SUBJECT: Priority of payments to homeowners association

COMMITTEE: Business and Industry — favorably without amendment

VOTE: 6 ayes — Giddings, Elkins, Solomons, Taylor, Vo, Zedler

0 nays

3 absent — Bailey, Bohac, Martinez

SENATE VOTE: On final passage, May 3 — 31-0

WITNESSES: (*On House companion bill, HB 1446 by Orr:*)
For — Amy McCorkle, Texas Homeowners Advocate Group; Tom Morgan, Texas Association of Realtors

Against — Connie Heyer, Texas Community Associations Institute

BACKGROUND: Homeowners associations are groups formed to provide services for homeowners in exchange for mandatory assessments or dues. The associations are governed by the homes' deed restrictions and by the associations' 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 the Texas Residential Property Owners Protection Act (Property Code, ch. 209), which the 77th Legislature enacted in 2001 through SB 507 by Carona. Under sec. 209.009, homeowners associations cannot foreclose on a homeowner's assessment lien if the debt securing the lien consists solely of fines assessed by the association or attorney's fees incurred by the association associated with the fines.

DIGEST: SB 244 would stipulate that, unless otherwise provided in writing by the property owner, a payment received by a homeowners association from the owner would be applied to the owner's debt in the following order of priority:

- any delinquent assessment;
- any current assessment;
- any fines assessed by the association; and
- any attorney's fees incurred by the association solely related to fines assessed by the association.

The priority order of payments would not apply to a payment received by a homeowners association if:

- membership in the association was mandatory for owners or for a defined class of owners of private real property in a defined geographic area in Harris County or an adjacent county;
- the association had the power to make mandatory special assessments for capital improvements or mandatory regular assessments; and
- the amount of the mandatory special or regular assessments was or had been based before in whole or in part on the value at which the state or a local governmental body assessed the property for purposes of ad valorem taxation.

The bill would take effect September 1, 2005, and would apply to a payment received by a homeowners association on or after that date.

SUPPORTERS SAY:

SB 244 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. In 2001, the Legislature enacted a law prohibiting a homeowners association from foreclosing on an assessment lien if the debt securing the lien consists 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, creating an outstanding assessment. Therefore, a homeowners association can foreclose on an assessment lien because the debt securing the lien consists of an unpaid assessment.

Texas has more than two million homeowners in homeowners associations. Among these owner's groups there are many that operate fairly and in the general interests of the property owners, but there are some that circumvent the intent of the law by continuing to use fines as a means or threat of foreclosure. Homeowners have faced foreclosure proceedings for infractions as minor as having no net on a basketball goal

or having a garbage can visible from the street. Owners report deed restrictions enforced that do not exist anywhere in written form and incidents of foreclosures filed without the association board's authority. While deed restrictions have their place, the threat of foreclosure should not be abused simply to enforce these infractions, and homeowners associations should never use debts secured by fines and attorney's fees as a means of foreclosure.

The bill would exempt The Woodlands, which contains two homeowners associations with 28,000 homes between them. Much like a city, these homeowner's associations apply ad valorem assessments and offer services affecting health and safety, such as fire services, garbage collection, and law enforcement. They properly would be exempt from this legislation in order to protect the certainty of revenue assessments. The Woodlands has due process provisions in place, abides by open meetings laws, and has foreclosed on only two properties in 30 years — at the behest of residents in both cases to eliminate health hazards.

OPPONENTS SAY:

SB 244 would punish rule abiding homeowners association members for the benefit of rule breakers. It 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.

Current law contains built-in safeguards to prevent an owner from being blindsided by fines or attorney's fees. In the matter of a deed restriction violation, an owner must receive a certified letter stating a specific time period in which to settle the infraction. At that point, an owner has the chance to be heard before the board and sufficient knowledge that attorney's fees may be assessed to the person's account if the violation is not cured by a certain date. Attorney's fees cannot be assessed until after a hearing if a homeowner requests one, and the association cannot assess a fine without notice to the homeowner and the opportunity for the owner to cure the violation.

NOTES: The companion bill, HB 1446 by Orr, was reported favorably, without amendment, by the Business and Industry Committee on May 3. A related bill, HB 2215 by Bailey, passed the House on May 10 and was left pending in the Senate Intergovernmental Relations Committee on May 20.