

## **BILL ANALYSIS**

Senate Research Center  
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S.B. 1235  
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### **AUTHOR'S / SPONSOR'S STATEMENT OF INTENT**

An estimated 57 million Americans live in more than 200,000 community associations, including approximately 4.8 million Texans who pay assessments of \$3.2 billion annually. Property owners' associations may be classified as a condominium association, a cooperative association, or a homeowners' association. In Texas, these entities are regulated under the Property Code. As the popularity of homeowners' associations increases, so does the potential for abuse. Existing statutory provisions regarding these associations do not provide adequate protections for homeowners.

S.B. 1235 seeks to ensure the basic private property rights of individuals residing within community associations by changing statutory provisions regarding restrictive covenants commonly governing some associations, removing unfair voting thresholds required in some associations to amend governing documents, and leveling the playing field in legal proceedings between associations and homeowners.

As proposed, S.B. 1235 amends current law relating to real property that is subject to restrictive covenants and the operation of property owners' associations of subdivisions that are subject to restrictive covenants.

### **RULEMAKING AUTHORITY**

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends Section 5.006(a), Property Code, to authorize the court, in an action based on breach of a restrictive covenant pertaining to real property or a statute pertaining to real property subject to a restrictive covenant or to restrictive covenants to which real property is subject, to allow a prevailing party, rather than require the court to allow a prevailing party who asserted the action reasonable attorney's fees in addition to the party's cost and claim.

SECTION 2. Amends Section 202.004, Property Code, by adding Subsections (d), (e), and (f), as follows:

(d) Authorizes a property owners' association board, in evaluating an alleged or potential violation of a restrictive covenant, notwithstanding any provision in a dedicatory instrument, to elect to not enforce the restrictive covenant if the board, in the board's reasonable judgment, determines:

- (1) the property owners' association's position is not sufficiently strong to justify taking any action or further action;
- (2) the provision alleged to have been violated may be inconsistent with applicable law;

(3) the alleged violation is not of such a material or visible nature as to be objectionable to a reasonable person or to justify expending the property owners' association's resources;

(4) enforcement of the provision is not in the association's best interests, based on hardship, expense, or other reasonable criteria; or

(5) the facts of the particular circumstances, such as topography of the owner's land or unforeseen circumstances unique to the particular owner, justify the board's election to not enforce the restrictive covenant.

(e) Prohibits an election by the property owners' association board to not enforce a restrictive covenant under Subsection (d) from being considered a waiver of the association's authority to enforce any dedicatory instrument provision in the future.

(f) Requires a property owners' association board to document each election by the board to not enforce a restrictive covenant under Subsection (d) by noting in the minutes of the board meeting at which the election was made:

(1) the person who was not subjected to enforcement of the covenant;

(2) the specific covenant the board did not enforce; and

(3) the board's rationale for not enforcing the covenant.

SECTION 3. Amends Chapter 202, Property Code, by adding Sections 202.011, 202.012, 202.013, 202.014, and 202.015, as follows:

Sec. 202.011. RIGHT OF FIRST REFUSAL PROHIBITED. (a) Defines, in this section, "development period."

(b) Provides that, to the extent a restrictive covenant provides a right of first refusal for the sale or lease of a residential unit or residential lot in favor of the property owners' association or the association's members, the covenant is void.

(c) Provides that this section does not apply to a restrictive covenant that provides a right of first refusal in favor of a developer or builder during the development period.

Sec. 202.012. REGULATION OF SOLAR ENERGY DEVICES. (a) Defines, in this section, "solar energy device."

(b) Prohibits a property owners' association, except as otherwise provided by this section, from including or enforcing a provision in a dedicatory instrument that prohibits or restricts a property owner from installing a solar energy device.

(c) Provides that a provision that violates Subsection (b) is void.

(d) Provides that this section does not prohibit the inclusion or enforcement of a provision in a dedicatory instrument that prohibits a solar energy device that:

(1) as adjudicated by a court:

(A) threatens the public health or safety; or

(B) violates a law;

(2) is located on property owned or maintained by the property owners' association;

(3) is located on property owned in common by the members of the property owners' association; or

(4) is located in an area on the property owner's property other than:

(A) on the roof of the home; or

(B) in a fenced yard or patio maintained by the property owner.

