St. Mary's Law Journal

Volume 42 | Number 3 Article 4

1-1-2011

Home Sweet Homestead - Not if You are Subject to a Mandatory Homeowners' Association.

Bridget M. Fuselier

ARTICLE

HOME SWEET HOMESTEAD? NOT IF YOU ARE SUBJECT TO A MANDATORY HOMEOWNERS' ASSOCIATION!

BRIDGET M. FUSELIER*

* Associate Professor, Baylor University School of Law; B.A. 1994, Lamar University; J.D. 1998, Baylor University School of Law, *magna cum laude*. I would like to thank Juli Stibbe, Nathan Winkler and Jeff Fisher for their research and editorial assistance.

> *Muriel and I have found what I'm not ashamed to call our dream house. It's like a fine painting. You buy it with your heart, not your head. You don't ask, "How much was the paint? How much was the canvas?" You look at it and say, "It's beautiful. I want it." And if it costs a few more pennies, you pay it and gladly. Because you love it. And you can't measure the things you love in dollars and cents. Well, anyway, that's the way I feel about it. When I sign those papers on Saturday, I can look the world in the eye and say, "It's mine. My house. My home. My 35 acres."*[1]

The above sentiment is how many people feel when entering into the home-buying process. Purchasing a home is the largest investment most individuals will make. However, unlike other large investments, purchasing a house is much more personal and emotional. The process is filled with anxiety, excitement,

1. MR. BLANDINGS BUILDS HIS DREAM HOUSE (Warner Bros. 1948), *script available at* http://www.script-o-rama.com/movie_scripts/m/mr-blandings-builds-his-dream-house-script.html.

unfamiliarity, and, often times, a lack of knowledge. The home that will be created from that house will be a central part of the family unit or of an individual's life. In many states, including Texas, "homestead" laws provide protection to prevent the significant impact that the loss of a home would have on the individual, the family, and society as a whole.

A modern day horror story occurred recently in Frisco, Texas, where a local homeowners' association (HOA) foreclosed on the home of Captain Mike Clauer and his family for nonpayment of dues. His $300,000 home was sold on the courthouse steps for $3,500 while Captain Clauer was serving his country in Iraq.[2] While the house was paid for in full and was clearly the family's homestead under Texas law, the association sold it at a foreclosure sale. Moreover, the new owner threatened eviction if Captain Clauer and his family did not pay rent.[3] Abuses like this lead to increased animosity toward HOAs and the power they yield. The Texas Supreme Court allows foreclosure for liens on unpaid HOA dues despite the lack of a supporting constitutional amendment.[4] Current Texas law does not place any threshold dollar amounts for a foreclosure action. The current real estate disclosure forms do not provide adequate notice for homebuyers to truly understand the gravity of the mandatory owners' association. In the event that a homeowner becomes delinquent, the HOA can foreclose without court involvement.[5] Together, this serves as the right combination for a devastating outcome.

This Article revisits a 1987 decision by the Texas Supreme Court that has gone unnoticed by most homeowners for more than twenty years. In today's housing climate, homeowners should be especially concerned about the status enjoyed by the HOA assessment lien. Changes must be made to current Texas laws to strike a proper balance between the homeowners' rights and the HOA's rights. The basis for the proposals in this Article is the historical justification for Texas homestead protection. Additionally, the plain language of the Texas Constitution sets

2. *All Things Considered: Not So Neighborly Associations Foreclosing on Homes*, National Public Radio (June 29, 2010), http://www.npr.org/templates/story/story.php?storyId=128078864.

3. *Id.*

4. *Id.*

5. *Id.*

forth the homestead protection and illustrates the legislature's concerted efforts to keep broad and strong protections in place, even in recent years. However, this Article also discusses the Texas Supreme Court's reasoning in *Inwood North Homeowners' Ass'n v. Harris*,[6] which allows such liens to attach to what would otherwise be considered homestead-protected property.[7] This Article addresses problems with allowing the attachment of a lien to homestead property for association dues without obtaining approval by the voters through a constitutional amendment. Because of the problem the *Inwood* rule creates, the disclosure requirements in the home-buying process are inadequate to truly inform purchasers about the potential consequences of a mandatory owners' association. This Article proposes a workable framework and solution to the practical reality these associations face, while balancing the interests in having homestead property protection.

I. HISTORICAL BACKGROUND OF TEXAS HOMESTEAD PROTECTION

In May 1837, New York banks ceased payments to investors, leading other banks across the nation to do the same.[8] In a short period of time, the country's currency lost its value, many companies crashed, and fortunes were lost.[9] Unemployment skyrocketed—especially in the West and South, with a loss of agricultural exports and crop failures.[10] Public calls for banking reform increased anxiety and a six-year depression followed.[11]

While this may sound like a story ripped from recent headlines, this was the status of the economic situation in 1837, and Texas

6. Inwood N. Homeowners' Ass'n v. Harris (*Inwood II*), 736 S.W.2d 632 (Tex. 1987).

7. *See id.* at 635 ("Thus, we reaffirm that when the property has not become a homestead at the execution of the mortgage, deed of trust or other lien, the homestead protections have no application even if the property later becomes a homestead.").

8. *See* 1 JERRY W. MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES 149 (2002) (noting that banks ceased payments to investors during the Panic of 1837).

9. *See* TEX. CONST. art. XVI, § 50 interp. commentary (West 1993) ("[N]umerous families lost homes and farms through foreclosures, and in the Republic of Texas business became stagnate, money scarce, and credit unobtainable.").

10. *See* 1 JERRY W. MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES 149 (2002) (acknowledging how the South was disproportionately affected by the Panic of 1937).

11. *Cf. id.* (noting that President Andrew Jackson called for bank reform in the wake of the Panic, and describing the ensuing depression).

was hit hard. As a result, Texas homestead laws were born.[12] The homestead laws served a three-fold purpose: (1) to protect the wife and children of the debtor from losing their home; (2) to protect the debtor himself; and (3) to protect society as a whole by keeping people in their homes to prevent them from being dependent on others for their care and well-being.[13]

Until its independence in 1836, Texas had been under the rule of France, Spain, and Mexico at various points in time.[14] Spanish civil law provided statutory protection against execution on certain items of personal property, tools of trade, and the dwelling houses of knights and noblemen, but the protection was not absolute.[15] Spanish law also provided protections for the wife, who, once married, was otherwise not allowed to own property.[16] There was an exemption for antecedent debts against the property of colonists and empresarios under the laws of the Republic of Texas.[17]

In 1839, the Texas legislature enacted the first statutory provision for homestead protection.[18] The provision reserved

12. 1018-3rd St. v. State, 331 S.W.2d 450, 453 (Tex. Civ. App.—Amarillo 1959, no writ) (stating that the Panic of 1837 incited the creation of Texas homestead laws in response to numerous farms lost to foreclosure); *see also* Inge v. Cain, 65 Tex. 75, 77–80 (1885) (analyzing the expansion of homestead protection beginning with the Texas Constitution of 1845 through the adoption of the 1876 Constitution).

