SUBJECT: Pre-litigation requirements for condo owners' associations in defect cases

COMMITTEE: Judiciary and Civil Jurisprudence — committee substitute recommended

VOTE: 7 ayes — Smithee, Clardy, Laubenberg, Raymond, Schofield, Sheets, S. Thompson

2 nays — Farrar, Hernandez

WITNESSES: For — Les Brannon, D.R. Horton, Inc.; Scott Norman, Texas Association of Builders; Robert Burton; Patrick Casey; Amy Hansen; Terry Mitchell; (*Registered, but did not testify*: Michael Chatron, AGC Texas Building Branch; Peyton McKnight, American Council of Engineering Companies of Texas; Drew Campbell, Associa, Inc.; Jon Fisher, Associated Builders and Contractors of Texas; Neal T. "Buddy" Jones, Perry Homes; Jay Propes, Spectrum Association Management, LLC; Mike Hull, Texans for Lawsuit Reform; Felicia Wright, Texas Association of Builders; Steven Garza, Texas Association of REALTORS; George Christian, Texas Civil Justice League; David Mintz, Texas Institute of Building Design; and six individuals)

Against — Susan Valk, Brodie Heights Condominiums HOA; D'Ann Pate, Cat Hollow HOA; Hugh Levrier, San Felipe Townhomes HOA; Connie Heyer, Texas Community Association Advocates; Kerry Lee; Michael Parr; Mauro Reyna; Chris Rhody; (*Registered, but did not testify*: Randy Happel, Cat Hollow Condominium HOA; Worth Ross, Texas Community Association; Kristen Hawkins; David Kahne)

On — Bryan Blevins, Texas Trial Lawyers Association; (*Registered, but did not testify*: David Lancaster, Texas Society of Architects)

DIGEST: CSHB 1455 would restrict condominium unit owners' associations in condominiums that had eight or more units from filing lawsuits or initiating arbitration proceedings to resolve a claim pertaining to the construction or design of a unit on behalf of all of the owners unless they obtained:

- an inspection and a written independent third-party report from a licensed professional engineer that identified the specific units or common elements subject to the claim, described their condition, and described any modifications, maintenance, or repairs done by the unit owners; and
- approval from unit owners holding at least 67 percent of the total votes in the association, in person or by proxy, at a special meeting.

Any third party report would have to be obtained directly by the association and paid for by the association and could not be prepared by anyone affiliated with an attorney or law firm representing or planning to represent the association in the claim.

At least 10 days before any inspection occurs, an association would be required to provide each party subject to a claim with a notice that identified the party preparing the report, the specific units or common elements inspected, and the date and time the inspection would occur. Those parties would be allowed to attend the inspection.

The association would be required to provide the report to each unit owner and each party subject to a claim and to allow them 90 days to inspect and correct any condition identified in the report before the special meeting was held.

At least 30 days before the special meeting, the association would be required to provide each unit owner with written notice that would include:

- the date, time, and location of the meeting;
- a description of the claim, the relief sought, anticipated duration, and likelihood of success;
- the third-party report;
- a copy of the contract or proposed contract with the attorney selected to provide assistance with the claim;

- a description of the fees and court costs that could be incurred by the association for prosecuting the claim;
- a summary of the steps taken to resolve the claim;
- a statement that initiating a lawsuit or arbitration could affect market value, marketability, or refinancing of a unit; and
- a description of the manner in which the association proposed to fund the litigation.

This notice could not be prepared by anyone affiliated with the attorney or law firm that would represent the association in the claim.

The bill also would allow the declaration that created a condominium to contain provisions that would require binding arbitration for claims of construction or design defects and would prohibit associations from retroactively modifying or removing arbitration provisions.

This bill would take effect September 1, 2015, and would apply to claims based on acts or omissions that occurred on or after that date.

SUPPORTERS SAY:

CSHB 1455 is necessary to restrict the ability of owners' associations to initiate construction defect claims without the approval of condo owners, which would ensure transparency in the process of initiating litigation. Requiring proper notice and owner approval prior to litigation would help ensure that owners were provided with sufficient information and the ability to make an informed decision. Owners often are unaware that litigation could have a significant impact on the value of and their ability to sell their condominiums. This bill would ensure that owners were properly informed of this impact before initiating litigation. The required notice also would give the parties the ability to sit down and resolve their claims without the need for costly litigation.

This bill also could enable growth in condominium construction by helping to deter excessive litigation initiated by owners' associations. Other states where unit owners' associations are authorized to initiate litigation on behalf of the owners have seen a severe decline in condominium construction. Fear of frivolous liability and increased

insurance costs have made condominium construction largely unfeasible, except for condos with high-price units. Demand for condominiums is high across the state, as they often provide a reasonably priced way to move up from renting. Current Texas law limits the ability of construction companies to build reasonably priced condos for middle and low-income families.

This bill would not restrict the ability of associations or condo owners to sue for construction defects. It simply would require associations to properly inform and seek input from the owners they represent.

OPPONENTS SAY:

CSHB 1455 would create costly and complex barriers to justice for condominium owners. They would be required to jump through numerous administrative hoops without the assistance of counsel before filing a claim. Associations often do not have the resources to hire an expert forensic engineer and to create and distribute a detailed notice that would require them to predict chances of success and costs of litigation.

Generally, in these cases, associations contract with attorneys on a contingency basis, and the attorneys bear the upfront costs of investigating the claims and hiring engineers to determine the likelihood of success. Under the bill, associations would have to bear this cost themselves. This would make it all but impossible for associations to initiate litigation when their owners were facing construction defects.

It also would be difficult for large associations to get the 67 percent of votes required to file a claim. This high bar would give the minority power over the majority and would inhibit the ability of the association to act. Many large associations would have difficulty getting 67 percent of owners to vote in the meeting, even if they were allowed to do so by proxy.

A significant number of construction defect issues arise from failures by construction companies to follow the building code. This often occurs in lower-priced condominiums when developers want to keep costs low. However, the building code provides minimum standards for construction

to ensure that affordable housing still is properly built.

NOTES: The author plans to offer an amendment that would:

- reduce the percentage of votes required to initiate a proceeding from at least 67 percent to more than 50 percent;
- allow a vote to file a suit to be taken at a regular, annual, or special meeting;
- not prohibit attorneys or their affiliates from assuming the cost of hiring a third-party licensed engineer;
- toll the statute of limitations for up to a year, if the procedures of obtaining a report and giving notice were commenced during the final year of the limitations period; and
- make the bill apply to any suit filed or arbitration proceeding initiated after the effective date.