

SUBJECT: Amending procedures on operation of homeowners' associations

COMMITTEE: Business and Industry — favorable, without amendment

VOTE: 6 ayes — Giddings, Bailey, Castro, Martinez, Solomons, Zedler
0 nays
3 absent — Elkins, Darby, Bohac

SENATE VOTE: On final passage, April 30 — 31-0

WITNESSES: For — (*Registered, but did not testify:* Daniel Gonzalez, Texas Association of Realtors; Jay Propes, Communities for Fair Legislation)

Against — (*Registered, but did not testify:* Lynn G. Walshak, Texas Homeowners for HOA Reform Inc)

On — David Mintz, Community Associations Institute / Legislative Action Committee

BACKGROUND: Homeowners' associations are groups formed to provide services for homeowners in exchange for mandatory assessments or dues. The associations are governed by deed restrictions on the homes and by the association's articles of incorporation, bylaws, and rules. Deed restrictions and rules generally are enforced through a system of fines for infractions. In general, homeowners' associations are governed by Property Code, ch. 209 and are given powers of enforcement against owners in violation of association rules.

Property Code, ch. 211 regulates the amendment and enforcement of property restrictions in residential subdivisions any part of which are within the unincorporated area of a county with a population less than 65,000. The chapter provides for the adoption of a process for amending property instruments in subdivisions without a practicable procedure in place.

DIGEST:

SB 979 would modify provisions regulating the process by which a homeowners' association could amend declarations, judicial options available to property owners facing foreclosure, notices of violations of association rules and collection of fines for such violations, and the availability of association and candidate information, among other things.

Association processes. The bill would modify processes by which declarations governing property owners' associations could be amended after a development period. Unless otherwise provided in a declaration creating a residential subdivision, declarations governing a mandatory property owners' association could be amended with a vote of at least 67 percent of property owners who belonged to the association.

An association would be required to use a neutral third party to tabulate votes if it scheduled an election with less than 30 days notice, or if it received written requests at least 10 days before the vote from at least 25 percent of property owners or 50 owners, whichever was less. A neutral third party could be anyone who was not an existing board member or candidate, an attorney who represented an association, a member of the management company, or persons closely affiliated. Any provisions that disqualified property owners from voting in association matters or running for a position on the association's board would be null and void.

Restrictions on associations. Unless an owner waived the right to judicial foreclosure, an association would not be able to foreclose a lien it placed for assessment before first obtaining a court judgment foreclosing the lien and providing for an order of sale. The bill would also prohibit the property owners' association from establishing a primary right to purchase or lease a residential unit or lot. The restriction would not apply to a restrictive covenant granting a primary right to purchase to a developer or builder during the development period of the subdivision.

The bill would limit a property owners' association's ability to restrict or prohibit property owners from installing solar energy devices. To be protected, solar energy devices would have to be located on the roof of a home or a fenced area maintained by a property owner and could not be mounted on a device that was taller or more obtrusive than necessary for the panel's operation at 90 percent of rated efficiency.

Notices and fines. Notices sent to property owners regarding violations of association rules would have to be personally delivered or sent through

verified mail and would have to specify a reasonable date by which the owner would have to resolve the violation. Fines assessed by associations for a violation would have to be based on the nature, frequency, and effect of the violation, and fines for recurring violations would have to be subject to caps set by the association. Associations could assess fines against non-owner occupants and property owners but not on both for the same infraction.

Property owners' associations imposing fines would have to adopt guidelines for payment plans for incremental payments extending at least 12 months from an owner's request for a plan. Payments received by property owners' associations would be applied to an owner's debt in an order of priority to resolve :

- any delinquent and current assessments, in that order;
- attorney's fees and other charges that could be the basis for foreclosure;
- association fines; and
- and any other attorney's fees and amounts.

A property owners' association would have to bring suit or other action to collect any outstanding debt from an owner within 10 years of the original cause for action.