13. *See 1018-3rd St.*, 331 S.W.2d at 453–54 (listing the three objectives the homestead laws served during the depression following the Panic of 1837). There are numerous cases that discuss societal welfare. *See* Pierce v. Wash. Mut. Bank, 226 S.W.3d 711, 714 (Tex. App.—Tyler 2007, pet. denied) (holding Texas homestead laws are based upon the welfare of both the citizen and the state); Andrews v. Sec. Nat'l Bank of Wichita Falls, 121 Tex. 409, 50 S.W.2d 253, 256 (1932) ("Homestead laws are not only based upon a tender regard for the welfare of the citizen, but have for their object the stability and welfare of the state."); Miller v. Menke, 56 Tex. 539, 558–59 (1881) (discussing the societal welfare of the family and the inclusion of the family business as part of the homestead); Franklin v. Coffee, 18 Tex. 413, 416 (1857) ("That the homestead exemption was founded upon principles of the soundest policy cannot be questioned. Its design was not only to protect citizens and their families, from the miseries and dangers of destitution, but also to cherish and support in the bosoms of individuals, those feelings of sublime independence which are so essential to the maintenance of free institutions.").

14. *See* ALAN C. HUFFINES, THE TEXAS WAR OF INDEPENDENCE 1835–1836: FROM OUTBREAK TO THE ALAMO TO SAN JACINTO, 17–21 (2005) (listing the events that led to Texas's Independence).

15. TEX. CONST. art. XVI, § 50 interp. commentary (West 1993).

16. *See id.* (discussing Spanish colonial law, including statutory protections against execution).

17. *Id.*

18. Act approved Jan. 26, 1839, 3d Cong., R.S., § 1, 1839 Repub. Tex. Laws 125, 126,

from execution fifty acres of land or one town lot, as well as improvements not to exceed $500 in value.[19] Since 1843, Texas has continually had constitutional homestead protections in place. In 1843, the legislature also extended homestead protection to the probate process.[20]

Texas adopted a new constitution when it joined the United States in 1845.[21] The new constitution included a homestead provision that increased the amount of land protected to 200 acres; the value of land of an urban homestead, however, could not be protected if it exceeded $2,000.[22] A joinder requirement was also created at this time.[23] Under the joinder requirement, in an effort to provide a wife with some protection from her husband's actions, the wife had to consent to the sale of the homestead property.[24] Homestead protection only applied to families and not to single individuals.[25] The constitutions of 1861 and 1866 contained the same provisions.[26]

The Texas Constitution of 1876, which is the current constitution, introduced the business homestead.[27] An urban homestead may be used for the purpose of a home "or as a place to exercise the calling or business of the head of a family." This constitution also provided survivorship rights to the surviving spouse.[28] In 1897, the legislature added a statute that protected proceeds of a voluntary sale of a homestead for six months after such sale.[29]

---

reprinted in 2 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 125, 125–26 (Austin, Gammel Book Co. 1898).

19. *Id.*

20. Act approved Jan. 9, 1843, 7th Cong., R.S., § 1, 1843 Repub. Tex. Laws 14, 15, *reprinted in* 2 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 834, 834 (Austin, Gammel Book Co. 1898).

21. TEX. CONST. of 1845. At this time, Texas enacted laws to liberally protect homestead claimants from foreclosure. *See* TEX. CONST. of 1845, art. VII, § 22 (providing a homestead exemption to protect claimants from foreclosure).

22. *See id.* (protecting homesteads of 200 acres, so long as their value did not exceed $2,000).

23. *See id.* (creating the joinder requirement, which required the consent of both partners in marriage to sell the homestead property).

24. *Id.*

25. *See id.* (applying the homestead provisions to families only).

26. TEX. CONST. of 1861, art. VII, § 22; TEX. CONST. of 1866, art. VII, § 22.

27. TEX. CONST. art. XVI, § 50.

28. *Id.*

29. Act of Apr. 26, 1897, 25th Leg., R.S., ch. 101, § 1, 1897 Tex. Gen. Laws 131

The homestead provisions remained largely stagnate for decades. But then, in 1970, the value of the urban homestead that could be protected increased to $10,000.[30] In 1973, the scope of the homestead protection was finally expanded to single adults.[31] In 1983, the requirements for protection under the homestead laws were changed.[32] Instead of using a specific monetary range to determine what was protected, the law was amended to protect a homestead up to a specified amount of acreage.[33] The urban homestead could be as large as one acre while a family's rural homestead could be up to 200 acres.[34] In 1989, the legislature also took steps to clearly define the distinction between a rural and an urban homestead.[35]

Some of the most significant changes to homestead protection occurred during the 1990s. In 1995, Texas voters amended the Texas Constitution.[36] That amendment triggered amendments to the Property Code, which expanded the list of liens permitted to attach to homestead property, including owelty of partition judgments and refinancing of a lien on a homestead.[37]

In 1997, the voters amended the Constitution to further add exemptions from homestead protection.[38] The 1997 amendments allow Texas property owners to take advantage of home equity loans and reverse mortgages.[39] They also allow the valid attachment of a home improvement lien if specific requirements are met.[40] The most recent amendments with respect to the content

(amended 1973) (current version at TEX. PROP. CODE ANN. § 41.001 (West 2010)).

30. *See* Tex. S.J. Res. 32, 61st Leg., R.S., 1970 Tex. Gen. Laws 3229 (proposing a constitutional amendment to extend the protected value of a homestead to $10,000).

31. *See* Tex. H.R.J. Res. 7, 63d Leg., R.S., 1973 Tex. Gen. Laws 2478 (setting forth a constitutional amendment to expand homestead protection to single adults).

32. Tex. H.R.J. Res. 105, 68th Leg., R.S., 1983 Tex. Gen. Laws 6724 (laying out a constitutional provision to change the requirements for homestead protection).

33. *See id.* (changing homestead protection requirements to a specific acreage).

34. *See id.* (providing for protection of a rural homestead of up to 200 acres of land).

35. TEX. PROP. CODE ANN. § 41.002 (West 2000). This section was amended to add more specific criteria for determining whether property was urban or rural in character, including factors like whether there was police and fire protection or other municipal services. Act of Aug. 28, 1989, 71st Leg., R.S., ch. 391, § 2, 1989 Tex. Gen. Laws 1517, 1519 (current version at TEX. PROP. CODE ANN. § 41.002 (West 2000)).

36. Tex. S.J. Res. 46, 74th Leg., R.S., 1995 Tex. Gen. Laws 6431.

37. *Id.*

38. Tex. H.R.J. Res. 31, 75th Leg., R.S., 1997 Tex. Gen. Laws 6739.

39. *Id.*

40. *Id.*

or extent of homestead protection occurred in 1999.[41] These amendments made various changes to the urban homestead, including increasing its size.[42] Despite some discussions in the legislature in recent years, the only changes made since 1999 have merely fine-tuned the provisions already in place.[43]

Homestead protections are an important part of Texas law, and it has been clear since 1882 that homestead laws should be liberally construed to provide the most protection possible to the debtor's property.[44] This will not, however, be done to the detriment of any pre-existing interest that attached to the property before it gained homestead protection.[45] On the other hand, Texas courts have clearly held that if liens attach simultaneously to the acquisition of the homestead property they shall be subordinate to the debtor's homestead claims, unless they are one of the constitutionally permissible liens.[46]

II. EXPRESS PROVISIONS OF HOMESTEAD PROTECTION FROM THE TEXAS CONSTITUTION AND TEXAS PROPERTY CODE

Article XVI, section 50 of the Texas Constitution begins today the same way it did in 1987 when the Texas Supreme Court entered its decision in *Inwood v. Harris.* This language is the starting point for any discussion regarding the lien for assessments imposed by a property owners' association.[47] A deciding court

41. Tex. S.J. Res. 12, 76th Leg., R.S., 1999 Tex. Gen. Laws 6603.

42. *Id.*

43. *See* Tex. H.R.J. Res. 72, 80th Leg., R.S., 2007 Tex. Gen. Laws 6138 (allowing the owner to request an earlier closing date due to a state of emergency, and requiring the owner to receive a copy of the loan application before closing); Tex. S.J. Res. 7, 79th Leg., R.S., 2005 Tex. Gen. Laws 5406 (imposing additional restrictions on reverse mortgages similar to those already in place for home equity loans, and allowing future advances for reverse mortgages); Tex. S.J. Res. 42, 78th Leg., R.S., 2003 Tex. Gen. Laws 6219 (permitting home equity lines of credit, biweekly payments, loans made by mortgage brokers, and specifying time and methods for lenders to correct their failures to comply with their obligations); Tex. H.R.J. Res. 5, 77th Leg., R.S., 2001 Tex. Gen. Laws 6701 (adding a provision for converting a personal property lien on a manufactured home to a real property lien, and altering the time regarding some work and material liens).

