sewer services as required could bring suit in county district court to declare the sale void, recover the purchase price, require the subdivider to plat or amend the existing plat, and seek other damages.

CSHB 611 would require that counties and cities adopt model subdivision rules before applying for grant funds offered under the Water Code to provide water and wastewater infrastructure for existing colonias.

The bill would prohibit counties from imposing a higher standard for streets or roads in a subdivision than it applied to construction of new county streets or roads.

The bill would take effect September 1, 2013. Changes to plat applications and enforcement actions in the bill would apply on or after that date.

SUPPORTERS SAY:

CSHB 611 would recognize the enormous strides Texas has made to address the factors that contributed to the proliferation of colonias and would take some key steps in applying to border counties standards that prevail elsewhere. Broad consensus exists among stakeholders that subchapter B regulations have been successful in preventing the spread of new colonias. There is equally broad agreement, however, that some of the more stringent regulations are no longer necessary and are poorly suited to new financial realities. In addition, rapid population growth in border regions calls for new approaches to ensure development standards accommodate new business realities while protecting health and safety.

CSHB 611 would provide adequate safeguards to ensure all infrastructure necessary for convenience, health, and safety would be available while permitting the market to offer affordable housing opportunities for Texans of all income levels. By no means would the bill increase the likelihood of bad practices among subdividers, as it does not have any bearing on model subdivision rules.

The bill would help end separate regional standards and contribute to the development of a uniform statewide standard for development in unincorporated areas. While colonias have historically been viewed as a border problem, irregularly and poorly developed subdivisions can be found throughout Texas. If the Legislature has concerns about development in unincorporated counties, then it should approach this issue with an eye toward statewide solutions that do not single out a particular geographic area for special treatment.

Earnest-money contracts. CSHB 611 would help eliminate some of the regulatory roadblocks keeping developers from obtaining needed financing. Current restrictions prohibit developers from entering earnest-money agreements that indicate a market demand, so financial institutions cannot make sound business decisions whether to extend credit. Availability of financing will be a topic of ongoing concern as the housing market continues to emerge from the recent downturn. Limiting access to credit penalizes developers who want to follow the rules.

CSHB 611 would ensure against potential abuses by requiring that sellers meet strict standards on originating loans created after the meltdown of the subprime mortgage market. The standards for being a qualified mortgage originator are established at the state and federal level and provide a strong

protection against abusive practices. The $250 limit on earnest-money contracts would allow low-income Texans to commit to a longer agreement without risking a large amount of money.

Advertising. Provisions in CSHB 611 revising the advertising standards would assist developers and potential homebuyers in identifying and creating a market for new subdivisions. Advertising and access to earnest-money contracts would show financial institutions that a demand exists for these homes. The inability to advertise properly generates greater uncertainty, which ultimately is transformed into higher costs that are passed on to the consumer.

Cure provisions. Allowing developers a 90-day period to correct minor defects in the platting process would add to market viability of these affordable properties. CSHB 611 would not prevent enforcement actions when the health or safety of any person was involved and would preclude delays in addressing repeat or ongoing potential violations. It would, however, limit a developer's exposure to possibly ruinous penalties for minor problems, such as mistakes in translating technical information on the filed plat into Spanish. Such technicalities should be allowed to be addressed without penalty.

The attorney general already must exercise discretion in using limited resources to pursue violations in the colonias regulations. Providing a notice and 90-day cure period would protect developers acting in good faith from expensive and time-intensive legal action.

Other provisions. CSHB 611 would make the five- and 10-acre standards for filing plats uniform in all Texas counties. It would clarify a slight difference in the statutes that requires border counties to exempt subdivisions only where all plots were greater than 10 acres, while the rest of the state can exempt subdivisions of exactly 10 acres or larger.

OPPONENTS SAY:

Texas has spent millions in taxpayer money to remedy the health and safety dangers posed by colonias along the border. By all accounts, the subchapter B rules have worked, and every county that has enacted and enforced them has prevented the establishment of more colonias. It is expensive to retrofit and remediate problems when a developer cuts corners to save money and earn higher profits at the expense of low-income homebuyers. CSHB 611 could jeopardize progress in limiting the proliferation of colonias by relaxing some regulations that govern what

developers may do in economically distressed areas of the state.

Earnest-money contracts. CSHB 611 provisions that would allow even small installment payments on unplatted land could signal a return to the days when some unscrupulous developers would collect money for land, make empty promises to buyers and local officials and disappear once the lots were sold. Earnest-money contracts, even in small amounts, could create a perceived obligation to purchase an as yet unseen product. The authority to enter into such contracts was curtailed in these areas for good reason; in the past, various conditions gave rise to widespread abuse. Granting an earnest-money option is not worth risking a return to former practices in these economically sensitive regions.

Advertising. Much like the earnest-money contract provisions, the bill could allow developers to advertise and sell lots in poorly conceived developments without ensuring that the lots would be made habitable.

Cure provisions. Allowing a 90-day cure period could allow developers to ignore colonias regulations until they finally got caught and regardless of whether they knowingly violated the law. The provision could allow developers to delay compliance by dragging their feet on making corrections to violations brought to their attention. Once a suit is filed, there is ample opportunity for a developer to settle outside of court. Allowing a 90-day cure period is unnecessary. There is scant evidence that developers are being slapped with severe penalties for trivial violations. Providing the 90-day cure period creates unnecessary risks with few benefits.

Other provisions. There is no indication that problems that have plagued subdivisions with smaller lots in border and economically distressed regions would not also apply to those with larger lot sizes. Releasing subdivisions between five and ten acres from the requirement to file a plat would unnecessarily remove this safeguard for larger-scale developments.

NOTES:

The committee substitute differs from the bill as filed in that it would delete a provision in the original that would have allowed the attorney general to develop rules on the notice required to be provided before entering into an earnest-money contract.

The 82nd Legislature in 2011 considered similar legislation, HB 1604 by Guillen, which passed the House but died in the Senate.