

HOUSE BILL REPORT

HB 2790

As Reported by House Committee On:
Judiciary

Title: An act relating to the condominium and homeowners' association dispute resolution program.

Brief Description: Concerning the condominium and homeowners' association dispute resolution program.

Sponsors: Representative Kraft.

Brief History:

Committee Activity:

Judiciary: 1/30/18, 2/1/18 [DPS].

Brief Summary of Substitute Bill

- Creates a pilot program in three counties for the resolution of disputes between owners and condominium and homeowners' associations.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 10 members: Representatives Jinkins, Chair; Graves, Assistant Ranking Minority Member; Goodman, Haler, Hansen, Kirby, Klippert, Muri, Orwall and Valdez.

Minority Report: Do not pass. Signed by 1 member: Representative Shea.

Staff: Cece Clynch (786-7195).

Background:

Homeowners Associations.

A homeowners' association (HOA) is a legal entity with membership comprised of the owners of residential real property located within a development or other specified area. An HOA is typically created by a land developer or builder of a planned residential development pursuant to a declaration of covenants, conditions, and restrictions. Once the developer

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relinquishes control, HOAs are managed by a board of directors elected by the members. In general, the purpose of an HOA is to manage and maintain a subdivision's common areas and structures, to review design, and to maintain architectural control.

The power and duties of an HOA in Washington are defined by: (1) the Homeowners' Association Act; (2) the HOA's declaration, bylaws, rules, and other governing documents; and (3) the law governing the HOA's legal entity, such as the state Business Corporation Act or Nonprofit Corporation Act.

Under the Homeowners' Association Act, an HOA may: adopt and amend bylaws, rules, regulations, and budgets; make hiring and personnel decisions; engage in legal actions on behalf of the HOA; make contracts and incur liabilities; regulate activities involving the maintenance and use of common areas; acquire and convey property rights; and impose and collect any payments, fees, or charges for the use, rental, or operation of common areas.

Homeowners' associations have the responsibility to hold meetings annually; furnish notice of meeting times to HOA members; provide for the number, duties, and terms of HOA officers and directors; set out procedures for officer elections; act with loyalty and care on behalf of the HOA; provide homeowners with notice and a ratification process for the annual budget; prepare annual financial statements; and fulfill other HOA duties required by law.

A homeowner aggrieved by a violation of the Homeowners' Association Act may file a private lawsuit and may be awarded attorney's fees. In addition, the governing documents of an HOA may provide other means of dispute resolution.

Condominium Associations.

The Condominium Act governs the management of all residential condominiums built in Washington after July 1, 1990. The Horizontal Property Regimes Act (HPRA) governs those built before July 1, 1990.

Under the Condominium Act, a unit owners' association must be organized no later than the date the first unit is conveyed and must take the form of a profit or nonprofit association. The membership of the association consists exclusively of all the unit owners. As with HOAs, condominium associations are managed by a board of directors elected by the unit owners.

The powers and duties of an association are defined by the Condominium Act and the HPRA, the governing documents specific to a particular association, and the laws governing the association's legal entity, such as the state Business Corporation Act or Nonprofit Corporation Act. Pursuant to the Condominium Act, an association may, among other things:

- adopt and amend bylaws, rules, and regulations;
- adopt and amend budgets and impose and collect assessments;
- hire and discharge employees;
- institute, defend, or intervene in litigation in its own name on behalf of itself or two or more unit owners on matters affecting the condominium;
- make contracts and incur liabilities;
- regulate the use, maintenance, and repair of common elements;

- impose and collect any payments, fees, or charges for the use, rental, or operation of common elements; and
- impose and collect charges for late payments of assessments.

Condominium associations have the responsibility to hold certain meetings and provide the statutorily requisite notice of those meetings. Other statutory responsibilities include: maintaining insurance; keeping certain records and making them reasonably available for inspection; and taking certain actions with respect to reserve studies.

If a person subject to the Condominium Act fails to comply with any of the Act's statutory provisions, or any provision of the governing documents, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. The court, in an appropriate case, may award reasonable attorney's fees to the prevailing party.

Secretary of State.

The Secretary of State has authority to investigate corporations, including incorporated HOAs and condominium associations, and refer to the Office of the Attorney General (AGO) any potential legal violations revealed after an investigation. The AGO then has the discretion to take legal action against associations that are incorporated and engaged in certain conduct, such as: exceeding or abusing their legal authority; wasting corporate assets; acting illegally or fraudulently; or procuring articles of incorporation through fraud.

Summary of Substitute Bill:

The Office of the Attorney General (AGO) is directed to establish a dispute resolution pilot program (program), in Clark, King, and Spokane counties, for the resolution of disputes between condominium and homeowners' associations (associations) on the one hand, and owners on the other hand. The purpose of the program is to provide a cost-effective and time-efficient process to resolve disputes regarding alleged violations of the following Acts:

- Horizontal Property Regimes Act;
- Condominium Act; and
- Homeowners' Association Act.

The program does not apply to any disputes between owners and associations regarding construction defect actions.

The AGO must produce educational materials regarding the Acts and the program, including a notice capable of being posted which:

- summarizes rights and responsibilities;
- includes information about how to file a complaint;
- encourages mediation prior to the filing of a complaint and includes contact information regarding dispute resolution centers and other free or low-cost mediation services available in the pilot counties; and
- includes a toll-free telephone number and website address that owners and associations can use to seek additional information.

The AGO must exercise reasonable diligence to identify the names and addresses of associations within the pilot counties. The educational materials must be distributed to the associations identified, together with information alerting associations of the requirement that the notice be posted in a clearly visible location and that the AGO may visually confirm that notices are appropriately posted and issue a fine or other penalty for noncompliance.