44. *Cf.* Miller v. Menke, 56 Tex. 539, 562–63 (1881) (construing the Constitution as extending the homestead protection to the head of family's place of business).

45. *See* Inwood N. Homeowners' Ass'n v. Harris (*Inwood II*), 736 S.W.2d 632, 635 (Tex. 1987) ("Thus, we reaffirm that when the property has not become a homestead at the execution of the mortgage, deed of trust or other lien, the homestead protections have no application even if the property later becomes a homestead.").

46. Freiberg v. Walzem, 85 Tex. 264, 20 S.W. 60, 61 (1892).

47. When interpreting the Texas Constitution, courts "rely heavily on its literal text

may also, of course, look to legislative history, the conditions of the times, the evils intended to be remedied, and the goal sought to be accomplished by the law.[48]

"The Homestead of a family, or of a single adult person, shall be, and is hereby *protected from forced sale*, for the payment of all debts *except for* . . . ."[49] Following this clear language, which concisely expresses the desire of the legislature and the people of the state of Texas, is a list that sets forth the only debts that are constitutionally permitted to penetrate the homestead protection and validly attach to the property. The debts that have been carefully added to this list through the amendment process over the years are those that the people have deemed to be debts that should put the homestead at risk.[50]

Conspicuously absent from this list is any reference to a lien for assessments paid to a property owners' association.[51] It is a well-recognized cannon of statutory construction that when there are exclusively enumerated exceptions to a general prohibition, additional exceptions are not to be implied in the absence of evidence of contrary legislative intent.[52] Section 50 provides an

---

and must give effect to its plain language." LaSalle Bank Nat'l Ass'n v. White, 246 S.W.3d 616, 619 (Tex. 2007) (per curiam); Doody v. Ameriquest Mortg. Co., 49 S.W.3d 342, 344 (Tex. 2001); Spradlin v. Jim Walter Homes, Inc., 34 S.W.3d 578, 580 (Tex. 2000); Stringer v. Cendant Mortg. Corp., 23 S.W.3d 353, 355 (Tex. 2000).

48. Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp., 283 S.W.3d 838, 842 (Tex. 2009).

49. Tex. H.R.J. Res. 72, 80th Leg., R.S., 2007 Tex. Gen. Laws 6138. This provision goes on to set forth what the author refers to as the "magic eight." There are eight enumerated debts in this section of the Constitution that may validly attach even to homestead property that would be otherwise protected. *See id.* (listing eight debts that may attach to homestead property). However, outside this magic eight, nothing else can attach unless done prior to the attachment of the homestead character or after the homestead is abandoned. *See id.* (protecting the homestead from all other debt attachments); *see also Inwood II*, 736 S.W.2d at 635 (allowing for attachment of liens enacted prior to the homestead character).

50. The "magic eight" include: (1) the purchase money mortgage; (2) taxes due on the property; (3) an owelty of partition judgment imposed on the property; (4) a refinance of an otherwise permissible lien against the homestead, including a federal tax lien; (5) a lien for work and materials used in constructing new improvements on the land, or in repairing or renovating existing improvements; (6) a home equity loan or line of credit; (7) a reverse mortgage; and (8) the refinance of a personal property lien on a manufactured home to a lien on both the home and the real property. Tex. H.R.J. Res. 72, 80th Leg., R.S., 2007 Tex. Gen. Laws 6138.

51. *See id.* (omitting from the "magic eight" a lien for failure to pay homeowners' association assessments).

52. TRW Inc. v. Andrews, 534 U.S. 19, 20 (2001); United States v. Johnson, 529 U.S. 53, 58 (2000); Andrus v. Glover Constr. Co., 446 U.S. 608, 616–17 (1980).

express list, which has admittedly grown in past years, but anything not included in the list as an exception to the homestead protection should be an impermissible lien on homestead property. As evidenced by the legislative history available for the various amendments to section 50 over the past two decades, there has been a continued desire to limit the debts that can attach to homestead property.[53] The legislature took years to finally propose to the voters that home equity loans and reverse mortgages should be allowed to pierce the homestead protection.[54] Even then, that proposal still needed major revisions after its initial passage.[55]

In 1997—the same year the 75th regular legislative session was busy addressing the pressing issue of the attachment of home equity loans to homestead property—Senator Rodney Ellis filed Senate Joint Resolution number 38.[56] In the Bill Analysis

53. Senate Joint Resolution No. 46, which was proposed in 1993 to address voluntary, consensual encumbrances on homestead property in the form of a home equity loan, specifically stated that the proposed ballot language was to ask for a vote for or against the proposition: "The constitutional amendment granting the right to borrow on equity in homesteads under certain limited circumstances and maintaining homestead protections including those against judgment creditors." *See* Tex. S.J. Res. 46, 73rd Leg., R.S. (1993) (proposing a constitutional amendment, but failing to proceed out of the senate committee). Identical language was used in the House Joint Resolution proposed in the same session, which was also unsuccessful in making it out of the committee. *See* Tex. H.R.J. Res. 99, 73rd Leg., R.S. (1993) (failing to pass through the house committee). In the 74th Regular Legislative Session in 1995, another attempt was made by the Texas legislature to prepare a constitutional amendment for home equity loans to place before the voters. *See* Tex. S.J. Res. 25, 74th Leg., R.S. (1995) ("The constitutional amendment extending homeowners' rights to voluntarily borrow against the equity in and establish a valid lien on their homesteads under certain limited circumstances for purposes in addition to purchase money, improvements, and taxes."). In the Bill Analysis in the Senate Committee Report, the background section states that "Texas law prohibits borrowing against either piece of property [residence or business homestead] for any reason except purchase, improvements to the property, or to pay property taxes. The law applies automatically; a small business owner cannot waive the homestead designation on a business property and borrow against it." Senate Comm. on State Affairs, Bill Analysis, Tex. S.J. Res. 25, 74th Leg., R.S. (1995).

54. *See* Tex. H.R.J. Res. 31, 75th Leg., R.S., 1997 Tex. Gen. Laws 6739 (proposing home equity loans and reverse mortgages as exceptions to homestead protection).

55. *See* Tex. S.J. Res. 7, 79th Leg., R.S., 2005 Tex. Gen. Laws 5406 (making revisions to the 1997 amendment).

56. Tex. S.J. Res. 38, 75th Leg., R.S. (1997). The proposed language would have added to the list of debts that could validly attach to homestead property "[a]n obligation to pay property owners' association fees for maintenance and ownership of common facilities and services." *Id.* However, that the proposal further stated: "The homestead, however, is protected from forced sale for the payment of a debt described by this subsection." While this was filed and never made it out of the senate committee, it was a busy year for the legislature. It was addressing the issue of the home equity loan, which

accompanying Senate Joint Resolution number 38, the stated purpose of the resolution was to propose a constitutional amendment "permitting an encumbrance to be fixed on homestead property for an obligation to pay certain property owners' association fees without permitting the forced sale of the homestead by the property owners' association to collect delinquent assessments arising from such fees."[57] This seems to suggest that there was at least some concern and recognition of potential problems resulting from the 1987 *Inwood* decision.