Sec. 202.013. RENTAL RESTRICTIONS. (a) Prohibits a property owners' association, except as provided by Subsection (b), from amending a dedicatory instrument to prohibit or restrict the rental of property subject to the dedicatory instrument without the consent of at least 51 percent of the total votes allocated to property owners subject to the dedicatory instrument.

(b) An amendment to a dedicatory instrument may require:

(1) an owner to:

(A) exercise due diligence in not leasing to an occupant who is a registered sex offender or who has a history of violent crime; or

(B) terminate the possessory right of any tenant or occupant who is a registered sex offender or who has a history of violent crime;

(2) all leases to be subject to the dedicatory instruments of the property owners' association; or

(3) a minimum lease term of not more than six months.

Sec. 202.014. RESTRICTIONS REQUIRING CAPITAL IMPROVEMENTS. (a) Prohibits a dedicatory instrument from being amended to retroactively require a person who owns property subject to the dedicatory instrument at the time the amendment is adopted to make a capital improvement to the owner's property that is not required before the amendment. Authorizes a provision of a dedicatory instrument requiring an owner to make a capital improvement to the owner's property to only be adopted by a vote of at least 67 percent of the total votes allocated to property owners subject to the dedicatory instrument and to be applicable only to owners purchasing property subject to the dedicatory instrument after the provision is adopted.

(b) Defines, for the purposes of this section, "capital improvement."

Sec. 202.015. INJUNCTION; DAMAGES. (a) Authorizes a member of the property owners' association, if a property owners' association or other representative designated by the property owners' association has violated, is violating, or is threatening to violate this chapter, to bring a civil action against the property owners' association but prohibits the member from bringing an action against an association's officer or board member individually.

(b) Authorizes a member of a property owners' association bringing an action under this section to seek:

(1) injunctive relief;

(2) damages in an amount equal to the greater of:

(A) actual damages arising from the violation; or

(B) \$1,500 for each violation; or

(3) both injunctive relief and damages as provided in this subsection.

(c) Authorizes the court to increase an award under Subsection (b)(2) to an amount not to exceed three times the amount awarded under Subsection (b)(2) if the court finds that violations have occurred with a frequency that constitutes a pattern or practice.

(d) Provides that each day a violation continues is not considered a separate violation for purposes of an assessment of damages.

(e) Authorizes the court to award damages to a property owners' association for an action brought by a member of the property owners' association that the court finds frivolous or groundless in an amount that is not more than the greater of:

(1) three times the association's actual damages; or

(2) \$4,500.

(f) Requires the person, on or before the 30th day before the date a person brings an action under this section, to provide notice to the other party of the person's intent to bring an action under this section. Requires that the notice be sent certified mail, return receipt requested, or delivered by the United States Postal Service with signature confirmation service.

SECTION 4. Amends Chapter 209, Property Code, by adding Sections 209.0035 and 209.0041, as follows:

Sec. 209.0035. INJUNCTION; DAMAGES. (a) Provides that if a property owners' association or other representative designated by the property owners' association has violated, is violating, or is threatening to violate this chapter, a member of the property owners' association may bring a civil action against the property owners' association but may not bring an action against an association's officer or board member individually.

(b) Authorizes a member of a property owners' association bringing an action under this section to seek:

(1) injunctive relief;

(2) damages in an amount equal to the greater of:

(A) actual damages arising from the violation; or

(B) \$1,500 for each violation; or

(3) both injunctive relief and damages as provided in this subsection.

(c) Authorizes the court to increase an award under Subsection (b)(2) to an amount not to exceed three times the amount awarded under Subsection (b)(2) if the court finds that violations have occurred with a frequency that constitutes a pattern or practice.

(d) Provides that each day a violation continues is not considered a separate violation for purposes of assessment of damages.

(e) Authorizes the court to award damages to a property owners' association for an action brought by a member of the property owners' association that the court finds frivolous or groundless in an amount that is not more than the greater of:

(1) three times the association's actual damages; or

(2) \$4,500.

(f) Requires the person, on or before the 30th day before the date a person brings an action under this section, to provide notice to the other party of the person's intent to bring an action under this section. Requires that the notice be sent certified mail, return receipt requested, or delivered by the United States Postal Service with signature confirmation service.

