

**SUBJECT:** Revising practices of property owners' associations

**COMMITTEE:** Business and Industry — committee substitute recommended

**VOTE:** 6 ayes — Deshotel, Orr, Giddings, Quintanilla, Solomons, Workman  
0 nays  
3 absent — Bohac, Garza, Miller

**SENATE VOTE:** On final passage, April 5— 31-0

**WITNESSES:** No public hearing

**BACKGROUND:** Title 11 of the Property Code grants some powers to and imposes certain constraints on property owners associations.

Property Code, ch. 202 governs restrictive covenants established and enforced by property owners associations, including those for condominiums and residential subdivisions (HOAs). The chapter restricts HOAs from adopting and enforcing certain types of restrictive covenants, including prohibitions on political signs.

Property Code, ch. 207 governs the disclosure of information by property owners' associations. The chapter sets forth requirements for resale certificates, which are written statements issued by an association or its agent. The certificates must contain a variety of information about the association and the property subject to the request.

Property Code, ch. 209, the Texas Residential Property Owners Protection Act, applies to all HOAs and establishes requirements for association records, voting, attorneys' fees, foreclosure on property, and other procedures.

**DIGEST:** CSSB 142 would revise procedures that govern property owners' associations (HOAs and condo associations), by limiting the types of restrictive covenants associations could impose, amending laws on attorney's fees, and changing requirements for resale certificates. The bill

also would impose requirements for HOA board meetings and public information, fines and assessments, foreclosure, notice, priority of payments, and voting requirements.

**Restrictions on covenants in HOAs and condo associations.** CSSB 142 would add a number of restrictions to Property Code, ch. 202, which governs restrictive covenants for HOAs and condo associations.

***Unenforceable covenants.*** A restrictive covenant would have no effect until it was filed with the appropriate county and could not be enforced against an owner who purchased the property before the instrument was filed without the owner's consent to comply with the instrument. Associations that had not previously recorded covenants with the county would have to do so by January 1, 2012.

***Right of first refusal.*** The bill would prohibit any restrictive covenant that provided a first right of refusal upon the sale or lease of a residential unit in favor of an association. This restriction would not apply to a covenant that provided a right of first refusal to a developer or builder during the development period.

***Solar energy devices.*** An association could not adopt or enforce a restrictive covenant that prohibited or restricted a property owner from installing a solar energy device. An association could prohibit a solar energy device that:

- threatened public health or safety or violated a law;
- was located on property owned or maintained by the property owners' association;
- was located on property owned in common by the members of the property owners' association;
- was located anywhere on the individual property owner's premises other than the roof of the home or in a fenced yard or patio;
- if mounted on the roof, was higher than the roofline and did not conform to other standards;
- if in a fenced yard or patio, was taller than the fence; or
- conflicted with the manufacturer's installation requirements or voided material warranties.

***Roofing materials.*** The bill would prohibit an association from adopting or enforcing a covenant that prohibited or restricted a property owner who

was otherwise authorized to install shingles that were designed to be wind and hail resistant, provided improved heating and cooling efficiencies, or had solar generation capabilities, and that resembled other shingles in the subdivision and matched the aesthetics of surrounding property.

***Capital improvements.*** An association could not amend a restrictive covenant to require a person who owned property to make a capital improvement — such as tree plantings, fences, and new building, but not including repair or maintenance of existing improvements — to the person’s property that was not previously required.

***Attorney’s fees.*** The bill would amend a current law that awards attorneys fees to a prevailing party “who asserted a legal action” to instead allow a court to award fees to a prevailing party, regardless of who asserted the action. The bill would add attorney’s fees relating to an action based on the breach of a statute pertaining to property subject to a restrictive covenant.

***Revisions to laws governing HOAs.*** The bill would expand and revise provisions in Property Code, ch. 209, which establishes requirements for records, voting, attorneys’ fees, foreclosure on property, and other procedures for HOAs. Some of the revisions would not apply to a mixed-use master association that existed before 1974 and that did not have the authority to impose fines.

***Procedures for amending a declaration.*** Under the bill, a document declaring an association could be amended only by a vote of 67 percent of the total votes allocated to property owners, in addition to any governmental approval required by law. If the association’s declaration specified a lower percentage, then it would control. An association bylaw could not be amended to conflict with the declaration. Ballots cast in a vote that resulted in an amendment to a restrictive covenant or bylaws would be association records subject to inspection. The requirement would not apply to an association that was subject to state open records laws or during a development period.