The Texas Property Code includes a provision that sets forth the interests in land that are exempt from seizure.[58] Section 41.001 incorporates within it the list of encumbrances that may be properly fixed on homestead property as provided by the Constitution.[59] Section 41.001(c) also includes an additional provision that protects proceeds from the sale of a homestead from seizure for six months in order to give an individual the opportunity to invest those proceeds in a new homestead.[60] Everything that the legislature has done concerning the homestead protection illustrates a concerted effort to continue protecting the homestead as intended since 1839.

In recent years, the legislature and voters in this state have not expanded the scope of constitutionally permissible liens on the homestead except for some very specific provisions. Homestead protections have always been liberally construed. The Texas Supreme Court was aware of these facts in 1987 when it decided *Inwood*, and it carefully avoided any attempt to construe the constitutional provisions to include a lien for HOA assessments. Aside from the dissenting opinion, the court provided very little

---

had been proposed in the past two legislative sessions. *Id.*; *see also* Tex. H.R.J. Res. 31, 75th Leg., R.S., 1997 Tex. Gen. Laws 6739 (proposing the home equity loan exception).

57. Senate Comm. on State Affairs, Bill Analysis, Tex. S.J. Res. 38, 75th Leg., R.S. (1997).

58. TEX. PROP. CODE ANN. § 41.001 (West 2000).

59. *Id.* § 41.001(b).

60. *Id.* § 41.001(c). This provision compliments the amendment to the Texas Constitution in 1897, which recognized the need for such protection because, without it, a person could not acquire a new homestead without resolving all debts. As the Texas Court of Civil Appeals stated in *Harkrider-Keith-Cooke Co. v. Smith*, "If a man owes nothing, or is able to pay all that he owes, he does not need the [homestead] exemption; ... but if he has nothing but the homestead, he comes within the necessity of the constitutional provision, and to him is the chief value of [the] exemption." Harkrider-Keith-Cooke Co. v. Smith, 284 S.W. 612, 614 (Tex. Civ. App.—Austin 1926, no writ).

constitutional analysis. The court utilized a legal theory that provided a way around the constitutional issue. In relying on distinguishable case law from other states and on state laws that were not comparable to the Texas Constitution, the court allowed another lien with very powerful teeth to penetrate the homestead shield. Unbeknownst to most homeowners and voters in Texas, the Texas Supreme Court found a creative way to allow liens for unpaid property owners' association assessments to attach to property—even the ever-protected homestead.

III. *INWOOD NORTH HOMEOWNERS' ASS'N V. HARRIS*: THE UNCONSTITUTIONAL LEGAL LOOPHOLE FOR THE HOA

The Inwood North Homeowners' Association was a non-profit organization in charge of collection, expenditure, and management of maintenance funds in the Inwood North subdivision of Harris County, Texas.[61] At the time of purchase, the homeowners were provided with deeds indicating the land was subject to any covenants and conditions recorded in the Harris County public records.[62] A "Declaration of Covenants and Restrictions" was already recorded in the records prior to the sale of the lots.[63] The Declaration specifically provided that all of the property in the subdivision would be subject to an annual maintenance charge that was secured by a vendor's lien on the lots.[64]

The various defendants had failed to pay maintenance dues ranging in amounts from $286 to $656, and the Association sued to foreclose on the vendor's lien in order to recover the amounts due.[65] The trial court awarded default judgment against the homeowners but denied the Association's request for foreclosure; the Association appealed to the First Court of Appeals.[66]

Subsequently, the Association argued that the lien attached to the lots *before those lots achieved homestead status* and, therefore, were valid.[67] The First Court of Appeals refused to

61. Inwood N. Homeowners' Ass'n v. Harris (*Inwood I*), 707 S.W.2d 127, 128 (Tex. App.—Houston [1st Dist.] 1986), *rev'd*, 736 S.W.2d 632 (Tex. 1987).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Inwood I*, 707 S.W.2d at 128.

67. *Id.*

grant foreclosure, affirming the trial court's judgment.[68] The court found that, because the assessments were not part of the purchase price, they could not be the basis for a vendor's lien on the property, and thus the default in payment could not constitute a basis for foreclosure.[69] Even though foreclosure was not considered a viable option, the court stated that the homeowners were still obligated to abide by the covenants and restrictions and to pay the sums due.[70]

The victory for the homeowners did not last long, as the Association appealed the case to the Texas Supreme Court.[71] While the Texas Supreme Court agreed that no vendor's lien existed, the court disagreed with the result reached by the court of appeals and reversed.[72] In doing so, the court looked at various public policy considerations along with the express provisions of the Texas Constitution and Texas Property Code.[73]

---

68. *Id.*

69. *Id.*

70. *Id.* at 129. The court of appeals did not find foreclosure to be a viable remedy for non-payment because, despite the language of the declaration, the assessment charges were not secured by a vendor's lien. Inwood N. Homeowners' Ass'n v. Harris (*Inwood I*), 707 S.W.2d 127, 128 (Tex. App.—Houston [1st Dist.] 1986), *rev'd*, 736 S.W.2d 632 (Tex. 1987). A vendor's lien will only arise to secure payment of the purchase price or a portion thereof. Therefore, a default in payment of the assessments was not a default of a vendor's lien and could not be used as a basis for foreclosure. *Id.* (citing Lifemark Corp. v. Merritt, 655 S.W.2d 310, 313 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.)). The court of appeals also determined *Johnson v. First Southern Properties*, which was offered by appellants in support of their argument, was distinguishable. *Id. Johnson* involved a condominium assessment, which is an assessment levied against an individual with a percentage of ownership in the common elements for which the assessments are paid. Johnson v. First S. Props., Inc., 687 S.W.2d 399, 401 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.). Johnson had used his percentage of ownership in the common elements to secure the payment of unpaid future assessments. *Id.* at 402; *see also Inwood I*, 707 S.W.2d at 128 (explaining that Johnson's ownership in the condominium secured payment of unpaid assessments). In the *Inwood* situation—which did not involve common elements of a condominium development—there were no deeds or deeds of trust by which the homeowners expressly agreed to secure assessments with their property. *Inwood I*, 707 S.W.2d at 128–29. "At most, the homeowners have committed themselves to an unsecured obligation to pay the assessment charges pursuant to the terms of their respective deeds and declarations." *Id.* at 129.

71. Inwood N. Homeowners' Ass'n v. Harris (*Inwood II*), 736 S.W.2d 632, 633 (Tex. 1987).

72. *Id.* at 634.

73. *Id.* at 634–35.

A. *Public Policy Implications*

The State of Texas created the homestead laws with the purpose of "protect[ing] citizens and their families from destitution, but also to cherish and support in bosoms of individuals, those feelings of sublime independence which are so essential to maintenance of free institutions."[74] Although these laws provide protection from debts other than those constitutionally permitted, an encumbrance that exists prior to establishing the homestead status is properly attached and will not be impacted by the later acquisition of such status.[75] While liberally construing homestead laws, the courts should not read them in such a way as to avoid or destroy pre-existing rights.[76]

In *Inwood*, the court incorporated this idea of pre-existing rights along with the constitutional right of freedom to contract.[77] The court stated that an owner of land may contract with regard to their land as long as the contracts "do not contravene public policy."[78] The court seemed to ignore the important and long-venerated public policy of protecting the family home by instead protecting the financial interests of the property owners' association. Additionally, the court did not properly weigh all of the case law supporting the rule of law that an individual may not contract away homestead protections.[79] The homestead

74. *Id.* at 635 (citing Franklin v. Coffee, 18 Tex. 413, 416 (1857)).