Sec. 209.0041. AMENDMENT OF DEDICATORY INSTRUMENTS. (a) Provides that this section applies to a residential subdivision in which property owners are subject to mandatory membership in a property owners' association.

(b) Provides that this section applies to all dedicatory instruments regardless of the date on which the dedicatory instruments were created.

(c) Provides that this section does not apply to the amendment of a dedicatory instrument during a development period, as defined by Section 202.011.

(d) Provides that, to the extent of any conflict with another provision of this title, this section prevails.

(e) Authorizes a dedicatory instrument, except as provided by Subsection (f), to be amended only by a vote of at least 51 percent of the total votes allocated to property owners in the property owners' association, in addition to any governmental approval required by law.

(f) Authorizes a rule or guideline that affects land owned, leased, maintained, or otherwise controlled by the property owners' association to be adopted or amended by majority vote of the association board. Authorizes a rule or guideline that impacts the use and enjoyment of personal or real property owned exclusively by the owner or that may result in a fine or loss of privilege of a member of the association to be adopted or amended only by a vote of at least 51 percent of the total votes allocated to property owners who cast votes by any permissible method in an association-wide vote.

(g) Authorizes a property owners' association board by majority vote to adopt ministerial, office-related procedural policies, such as payment plan guidelines, a collections policy, an enforcement policy, or other similar ministerial, office-related procedural policies. Authorizes the policy to outline circumstances under which, or the manner by which, enforcement remedies may be carried out but may not otherwise impact the use and enjoyment of personal or real property owned exclusively by the owner. Prohibits the policy from:

(1) creating a power to:

(A) levy a fine; or

(B) impose a loss of a privilege on a member of the association; or

(2) expanding the association's powers beyond the powers granted by any other dedicatory instrument.

(h) Provides that all ballots cast in an election that results in an amendment to a dedicatory instrument under this section are records of the property owners' association for the purposes of Section 209.005 (Association Records).

(i) Provides that this section supersedes any contrary requirement in a dedicatory instrument.

(j) Provides that this section does not apply to a property owners' association that is subject to Chapter 552 (Public Information), Government Code, by application of Section 552.0036 (Certain Property Owners' Associations Subject to Law), Government Code.

SECTION 5. Amends Section 209.006, Property Code, as follows:

Sec. 209.006. NOTICE REQUIRED BEFORE ENFORCEMENT ACTION. (a) Requires the association or its agent, before a property owners' association may suspend an owner's right to use a common area, file a suit against an owner other than a suit to collect a regular or special assessment or foreclose under an association's lien, charge an owner for property damage, or levy a fine for a violation of the restrictions or bylaws or rules of the association, to send written notice, rather than give written notice to the owner by certified mail, return receipt requested, or delivered by the United States Postal Service with signature confirmation service to the owner at the owner's last known address as shown on the association's records.

(b) Requires that the notice:

(1) describe the violation or property damage that is the basis for the suspension action, charge, or fine and state any amount due the association from the owner;

(2) except as provided by Subsection (d), inform the owner that the owner:

(A) is entitled to a reasonable period to cure the violation and avoid the fine, rather than avoid the fine or suspension unless the owner was given notice and a reasonable opportunity to cure a similar violation within the preceding six months; and

(B) may request a hearing under Section 209.007 (Hearing Before Board; Alternative Dispute Resolution) on or before the 30th day after the date notice was delivered to the owner, rather than after the date the owner received the notice;

(3) specify the date by which the owner must cure the violation if the violation is of a curable nature and does not pose a threat to public health or safety;

(4) specify the dollar amount of any fine the association seeks to levy; and

(5) specify each provision of the dedicatory instrument the owner is alleged to have violated.

(c) Requires that the date specified in the notice under Subsection (b)(3) provide a reasonable period of at least 30 days for the owner to cure the violation if the violation is of a curable nature and does not pose a threat to public health or safety.

(d) Provides that Subsections (a) and (b) do not apply to a violation for which the owner has been previously given notice under this section and the opportunity to exercise any rights available under this section in the preceding six months.