Availability of information. The bill would entitle an owner to receive from a property owners' association copies of restrictions, bylaws, and a resale certificate containing statements specifying the amount and frequency of regular assessments, the association's operating budget, and information about lawsuits to which the association was a party. Upon request, a seller would have to obtain and deliver a copy of a resale certificate to a purchaser. A resale certificate would have to include a statement and description of the type and amount of fees associated with the transfer of ownership.

An owner would have recourse through court if a property owners' association did not make available the association's books and records as required by statute. The bill also would require that candidates running for a board position disclose any amount owed to the association that was six months overdue, any notifications of violations of restrictive covenants the candidate had received, and any lawsuits involving the association and the candidate.

The bill would amend Property Code ch. 211 to stipulate that it applied to certain residential subdivisions not covered under other statutes that govern how subdivision restrictions may be amended. The bill would repeal Property Code, sec. 202.004(c) providing for civil damages a court may assess for violations of restrictive covenants in an amount not to exceed \$200 for each day of the violation.

The bill would take effect January 1, 2008.

**SUPPORTERS
SAY:**

SB 979 would present a carefully crafted approach to protecting property owners while preserving the ability of homeowners' associations to effectively manage residential subdivisions.

Foreclosure protections. In 2001, the Legislature enacted a law prohibiting a homeowners' association from foreclosing on an assessment lien if the debt securing the lien consisted solely of fines assessed by the association or attorney's fees incurred by the association. Despite this clear prohibition, many associations apply regular payments made by a homeowner to that owner's outstanding fines, preserving any outstanding assessments. This effectively allows a homeowners' association to foreclose because the debt securing the lien constitutes an unpaid assessment. SB 979 would prevent homeowners' associations from foreclosing on a lien based on unpaid fines by creating an order of priority for which a payment made by a homeowner to an association would have to be applied.

Non judicial foreclosures avoid both judicial and public oversight and skirt existing statutes regulating judicial foreclosure processes. Current statutory omissions that do not guarantee judicial foreclosures deny property owners that belong to mandatory associations the same protection afforded other landowners. Reserving the right to judicial review for property owners facing foreclosure would provide a simple protection to guard against unjust foreclosure proceedings. The bill would clarify that a homeowner would be entitled to judicial proceedings before foreclosure.

Fair practices. To ensure that owners were given ample opportunities to pay assessments, SB 979 would require that associations institute payment plans. This would increase revenue for associations that might otherwise get nothing from owners with delinquent assessments. SB 979 would not mandate a specific type of collection plan, but would give associations the flexibility to implement one that met their needs.

Allowing associations to modify restrictive covenants and other instruments with 67 percent of a vote would constitute a large enough threshold to make such changes unlikely while allowing associations' critical self-determination. Associations could modify rules based on changing memberships and circumstances, and to accommodate changes in landscape and structural environments in a subdivision. While the bill would grant necessary flexibility for an association to make reasonable changes, it would strictly eliminate certain unfair practices that have arisen in a very small number of associations. The bill would forbid an association from prohibiting any member from voting or running for office and would eliminate potentially discriminatory practices that associations could employ to grant themselves a first right to purchase land so they could determine who could live in the subdivision. Prohibiting these practices would immediately eliminate conspicuous discriminatory and unfair practices.

Homeowner awareness. The bill would include measures to ensure that prospective owners were better informed about the details of association rules and the history of the association's action against homeowners. The bill would allow homeowners to take judicial action to ensure that an association released public records, and would require candidates running for office to disclose key information. Enhancing statutory protections for public information and disclosure would increase the transparency of association actions and reduce dissatisfaction among property owners who were not adequately informed of association practices before buying a home.

The bill would ensure that homeowners were informed of violations identified by an association early in the process when a resolution might be easier and less expensive. Caps on fines for recurring violations would help protect against excessive dues that could accrue for minor violations that continue for days, months, or years.