75. *Id.*

76. *Inwood II*, 736 S.W.2d at 635 (citing Minnehoma Fin. Co. v. Ditto, 566 S.W.2d 354, 357 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.)).

77. *Id.* at 634–35.

78. *Id.* at 634 (citing Goodstein v. Huffman, 222 S.W.2d 259, 260 (Tex. Civ. App.—Dallas 1949, writ ref'd)).

79. *See* NCNB Tex. Nat'l Bank v. Carpenter, 849 S.W.2d 875, 880 (Tex. App.—Fort Worth 1993, no writ) ("No estoppel can arise in favor of a lender or encumbrancer who has attempted to secure a lien on homestead property that is in actual use and possession of the homestead claimant, based solely upon declarations, whether written or oral, which state to the contrary." (citing Lincoln v. Bennett, 138 Tex. 56, 156 S.W.2d 504, 506 (1941))); *see also* Tex. Land & Loan Co. v. Blalock, 76 Tex. 85, 13 S.W. 12, 13 (1890) (claiming the Constitution forbids liens, other than those expressly permitted, to be attached to the homestead and that lenders may not have a homeowner contract otherwise). In *Texas Land & Loan Co. v. Blalock*, the homeowner and loan company entered into a lien on the property for a second mortgage, and the property owner falsely declared the property was not homestead. *Blalock*, 13 S.W. at 13. The Texas Supreme Court stated that "lenders must understand that liens cannot be fixed upon [the homestead], and that declarations of husband and wife to the contrary, however made, must not be relied upon. They must further understand that no designation of homestead, contrary to the fact, will enable parties *to evade the law, and [encumber] homesteads with*

protection is a constitutional right in Texas.[80] When constitutional rights are waived, the waiver must be knowing and voluntary in order to be enforceable.[81] Given the structure of the residential development process,[82] little about the process can be said to include knowing or voluntary action by the homebuyer.[83]

B. *Substance and Timing: What Type of Lien Exists and When Was It Created?*

The law recognizes different types of liens. The common thread is that a lien is an interest in property used to ensure the payment of a debt or the fulfillment of an obligation.[84] A lien does not provide title to the property that secures the debt or obligation, and it does not confer any legal rights of property ownership to the lienholder.[85] A lien is an interest acquired in the property of another; it would be inconsistent to have an ownership interest and a lien interest in the same property.[86] In order for a lien to be established, there must be: (1) a specific obligation to pay money; and (2) an agreement, instrument, or act giving a creditor superior right in the property.[87] Texas courts have stated that "[t]o permit a lien to attach to property without a debt would grant authority to create a lien, whether real or imagined, at leisure by merely

---

liens forbidden by the constitution." *Id.* at 13 (emphasis added).

80. Florey v. Estate of McConnell, 212 S.W.3d 439, 443 (Tex. App.—Austin 2006, no pet.).

81. Ulico Cas. Co. v. Allied Pilots Ass'n, 262 S.W.3d 773, 778 (Tex. 2008).

82. The developer creates the restrictions and obligations to be placed on all of the lots in the development before any of the lots are sold and without the involvement of the individuals who will become the homeowners.

83. *See generally id.* (listing the elements required to constitute a waiver).

84. Nelson v. Nelson, 193 S.W.3d 624, 628 (Tex. App.—Eastland 2006, no pet.) (quoting TEX. BUS. & COM. CODE ANN. § 24.002(8) (West 2002)).

85. 50 TEX. JUR. 3D *Liens* § 2 (2010); *see also* FCLT Loans, L.P. v. Estate of Bracher, 93 S.W.3d 469, 482 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (describing a lien as an instrument that does not provide title but only secures payment of a debt); Sadeghian v. City of Denton, 49 S.W.3d 403, 406 (Tex. App.—Fort Worth 2000, no pet.) (reiterating the long-recognized principle in Texas law that a lienholder does not acquire title to the property).

86. 50 TEX. JUR. 3D *Liens* § 12 (2010); *see also* Robinson v. Cleveland State Bank, 282 S.W. 860, 866 (Tex. Civ. App.—Beaumont 1926, writ dism'd w.o.j.) (calling the ability to own land and carry a lien on the same land "rather singular").

87. *Nelson*, 193 S.W.3d at 624. In *Calvert v. Hull*, the Texas Supreme Court stated that, as a matter of Texas law, a lien affixes to property when a corresponding obligation to pay a debt arises. Calvert v. Hull, 475 S.W.2d 907, 911 (Tex. 1972).

envisioning an intent to secure a future debt."[88] Additionally, if a lien is obtained by agreement, any equitable lien that might be impliedly created is negated.[89] Ordinarily, a lien is created by the owner of the collateral or by someone authorized by the owner.[90]

A vendor's lien is defined as "[a] creature of equity, being a lien impliedly belonging to a vendor for the unpaid purchase price of land, where he has not taken any other lien or security beyond the personal obligation of the purchaser."[91] As the First Court of Appeals stated in *Inwood*, although the lien at issue was referred to in the Declarations of Covenants and Restrictions as a vendor's lien, the lien had nothing to do with the purchase price of the property; rather, it was for assessments and fees arising *after* the purchase of the land.[92] The Texas Supreme Court did agree that the assessments could not be considered a vendor's lien; however, the fact that the declarations incorrectly referred to the lien as a vendor's lien did not invalidate the obligation or the lien in any respect.[93]

The Texas Supreme Court concluded that the covenants created a contractual lien.[94] A contractual lien is established purely by agreement of the parties.[95] All that is necessary is language evidencing the parties' intent to create a lien.[96] The court

88. Randy B. Warmbrodt, Note, *Real Property—Homestead—Covenant to Pay Assessments Enforced by Foreclosure Provision Is Superior to After-Acquired Homestead Exemption*, 19 ST. MARY'S L.J. 435, 447–48 (1987); *see also* Spencer v. Anderson, 669 S.W.2d 862, 866 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.) (refusing to allow a lien to be created at the leisure of the creditor); Bledsoe v. Colbert, 120 S.W.2d 909, 910 (Tex. Civ. App.—Eastland 1938, no writ) (explaining that for a lien to be imposed, a binding contract on the actual owner of the property is essential); Masterson v. Ginners' Mut. Underwriters' Ass'n, 222 S.W. 263, 267 (Tex. Civ. App.—Texarkana 1920) (emphasizing that a debt is indispensable to the creation of a mortgage), *aff'd*, 235 S.W. 1081 (Tex. Comm'n App. 1932, judgm't adopted).

89. GXG, Inc. v. Texacal Oil & Gas, 977 S.W.2d 403, 427 (Tex. App.—Corpus Christi 1998, no writ).

90. *See* Cont'l Credit Corp. v. Norman, 303 S.W.2d 449, 452 (Tex. Civ. App.—San Antonio 1957, writ ref'd n.r.e.) (stating that a party who did not own the collateral had no power to mortgage it).