(e) Authorizes the property owners' association, if the property owner does not cure the violation in the time provided by Subsection (c) and does not request a hearing under Section 209.007 in the time provided by Subsection (b)(2)(B), to assess the fine and require the property owners' association to provide notice of the assessment to the owner. Provides that, if the property owner cures the

violation before the expiration period for cure specified under Subsection (c), any fine assessed for the violation is void.

(f) Provides that, for purposes of this section, a violation is considered a threat to public health or safety if the violation could materially affect the physical health or safety of an ordinary resident.

SECTION 6. Amends Chapter 209, Property Code, by adding Section 209.0061, as follows:

Sec. 209.0061. ASSESSMENT OF FINES. (a) Requires that a fine assessed by the property owners' association be reasonable in the context of the nature and frequency of the violation and the effect of the violation on the subdivision as a whole. Requires the association, if the association allows fines for a continuing violation to accumulate against a lot or an owner, to establish a reasonable maximum fine amount for a continuing violation at which point the total fine amount is capped.

(b) Authorizes the property owners' association, in addition to exercising any of the association's powers against the owner, if a lot occupant other than the owner violates a provision of the dedicatory instrument, to assess a fine directly against the nonowner occupant in the same manner as provided for an owner but prohibits the association from requiring payment from both the owner and a nonowner occupant for the same violation.

(c) Provides that, if the property owners' association assesses a fine against a nonowner occupant under this section, the notice provisions of Section 209.006 and the hearing provisions of Section 209.007 apply to the nonowner occupant in the same manner as those provisions apply to an owner.

SECTION 7. Amends Section 209.007, Property Code, by amending Subsection (a) and adding Subsections (f), (g), (h), (i), and (j), as follows:

(a) Provides that, if the owner is entitled to an opportunity to cure the violation, the owner has the right to submit a written request for a hearing to discuss and verify facts and resolve the matter in issue before a committee appointed by the board of the property owners' association or before the board if the board does not appoint a committee. Requires that the written request contain a statement of the grounds on which the owner believes the owner is not in violation and citations of the dedicatory instrument for each violation alleged.

(f) Requires the property owners' association, if the parties fail to reach agreement in or after the hearing described by this section, to file suit to uphold and enforce any fine sought to be assessed. Requires that the suit be filed in a justice court or small claims court not later than the 180th day after the date of the hearing described by this section or an appeal under Subsection (b) (requiring that the notice prescribed by Section 209.006, if a hearing is to be held before a committee, state that the owner has the right to appeal the committee's decision to the board by written notice to the board), whichever is later. Requires that the complaint list each violation and be accompanied by citation of the dedicatory instrument for each violation. Provides that, if the property owners' association does not file suit within the time prescribed by this subsection, the association's right to collect the fine is considered waived.

(g) Requires the court, not later than the 30th day after the date a suit is filed under Subsection (f), to hold an evidentiary hearing on the matter. Provides that the parties are not entitled to any discovery.

(h) Provides that at the evidentiary hearing, the property owners' association has the burden of proving by a preponderance of the evidence that the property owner has violated a restrictive covenant.

(i) Requires the court to determine whether a violation has occurred and, if so, whether the fine for the violation is reasonable considering the type, duration, and severity of the violation.

(j) Authorizes the court, if the court finds that the position taken by either party is groundless or is taken in bad faith, to award the prevailing party's attorney's fees.

SECTION 8. (a) Provides that Section 5.006(a), Property Code, as amended by this Act, applies only to an action filed on or after the effective date of this Act. Provides that an action filed before the effective date of this Act is governed by the law in effect immediately before the effective date of this Act, and that law is continued in effect for that purpose.

(b) Provides that Sections 202.011 and 202.012, Property Code, as added by this Act, apply to a provision in a dedicatory instrument or a restrictive covenant enacted before, on, or after the effective date of this Act.

(c) Provides that Sections 202.015 and 209.0035, Property Code, as added by this Act, apply only to a cause of action that accrues on or after the effective date of this Act. Provides that a cause of action that accrues before the effective date of this Act is governed by the law in effect immediately before the effective date of this Act, and that law is continued in effect for that purpose.

(d) Provides that Sections 209.006 and 209.007, Property Code, as amended by this Act, apply only to an enforcement action initiated by a property owners' association on or after the effective date of this Act. Provides that an enforcement action initiated before the effective date of this Act is governed by the law in effect immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 9. Effective date: January 1, 2012.