An aggrieved party, whether an owner or an association, has the right to file a complaint with the AGO alleging a violation of one of the Acts. Upon receiving a complaint, the AGO must:

- inquire whether the complainant has participated in mediation and, if not, encourage the complainant to first pursue that route;
- inform the complainant of any statutory notification requirements and encourage the complainant to appropriately notify the respondent of the complaint; and
- if a statutory time period is applicable, inform the complainant of the time frame that the respondent has to remedy the complaint.

The AGO has discretion whether to investigate an alleged violation and, if appropriate, facilitate negotiations between the complainant and respondent. Complainants and respondents must cooperate with the AGO during the course of the investigation, including responding to subpoenas for papers or other documents and providing access to any facilities relevant to the investigation.

If, after investigation, the AGO determines that an agreement cannot be negotiated between the parties, the AGO must issue a written determination indicating whether or not violation of any of the Acts has occurred. If a violation is found to have occurred, the notice of violation must specify the violation, the corrective action required, the time within which the corrective action must be taken, the penalties including fines, and actions that will result if corrective action is not taken within the specified period. Regardless of whether a violation is found or not found, the written determination must include information regarding the process for contesting the determination.

Ordinarily, corrective action must take place within 15 days, except as required otherwise by the AGO or in the event that a timely request for an administrative hearing is made. Corrective action may include refunds of improper fees, charges, and assessments. If the respondent fails to take corrective action within the required period, the AGO may impose a fine of up to a maximum of \$100 per violation per day for each day the violation remains uncorrected. In determining whether to impose a fine or penalty, the AGO must consider the severity and duration of the violation and the impact on other owners, as well as whether the respondent has made a good faith effort and whether there are mitigating factors beyond his or her control. All receipts from imposition of fines or penalties must be deposited into the State General Fund. In the event a fine, refund, or other penalty is imposed, the respondent may not seek any recovery or reimbursement from a complainant.

A complainant or respondent may, within 15 business days of receipt, request an administrative hearing before an administrative law judge (ALJ) pursuant to the Administrative Procedures Act (APA) to contest: a notice of violation or nonviolation; a fine or penalty; or an order to cease and desist or take affirmative action. If a hearing is not timely requested, the notice or order becomes final and is not subject to review by any court or agency.

In the event an administrative hearing is requested, the ALJ is tasked with hearing and receiving pertinent evidence and testimony and deciding whether the evidence supports the AGO finding by a preponderance of the evidence. Within 30 days after the close of the hearing, the ALJ must enter an appropriate order and mail copies to the parties. The ALJ's order is the final agency order and may be appealed to the superior court under the APA.

This new hearing process is not exclusive and does not limit the right of owners or associations to take legal action, and exhaustion of the administrative remedy is not required before legal action may be brought.

Other AGO responsibilities under the program include:

- distributing educational materials as requested by owners and associations;
- creating and maintaining a database of associations that have had complaints filed against them; and
- submitting a brief progress report by December 1, 2018, and a final report by December 1, 2019, to the Legislature and the Governor, to include a variety of specific data together with a discussion of the effectiveness of the program and recommendations with respect to whether the program should be continued or not and, if so, whether it should be modified, continued in its current form, or expanded.

The program expires June 30, 2020.

Substitute Bill Compared to Original Bill:

The substitute bill provides that the program does not apply to any disputes between owners and associations regarding construction defect actions. In addition, the substitute bill makes some technical corrections, including applying the expiration date to the entire program created in the act rather than just a single section.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on February 1, 2018.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) The bill creates a due process pathway to hold homeowners' associations (HOAs) accountable to the owners and allow grievances to be heard. Currently, the only path available is filing a lawsuit in court, and this is not financially feasible for many homeowners. This dispute resolution pilot program is modeled after the mobile home dispute resolution program, which is currently housed in the Office of the Attorney General. All of the statutes governing condominiums and HOAs need a broader look but, in

the meantime, this pilot program will be in place for two years in three large counties which each have large numbers of HOAs and condominiums.

Last year, realtors established a work group to look into impediments to the building of more condominiums. Two things in particular are needed: (1) liability issues need clarification; and (2) more alternative dispute resolution measures should be made available. This bill addresses the second of these. If the pilot is successful, perhaps it can be expanded to the rest of the state. There is no impartial body to determine these disputes. Boards and managers are the judge, jury, and executioner in many instances. There is a 134-page bill this session, Senate Bill 6175, that says that even if an action by a board is not in compliance with that section, it stands unless set aside by a court. There is a need for better governance and greater accountability. This bill encourages mediation and recognizes the work of Dispute Resolution Centers (DRCs). Throughout the state, DRCs handle disputes between owners and associations. As this pilot moves forward, DRCs would like to see whether and how they could be part of the process that is outlined in this bill.

One HOA with over 400 homes has sometimes had a board in place which does not always operate as it should, particularly with respect to fines which have been imposed in too large amounts or for reasons which are simply not accurate. Another condominium association has 130 units, and the board has liens upon every unit. The board cited one woman for smoking and fined her \$50, despite the fact that she maintained that she was actually out of town at the time she was alleged to be smoking. It cost her \$15,000 to fight the citation; the board spent \$20,000 to defend. In one HOA with 431 homes, disputes are handled by the management company that gets paid by the HOA. The HOA board has an attorney and directors' and officers' insurance, which the homeowners have to pay for. The HOAs have no financial exposure while homeowners have to hire their own attorney and risk losing their homes.

(Opposed) None.

Persons Testifying: Representative Kraft, prime sponsor; Bob Mitchell, Washington Realtors; Raelene Schifano; Joseph Mendoza; and Lian Caspi, Dispute Resolution Center of King County.

Persons Signed In To Testify But Not Testifying: None.