91. BLACK'S LAW DICTIONARY 1555 (6th ed. 1990).

92. Inwood N. Homeowners' Ass'n v. Harris (*Inwood I*), 707 S.W.2d 127, 128 (Tex. App.—Houston [1st Dist.] 1986), *rev'd*, 736 S.W.2d 632 (Tex. 1987).

93. Inwood N. Homeowners' Ass'n v. Harris (*Inwood II*), 736 S.W.2d 632, 634 (Tex. 1987).

94. *Id.*

95. *Id.*

96. *Id.*

recognized Texas public policy does not allow individuals to contractually create liens on homestead property; however, the court stated that a contractual lien can be created on property *before* it acquires the homestead exemption protection.[97]

In order for this contractual lien for assessments to validly attach as a non-possessory interest in the land, the court had to find that the lien existed and attached prior to the property ever obtaining the homestead protection.[98] The supreme court's opinion focused on the timing of the contractual lien rather than liberally construing homestead protections and upholding public policy that has been followed for centuries.[99] The court concluded that because the declaration was recorded before the land was sold, the purchaser took title subject to the covenants and restrictions of record.[100] The court stated that "[t]he purchase of a lot in Inwood Homes carries with the purchase, as an inherent part of the property interest, the obligation to pay association fees for maintenance and ownership of common facilities and services. The remedy of foreclosure is an inherent characteristic of the property right."[101] This interpretation allowed the court to hold "the lien in the present case to be superior, and worthy of protection against the homestead claim."[102]

With the stroke of a pen, the supreme court allowed the mandatory homeowners' association to circumvent the ever-present and important homestead protection. The concepts of a lien and a covenant running with the land became muddled and confused. The very basis of the court's reasoning is flawed. The following maxim is as true to a legal decision as it is to a house: nothing good and lasting can be built on a shaky and unstable foundation.

C. *Liens vs. Covenants: Different Parts of the Bundle of Sticks*

A covenant is entirely different than a lien. Covenants originated hundreds of years ago in English common law as real

97. *Id.* at 635; *see also* Tex. Land & Loan Co. v. Blalock, 76 Tex. 85, 13 S.W. 12, 13 (1890) (disallowing foreclosure on a homestead despite debtors having told lender it was not their homestead).

98. *Inwood II*, 736 S.W.2d at 635.

99. *Id.*

100. *Id.*

101. *Id.* at 636.

102. *Id.* at 636–37.

covenants.[103] The English common law later developed the concept of the equitable servitude.[104] While both types of covenants still exist in American jurisprudence, the equitable servitude is the most commonly utilized today.[105] Real covenants provide rights to one landowner to require another landowner to do or refrain from doing something on or with his land; the remedy is an award of damages.[106] An equitable servitude allows for equitable relief rather than damages.[107] Regardless of the type of enforcement—damages or equitable relief—the covenant allows for the imposition of conditions and obligations on land without the harsh result of forfeiture of title that comes with the creation of defeasible estates.[108] Both real covenants and equitable servitudes are created as contracts but are considered property rights if the required elements are satisfied.[109]

Covenants, whether real or equitable, involve contractual promises that will continue to burden and benefit land as it passes through successive owners.[110] At the heart of each is a promise to do or not to do something related to land.[111] While negative promises have always been upheld if they were indeed found to touch and concern the land, courts have had a more difficult time

---

103. Davidson Bros., Inc. v. D. Katz & Sons, Inc., 579 A.2d 288, 291 (N.J. 1990).

104. *Id.*

105. Amos B. Elberg, *Remedies for Common Interest Development Rule Violations*, 101 COLUM. L. REV. 1958, 1966–67 (2001).

106. DANIEL B. BOGART & JOHN MAKDISI, INSIDE PROPERTY LAW: WHAT MATTERS AND WHY 231, 233 (2009).

107. *Id.* at 233.

108. *See* Hearne v. Bradshaw, 158 Tex. 453, 312 S.W.2d 948, 951 (1958) (stating that the remedy for a breach of the obligation to maintain property is damages, not recovery of the estate); Tex. Elec. Ry. Co. v. Neale, 151 Tex. 526, 252 S.W.2d 451, 456 (1952) (determining imposed obligations to be covenants and not conditions that would result in forfeiture); City of Wichita Falls v. Bruner, 165 S.W.2d 480, 484 (Tex. Civ. App.—Fort Worth 1942, writ ref'd w.o.m.) (favoring the construction of provisions as covenants to avoid the disapproved use of forfeitures); Daggett v. City of Fort Worth, 177 S.W. 222, 223 (Tex. Civ. App.—Amarillo 1915, no writ) (explaining that courts will interpret indistinguishable provisions as covenants because law generally disfavors forfeiture conditions).

109. DANIEL B. BOGART & JOHN MAKDISI, INSIDE PROPERTY LAW: WHAT MATTERS AND WHY 233 (2009).

110. *See id.* (identifying covenants as benefits and burdens that transfer with the estate).

111. *See* Drye v. Eagle Rock Ranch, Inc., 364 S.W.2d 196, 211 (Tex. 1962) (quoting RESTATEMENT (FIRST) OF PROPERTY § 537 (1944)) (stating that a covenant running with the land is a promise).

with the affirmative promise.[112] But, whether affirmative or negative, the covenant is a promise to do or not do something.[113] The homeowner promises that the land will only be used for a single-family residence,[114] that they will not park cars in the street,[115] or that they will pay fees and assessments for maintenance and upkeep of common areas in the community.[116] In the HOA context, the covenant or promise is to pay the fees that are due.[117] That promise is a part of the ownership of the land and is enforceable against all owners of the land if the covenant is found to run with the land.[118]

These promises are entirely different from a lien. A lien is a security interest that allows the land to be used as collateral or security for a debt or obligation; the covenant, by contrast, regulates the benefits and burdens placed on land in the form of promises to do or not to do something.[119] Common restrictions involve architectural standards (e.g., brick-only structures, no metal roofs, garages cannot face the street, etc.),[120] usage of the

112. *See* Murphy v. Kerr, 5 F.2d 908, 911 (8th Cir. 1925) (quoting JOHN NORTON POMEROY, POMEROY'S EQUITY JURISPRUDENCE § 1295 (The Lawyers Co-Operative Publ'g Co. 4th ed. 1919)) (claiming decisions by courts have held that a covenant running with the land does not extend to affirmative duties).

113. Webb v. Mullikin, 142 S.W.3d 822, 826 (Mo. Ct. App. 2004).

114. *See* Warehouse Partners v. Gardner, 910 S.W.2d 19, 25 (Tex. App.—Dallas 1995, writ denied) (listing cases addressing restrictions on the type of residence allowed).

115. *See* Holleman v. Mission Trace Homeowners Ass'n, 556 S.W.2d 632, 636 (Tex. Civ. App.—San Antonio 1977, no writ) (approving restrictions on parking as reasonable).

116. *See* Goddard v. Northhampton Homeowners Ass'n, 229 S.W.3d 353, 354 (Tex. App.—Amarillo 2007, no pet.) (explaining that the assessments at issue covered the maintenance responsibility of the common areas).

117. *See id.* at 358 (stating that the homeowners had bound themselves to pay assessments levied by the homeowners' association).

118. *See* Howard R. Williams, *Restrictions on the Use of Land: Equitable Servitudes*, 28 TEX. L. REV. 194, 199 (1949) (noting the requirement that the covenant "run with the land" for it to be enforceable by the assignees of the original parties); *see also* Inwood N. Homeowners' Ass'n v. Harris (*Inwood II*), 736 S.W.2d 632, 636 (Tex. 1987) ("The obligation to pay association dues and the corresponding right to demand that maximum services be provided within the association's budget are characteristics of that property interest.").