***Association records.*** CSSB 142 would expand and revise procedures for associations’ books and records. The bill would establish a process for property owners or their agents to obtain records from an association. If an association was unable to produce requested records within 10 days of receiving a request, the association would have to provide notice to the

requestor with the reason for the delay and a date by which the information would be available, not to exceed 15 business days. The association would have to produce records in a reasonably available format. An association would have to make restrictive covenants filed in the county deed records available online.

An association board would have to adopt a records production and copying policy to determine costs the association would charge for records. Charges could not exceed costs specified for records for records requests in the Texas Administrative Code. An association could not charge for records production without first recording the policy as a dedicatory instrument. An association would not be required to release information about a property owner or other personal information specified in the bill without the owner's express written approval or a court order.

An association with more than 14 lots would have to adopt and comply with a records retention policy that included requirements listed in the bill. An owner who was denied access to records could file a petition with the appropriate justice of the peace. The bill would provide remedies for the owner that could be ordered by the justice of the peace. A property owners' association that prevailed in a suit would be entitled to receive attorneys' fees from a property owner.

***Association board meetings.*** The bill would require regular and special board meetings to be open to property owners, subject to the board's right to reconvene in executive session to consider:

- actions involving personnel;
- pending or threatened litigation;
- contract negotiations;
- enforcement actions;
- confidential communications with the association's attorney;
- matters involving the invasion of privacy of individual owners; or
- matters that are to remain confidential by request of the affected parties.

Any decision made in an executive session would have to be summarized orally and placed in the meeting minutes. The association's board would have to keep a record of each meeting in the form of minutes or an audio recording. Association members would be entitled to receive a mailed

notice at least ten but not more than 60 days before a board meeting or the association could post a notice at least 72 hours before the meeting in a conspicuous place on common property or online. Emergency meetings would not be subject to notice requirements. A board could not vote on specific items listed in the bill without posting due notice.

Meeting notice requirements only would apply to an association in its development period only for a meeting on adopting or amending governing documents, increasing assessments, electing non-developer board members, or changing voting rights.

The bill would require an association board to call an annual meeting of all members. A board that failed to do so would be subject to reelection through procedures established in the bill.

***Voting requirements.*** Property owners would be entitled to receive written notice at least ten but not more than 60 days before an association election or vote. The bill would establish procedures for allowing an owner to request a vote recount. Voting requirement would not apply to an association covered by state open records laws.

The bill would require any vote cast in an election by a member of an association to be in writing and signed, a requirement that an electronic ballot would satisfy. Written and signed ballots would not be required for uncontested races.

The bill would void a restrictive covenant that disqualified a property owner from voting in an association election. A restrictive covenant that restricted a property owner's right to run for a position on an association board also would be void. The bill would bar a board member from serving who was verifiably convicted of a felony or crime involving moral turpitude.

A property owner's voting rights could be cast in person or by proxy at an association meeting, by an absentee or electronic ballot, or by any method provided for in an association's restrictive covenants. An absentee or electronic ballot would be counted as an owner present and voting in order to establish a quorum, but could not be counted if the property owner attended a meeting to vote in person. An absentee or electronic ballot also would not count if the final vote on a proposal had been amended to be different from the exact language on the absentee ballot. For purposes of

voting rights, an electronic ballot could be submitted by email, fax, or a posting on a website, provided the owner's identity could be confirmed.

A board member whose term expired would have to be re-elected. A board member could be appointed by the board only to fill a vacancy caused by a resignation, death, or disability.

The bill would establish procedures for a declaration to provide for a period of developer control over the association. Not later than 120 days after 75 percent of the lots in an association were conveyed to property owners rather than a developer, at least one-third of the board members would have to be elected by owners rather than the developer. If the declaration did not include the number of lots, then one-third of the board members would have to be elected by owners within 10 years of when the declaration was recorded.

***Fines and assessments.*** A fine that an association imposed would have to be reasonable in the context of the nature and frequency of the violation and its effect on the subdivision as a whole. An association would have to establish a reasonable cap for a continuing violation. If an occupant — as opposed to an owner — violated a restrictive covenant, the association could assess a fine against the occupant in the same manner as provided for an owner, but could not fine both.

An association with more than 14 lots would have to adopt reasonable guidelines to establish an alternative payment schedule for delinquent assessments or any other amount owed to the association without accruing additional penalties. An association could charge interest and reasonable costs associated with administering the payment plan. A payment plan would have to have a term of at least three months. An association would not be required to allow a payment plan for any amount that extended more than 18 months from the date of the owner's request or to enter into a plan with an owner who had failed to honor terms of a previous plan within two years. An owner would have a right to a payment plan even if an association failed to file with an applicable county guidelines for a plan as the bill would require. (pp.32-34)

***Priority of payments.*** A payment an association received from an owner would be applied toward the owner's debt in the following order of priority:

- any delinquent assessment;
- any current assessment;
- attorney's fees or third party collection costs incurred by the association for assessments or any other charge that could provide the basis for foreclosure;
- fines assessed by the association;
- other attorney's fees incurred by the association; and
- any other amount owed to the association.