**OPPONENTS
SAY:**

SB 979 would attempt to rectify a few extreme and rare examples of abuse by hampering the overwhelming majority of associations. Homeowners' associations need the flexibility in current law to collect overdue assessments, enforce deed restrictions, and provide essential services. SB 979 would infringe upon these associations' powers and impede their ability to enforce deed restrictions. This could ultimately result in higher dues for other members and make it easier for non-payers to avoid paying dues. Current law has appropriate, fair limits on foreclosures.

Administrative foreclosures are a necessary tool for associations and should be continued. Prohibiting administrative foreclosure would harm both owners whose homes were foreclosed and associations because the cost of judicial foreclosure is often many times that of administrative foreclosure due to attorneys fees and other items. Costs would be higher for owners who were being foreclosed upon and who would have to pay more for attorneys fees. Associations might not be able to recoup all of the money they were owed, and this could have the effect of increasing dues for other members.

SB 979 would unnecessarily burden associations by requiring them to send certified mail notifications of all enforcement actions, even a nonpayment of assessment violation. In nonpayment of assessment situations, owners most likely would have received several notices about their non-payment and under current law would have to receive a notice before fees could be assessed to them for a non-payment. Sending out additional notices could inhibit an association's ability to collect timely assessments. The need to offer payment plans could similarly delay the acquisition of funds for the associations, and in effect, force them to act as lenders while owners paid off their assessments.

SB 979 would cut off an association's ability to use reasonable means to enforce deed restrictions. If an association no longer could apply payments received at its own discretion, then the association would not have sufficient enforcement mechanisms to collect the fines. To collect the violations, a homeowners association either would have to sue in small claims or justice court or obtain injunctive relief through district courts, resulting in higher costs.

**OTHER
OPPONENTS
SAY:**

SB 979 would not go far enough to protect homeowners from a variety of abuses by certain homeowners' associations. The bill would not specifically provide for open deliberations of homeowners' associations meetings. The recourse the bill would provide is not sufficiently specific to allow homeowners access to key documents relating to proceedings that significantly impact their property. Judicial foreclosure proceedings in the bill merely would transplant problems to the legal realm. Specific statutory guidelines should be adopted to clarify the procedures that must attend foreclosure proceedings and should ensure that foreclosure would be an absolute final resort. SB 979 unfortunately would postpone for future legislative sessions consideration of the most pressing problems that plague homeowners' associations.

The bill would also not include guidelines on the type of payment plans that associations would have to implement, which could lead to wide variations in the plans. This could result in disagreements and litigation between owners and associations over the equitability of the plans. Provisions requiring a neutral third party in certain elections would take a step in the right direction but would call for neutral intervention too late in the voting process to make a difference. Neutral third parties should have a role in overseeing the conduct of an election and ensuring ballots were properly completed and filed.

Various provisions in the bill are underspecified and could have unintended consequences. Provisions allowing 50 homeowners to request an independent vote tabulation would be far too small a percentage for some larger associations, such as the Woodlands. The bill also would not specify at what level continuous fines should be capped, which could result in confusion for associations and highly inconsistent cap levels across associations.

NOTES:

Representative Solomons plans to propose a floor amendment that would make a number of changes to the bill, including:

- prohibiting a person from serving as an association board member if the person had been convicted of an offense involving moral turpitude;
- limiting an association board member from being elected to a term longer than three years;
- providing that the bylaws of a homeowners' association could not expand the powers of an association beyond those granted in a dedicatory instrument;
- stipulating that an association's bylaws had to provide for the qualifications, number, and terms of office of association directors, manner of electing and removing a board member, method for amending the bylaws, and protocol for meeting notices;
- modifying the notification requirement set forth in the bill, including providing for a disclosure in Spanish informing an owner of basic information relating to the violation;
- specifying that a cap for a continuing violation would be set at 10 times the amount of an initial fine; and
- prohibiting a municipality from requiring a homeowners' association as a condition of approval of a plat unless the subdivision was a planned unit development with private streets

and other private amenities or it contained common areas or amenities that required maintenance.