119. *Compare* Leyhe v. Leyhe, 220 S.W. 377, 379 (Tex. Civ. App.—Amarillo 1920, no writ) (noting the nature of a lien on collateral as security for the payment of a debt), *with* DANIEL B. BOGART & JOHN MAKDISI, INSIDE PROPERTY LAW: WHAT MATTERS AND WHY 231 (2009) (explaining the purpose of covenants as regulating benefits and burdens).

120. *See* Gettysburg Homeowners Ass'n v. Olson, 768 S.W.2d 369, 370 (Tex. App.—Houston [14th Dist.] 1989, no pet.) (describing HOAs as being responsible for preserving the architectural integrity of the subdivision).

property (e.g., residential purposes, single-family residences only),[121] and, in modern times, affirmative promises to pay dues or assessments.[122] The restrictive covenants are not in any way a pledge of collateral to secure a debt.[123] That is the role of a lien. Simply because a document says the association is obtaining a lien on the property does not mean a valid lien is created. There is not yet any debt owed to the association at that time, and, therefore, no lien can arise until *after* the debt is owed and *after* the property has acquired its homestead protection.[124] What happens when a person purchases a home in a neighborhood with a mandatory homeowners' association is different from what happens in other transactions where liens are obtained on property.

When a person finds a house and decides to buy it, whether they are the first person to purchase the home or the fiftieth person, they buy the house without any outstanding debt to the homeowners' association.[125] The deed covenants indicate that there is an obligation to pay the assessments for maintenance and upkeep, and the buyer agrees to that promise.[126] From the date of

121. *See* Burns v. Wood, 492 S.W.2d 940, 941 (Tex. 1973) (explaining that the petitioner sought an injunction to enforce usage covenants and prohibit the respondent from constructing an apartment building), *withdrawn*, 1973 WL 142567 (Tex. Mar. 28, 1973).

122. *See* San Antonio Villa Del Sol Homeowners Ass'n v. Miller, 761 S.W.2d 460, 464 (Tex. App.—San Antonio 1988, no writ) (describing the payment of assessments as a restrictive covenant).

123. *See* Inwood N. Homeowners' Ass'n v. Harris (*Inwood I*), 707 S.W.2d 127, 129 (Tex. App.—Houston [1st Dist.] 1986), *rev'd*, 736 S.W.2d 632 (Tex. 1987) (noting that deed restrictions are not a pledge by the homeowner to secure payment of assessments with the property itself).

124. *See id.* at 128 (depicting the assessment lien as attaching after the property is acquired).

125. While there could be outstanding association dues at the time a subsequent buyer purchases a home, a resale certificate is provided at closing that will put the new purchaser on notice of any outstanding debt. *See generally* Bankler v. Vale, 75 S.W.3d 29, 35 (Tex. App.—San Antonio 2001, no pet.) (declaring that the resale certificate must contain relevant obligations and rights of the homeowners' association). The purchaser will then require the seller to pay all past due sums prior to or at the time of closing to extinguish any sums due, allowing the new owner to start with a zero balance. *Cf.* Ingram v. Cent. Bitulithic Co., 51 S.W.2d 1067, 1067 (Tex. Civ. App.—Waco 1932, writ ref'd) (describing the legal liabilities of a purchaser refusing a deed due to the obligation to an existing paving lien). Additionally, at closing, it is typical for an association to require payment of a certain amount of dues up front, which means many homeowners begin with a credit balance, not an outstanding debt.

126. *See* Inwood N. Homeowners' Ass'n v. Harris (*Inwood II*), 736 S.W.2d 632, 635 (Tex. 1987) ("[T]he deeds signed by each of the homeowners made reference to the

purchase forward, they will be charged fees and have an obligation to pay them.[127] However, on the day the purchaser takes title to the property, there is no outstanding debt—no money owed.[128] There is a promise to pay in the future.[129] This is fundamentally different from all other situations where a lien has been constitutionally permitted to attach to homestead property. Other constitutionally permissible liens that attach, even to homestead property, are liens securing outstanding debts.[130] The key difference is that with the HOA lien, nothing has been advanced to the homeowner that must be repaid.[131] There is no object or benefit that has changed hands for which payment must be made. There is just a promise to pay in the future in exchange for benefits the homeowner will receive after he or she buys the house.

For example, when a person enters into a financing arrangement with a local bank to provide the purchase money for a home, it is easy to see how a lien would be validly created at that time. The bank advances funds that are paid to the seller so that the buyer may take title to the property. In exchange for parting with the money, the bank gets a lien on the property that the buyer acquires using that money. In the instance of a mechanic's lien, a

---

assessments that would be due, thus each of the homeowners had notice of what their obligations were, and a purchaser with constructive notice of restrictive covenants becomes bound by them."); Randy B. Warmbrodt, Note, *Covenant to Pay Assessments Enforced by Foreclosure Provision Is Superior to After-Acquired Homestead Exemption*, 19 ST. MARY'S L.J. 435, 440 (1987) ("Although covenants are often referred to as 'restrictive,' the parties may provide for affirmative duties, such as the payment of assessments for the benefit and maintenance of the common elements." (citing Frey v. DeCordova Bend Estates Owners Ass'n, 647 S.W.2d 246, 248 (Tex. 1983))).

127. *Inwood II*, 736 S.W.2d at 636 ("The purchase of a lot in Inwood Homes carries with the purchase, as an inherent part of the property interest, the obligation to pay association fees for maintenance and ownership of common facilities and services.").

128. *See* Cottonwood Valley Home Owners Ass'n v. Hudson, 75 S.W.3d 601, 604–05 (Tex. App.—Eastland 2002, no pet.) (requiring that a portion of the profits realized from a foreclosure sale be used to pay outstanding assessment fees owed to a homeowner's association while the purchaser of foreclosed property is placed in possession of said property).

129. *See Inwood II*, 736 S.W.2d at 636 (explaining that purchasers of a property in an area with deed restrictions impliedly consent to pay association fees relating to the maintenance of common property).

130. *See* TEX. CONST. art. XVI, § 50(a) (enumerating the various ways a lien will attach to homestead property).

131. *See Inwood II*, 736 S.W.2d at 634 (suggesting that while nothing has been advanced to the homeowner, the developer and owner of the land is "entitled to create liens on his land" that run with the land for the purpose of securing payment of assessments).

contractor puts labor and materials into the property to make improvements. The contractor is parting with something of value—his time and money—and, in exchange, he receives a lien on the benefitted property to ensure he is paid. Even in the context of the owelty of partition judgment, which is permitted by the Texas Constitution, an owelty judgment reflects the decision by the court that the property owner owes a certain amount of money because the value of the property the person is receiving is worth more than that person's rightful share. In this case, something of value—the land—has already changed hands, so the lien is in place to ensure the money is repaid. For tax liens permitted by the Constitution, the lien comes into place when the owed taxes become past due. Again, money that was owed was not paid, and thus the debt and lien arise. The government is out that money at that time and needs a way to ensure the debtor repays it.

In *Inwood*, the Texas Supreme Court mixed together the concepts of liens and covenants.[132] There is no doubt the recorded declarations contained a promise that assessment liens would be paid by each lot owner, which gave the Association the right to impose a lien to ensure the payment of such assessments.[133] While the promise was set forth in writing, touched and concerned the land, was intended to run with the land, and was properly recorded—providing at least constructive notice to the burdened property owners—that did not, in and of itself, create a contractual lien.[134]

A contractual lien is created by the language of an agreement

---

132. *Id.* at 634–35.