The bill would add notice requirements for third party collections.

Property owners associations would be prohibited from foreclosing on a property owner for fines for records requests or fees associated with third party collections.

***Foreclosure provisions.*** The bill would prohibit an association from foreclosing to collect an owner's assessment lien without first obtaining a court order. The Texas Supreme Court would have to adopt rules establishing expedited foreclosure proceedings for use by an association in foreclosing an assessment lien by January 2012. Rules adopted would have to be similar to other rules the court had adopted under constitutional authority and would require service notice processes specified in existing law. A property owner could waive an option for expedited foreclosure.

A covenant that granted a right to foreclose for delinquent assessments could be removed from or adopted into an association's declaration by a vote of at least 67 percent of property owners. An vote for this purpose could be initiated by a petition submitted by ten percent of property owners in the association.

The bill would affirm that a lien or other instrument evidencing the nonpayment of assessments or other charges that was filed in public records of a county would be a legal instrument affecting title to the property.

***Resale certificate.*** The bill would require a buyer to pay fees for a resale certificate to the association unless the buyer and seller agreed to another arrangement. It would add to the required resale certificate a description of all fees associated with the transfer of ownership, including the amount and recipient of each fee. The statement would not have to include

information about a lawsuit relating to unpaid property taxes of an association member.

**Other provisions.** Bylaws adopted by an association board could not expand the association's powers beyond those specifically granted in the association's declaration. If there were any conflict between an association's bylaw and a declaration, the latter would prevail.

The bill would extend current protections from foreclosure for active military members to include a lien securing payment of a lawful assessment.

The bill would modify a required seller's disclosure notice for property located in a property owners' association to add information about required disclosure laws. It also would amend notice requirements associated with public auctions for foreclosed property.

**Effective date.** The bill would take effect January 1, 2012. Provisions in the bill would be prospective, with a few exceptions. Some provisions would restrict current and future covenants, including those that prohibited an association from:

- granting to itself a right of first refusal;
- banning solar devices;
- restricting certain roofing materials; and
- restricting owners' right to vote and run for a position on an association board.

**SUPPORTERS  
SAY:**

CSSB 142 would finally resolve many long-standing issues with some property owners' associations that have been broadcast repeatedly around the state in personal stories, new reports, lawsuits, legislative committee hearings, and other forums. The undeniable lack of necessary state legislation restricting association practices has allowed some bad actors to run roughshod over the property rights of a minority of unfortunate owners. After many legislative sessions of attempting to adopt meaningful reform, the need to enact a bill that would include the reform that Texans around the state have been demanding for many years is more pressing than ever.

The bill would present a compromise to address far-reaching and conspicuous abuses without hampering the majority of associations. It

would include meaningful restrictions on associations' powers of foreclosure, establish the order in which they process payments from owners, strengthen provisions on open records and open meetings, require fines to be set at reasonable rates, and prohibit an association from adopting unreasonable restrictions on solar panels, certain roofs, and other practices.

The House committee substitute added a number of provisions to enhance protections for property owners. Opponents of these provisions have exaggerated their impact on associations. The substitute would prohibit an association from enforcing a covenant against an owner who purchased a property before the covenant was filed. Some have interpreted this provision as prohibiting associations from adopting new covenants. This is not the case — on the contrary, the provision would protect property owners from the unjustified imposition of an existing covenant that was not filed when they purchased property in the association. It would not relieve a property owner from having to comply with a covenant that was amended in accordance with the Property Code.

The substitute also added requirements that strengthened provisions requiring open meetings with sufficient notice, priority of payments, and expedited judicial foreclosure. These enhanced provisions are reasonable and necessary to add balance to the relationship between associations and owners, which has been severely tilted for many years. The bill's House sponsor plans to offer amendments to address other perceived issues with the substitute, such as removing posting requirements for emergency meetings, maximum charges that may be assessed for document production, a winner prevails option for attorney's fees relating to restrictive covenants, and allowing adjoining property owners a veto over a solar device. The amendments would correct certain issues with the substitute and reflect a willingness to adopt changes in response to legitimate concerns.

**Voting practices.** The bill would address issues that have arisen in some associations with secret ballots. Secret voting practices in some HOAs have resulted in issues with forgery and other types of voting manipulation. Removing the option for HOAs to use secret ballots would add accountability to each vote and allow associations to better enforce voting practices.

The bill would address abuses by some associations that have adopted covenants to prohibit or restrict property owners who owe fines or assessments from voting in association elections or serving on a HOA board. Some associations have even prevented certain property owners from participating by fining them prior to an election.

SB 472 would ban these practices by voiding any association covenant that barred a homeowner from voting or serving on a HOA board, except a convicted felon. Associations have abundant means at their disposal to collect assessments — they can even foreclose on an owner for outstanding assessments — so unfair sanctions, such as barring an owner from voting, are not necessary. The bill would address these conspicuous problems without hampering the majority of associations.

**OPPONENTS  
SAY:**

CSSB 142 is a troubling attempt to modify the relationship between a property owner and an HOA with legislation. When a property owner purchases property within an association, the new owner enters into a voluntary contract to abide by the association's restrictive covenants. The definition of these covenants should be left to association boards and bylaws, and any disputes over the covenants can be resolved through existing processes — specifically, through the right to file action in court. Legislative interference, even if well-intended, is likely to hinder the great majority of associations that have amicable relationship with property owners to get at the small minority that have problems.

While some revisions to law governing association practices may be inevitable, achieving a compromise solution is necessary. The Senate-approved version of CSSB 142 was an example of a compromise bill that was acceptable to many stakeholders. The committee substitute, however, would undermine many of the compromise provisions. The substitute added a number of provisions that would erode the authority of associations, increase costs of operation — which are inevitably transferred to homeowners — and add requirements and restrictions that could have far-reaching, negative consequences.

The substitute, for instance, added language stating that a covenant “may not be enforced against a property owner who purchased the property before the instrument was filed.” This could mean that an association could not add or amend any existing restrictions on property owners. Each owner, in essence, would be grandfathered. If that is how the provision

was interpreted, it would seriously hamper legitimate functions of associations.

The committee substitute also removed important language allowing associations to deny certain solar devices. It would expand the definition of association board meetings to include information discussions, thereby increasing potential lawsuits and forcing smaller, informal associations to abide by strict public notice requirements. The substitute also would require a 72-hour advance notice on emergency meetings, which would not be a realistic standard. The substitute also would cap the costs that may be set for producing documents to state standards, which would impose an unnecessary, uniform standard on all associations and result in many associations subsidizing the costs of record production.

**Voting practices.** This bill would ban secret ballots in HOA elections and other votes, which could have a number of unfortunate consequences. Secret ballots are used in all major governmental votes and most private surveys, and they are particularly important in small scale elections, where the participants may personally know each other. Removing anonymity could unduly influence the vote of a person who knew their ballot would be identified with their name and available for retrieval in association records. Removing anonymity could generate fear of possible retribution for a vote.

OTHER  
OPPONENTS  
SAY:

**Judicial review of foreclosures.** CSSB 142 would raise possible separation-of-powers concerns in its provisions that would require the Texas Supreme Court to develop procedures on expedited foreclosure procedures by January 1, 2012. The court has demonstrated in many cases that it is willing to ignore the Legislature.

NOTES:

The House committee substitute made a number of changes to the Senate-passed version of the bill, including:

- prohibiting an association from enforcing a restrictive covenant against an owner who purchased the property before the covenant was filed, unless the owner agreed to comply with the subsequently filed instrument;
- deleting language allowing an HOA's architectural review committee to determine that a placement of a solar device interfered with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities;

- adding requirements of at least 72 hours notice for an meeting to include emergency meetings;
- deleting a provision that would have allowed an association board to take action by unanimous written consent to consider routine and administrative matters;
- removed language that would have relieved an association from applying the specified priority of payment schedule if the owner was in default under an existing payment plan;
- broadening the attorney's fees awarded to a prevailing party to a suit pertaining to real property subject to a restrictive covenant; and
- added a requirement that rules on expedited judicial foreclosure would have to require service on the record owners of the property for foreclosure of the lien by the same methods found in the Texas Rules of Civil Procedure.

Rep. Solomons, the House sponsor, plans to offer four amendments on the House floor, which include:

- striking language that would require emergency meetings to conform to notice requirements;
- deleting additional attorney's fees awarded pertaining to real property subject to a restrictive covenant;
- adding a provision stating that an association could not restrict a solar device that "has been approved by all adjoining property owners"; and
- removing a provision that set a cap on fees that could be charged in conjunction with producing certain records.