133. *Id.* at 636.

134. In the *Inwood I* opinion, the court cites to a Florida case for support of its decision. *Id.* at 636 n.1. The Florida Supreme Court stated in *Bessemer v. Gersten*, that homeowners,

> in accepting the deed with actual or constructive notice of the lien provisions of the declaration of restrictions, manifest[] the intent to let the real property stand as security for the obligation . . . .
>
> . . . [T]he creation of the lien by acceptance of the deed relates back to the time of the filing of the declaration of restrictions. Thus, with regard to the time of attachment of the lien, this case is to be treated as if the [homeowners] had taken title subject to a valid pre-existing lien. Since the acquisition of homestead status does not defeat prior liens the lienor's right prevails over the [homeowner's] homestead right.

Bessemer v. Gersten, 381 So. 2d 1344, 1348 (Fla. 1980) (footnotes and citations omitted).

that evidences the parties' intent to create a lien.[135] There is only one party to the agreement when the declarations are drafted and recorded—the developer.[136] The language contained in the declarations is therefore that of the intent and desire of the developer in creating the master plan community or subdivision.[137] The contract or agreement is not made until the purchaser of the land accepts and agrees to that promise by accepting the deed to the land.[138] Up until that time, no assessment is due, no debt exists, and the purchaser still has the ability to walk away from the transaction and not take title to the land subject to such promises. In most instances, when the acceptance of the deed occurs, the homestead status is also achieved.[139] After that, a lien cannot attach, even one contractually created, unless it is permitted to attach by the Constitution.[140]

Although the circumstances are somewhat different, the issue of the contractual assessment lien's relationship to homestead status is comparable to the attachment of judgment liens. In the context of the judgment lien, the Texas Supreme Court considered the scenario of a pre-existing judgment lien attaching to homestead property in several different factual scenarios. Prior court decisions made it abundantly clear that, under Texas law, if a lien

---

135. *Inwood II*, 736 S.W.2d at 634 (citing Dabney v. Schutze, 228 S.W. 176, 177 (Tex. Comm'n App. 1921, judgm't adopted)).

136. *See id.* ("Therefore the developer of the subdivision, as owner of all land subject to the declaration, is entitled to create liens on his land to secure the payment of assessments.").

137. *See id.* ("It is unquestioned that an owner of land may contract with respect to their property as they see fit, provided the contracts do not contravene public policy." (citing Goodstein v. Huffman, 222 S.W.2d 259, 260 (Tex. Civ. App.—Dallas 1949, writ ref'd))).

138. *See* Cottonwood Valley Home Owners Ass'n v. Hudson, 75 S.W.3d 601, 603 (Tex. App.—Eastland 2002, no pet.) ("[T]he court is bound to enforce the agreements homeowners enter into concerning [deed restrictions]." (citing Inwood N. Homeowners' Ass'n v. Harris (*Inwood II*), 736 S.W.2d 632, 638 (Tex. 1987))).

139. *Cf.* Wilcox v. Marriott, 103 S.W.3d 469, 472 (Tex. App.—San Antonio 2003, no pet.) ("To establish homestead rights, a party must show overt acts of homestead usage, and intention on the part of the owner to claim the property as homestead.").

140. *See* TEX. CONST. art. XVI, § 50(a) (enumerating the major exceptions to homestead protection, including liens for the payment of the homestead's purchase money, for unpaid taxes, and for labor and materials used to improve the homestead); Tex. Land & Loan Co. v. Blalock, 76 Tex. 85, 13 S.W. 12, 13 (1890) (stating that allowing a contractual lien (other than those expressly allowed by the Constitution) agreed to by both parties to fix a homestead lien would "practically abrogate the Constitution" as it pertains to homesteads).

has already attached to property that is not homestead at the time, changing the character of the property to homestead in the future does not then remove the lien from the property.[141]

In the situation where a person has an outstanding judgment against him and he purchases property that immediately becomes impressed with homestead status, that pre-existing judgment lien cannot attach.[142] However, the Texas Supreme Court is inconceivably willing to allow an assessment lien for a debt that does not yet exist to attach before the purchaser buys the land, at which point the homestead status immediately begins.[143] These views are fundamentally inconsistent.

Even taking the viewpoint that the purchaser of property in a mandatory owners' association neighborhood is entering into a contractual lien, the lien cannot and does not exist until the acceptance of the deed by the purchaser, which is the same moment that, if all of the necessary facts and circumstances exist, property falls under homestead protection. Nothing can penetrate that homestead protection unless the Constitution permits it to do so, and the homestead assessment lien is not one of those magic eight debts that can avoid that protection.[144]

---

141. Minnehoma Fin. Co. v. Ditto, 566 S.W.2d 354, 357 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.); Boozer v. Smith, 36 S.W.2d 1064, 1065 (Tex. Civ. App.—Amarillo 1931, writ dism'd w.o.j.); Gage v. Neblett, 57 Tex. 374, 378 (1882); Baird v. Trice, 51 Tex. 555, 561 (1879); Hous. & G.N.R.R. Co. v. Winter, 44 Tex. 597, 615 (1876).

142. *See* Freiberg v. Walzem, 85 Tex. 264, 20 S.W. 60, 61 (1892) ("We are of the opinion that, under the disputed facts in evidence, as soon as appellee obtained the title to the property in question, it became immediately impressed with the homestead character, and therefore the judgment lien could not and did not attach to it."); *see also* Wallis v. Wendler, 65 S.W. 43, 45 (Tex. Civ. App.—Austin 1901, no writ) ("We hold, therefore, that in order to enforce the spirit of the constitution and laws of this state with respect to the homestead exemption, the right of the debtor to the use of the property as a home would be superior to the claim of the [pre-existing] judgment creditor."). In both *Freiberg* and *Wallis*, the courts recognized that the liens were clearly in existence for some time before the homestead property was acquired. *Wallis*, 65 S.W. at 45; *Freiberg*, 20 S.W. at 60–61. However, these pre-existing liens were not allowed to attach. *Wallis*, 65 S.W. at 45; *Freiberg*, 20 S.W. at 60–61. There was no "relation back" concept as introduced in *Inwood*; rather, the courts pointed out that to hold contrary would prevent an individual from acquiring a homestead until he discharged his pre-existing debt. *See Wallis*, 65 S.W. at 45 ("The legitimate deduction from this contention is that a judgment debtor could not thereafter acquire a homestead right until after he discharged the debt."); *Freiberg*, 20 S.W. at 61 (holding the land itself to be exempt from any attaching lien).

143. *See Inwood II*, 736 S.W.2d at 635 (holding assessment liens to be covenants running with the land, and thus to be attached prior to purchase).

144. *See* TEX. CONST. art. XVI, § 50(a) (omitting homestead assessment liens from the enumerated exemptions from homestead protection).

D. *Justice Mauzy's Dissent: Plain Reading of the Constitution*

Justice Mauzy, joined by Justice Gonzalez, closely examined the language in the Texas Constitution where the homestead protection originates. The pertinent language of article XVI, section 50 that existed at that time of the opinion stated:

> The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale for the payment of *all debts* except for the purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case, only when the work and material are contracted for in writing .... No mortgage, trust deed *or other lien* on the homestead *shall ever be valid*, except for the purchase money therefore, or improvements made thereon, as hereinbefore provided, whether such mortgage, or trust deed, *or other lien*, shall have been created by the owner alone, or together with his or her spouse, in case the owner is married.[145]

As the dissent highlighted, the public policy of the state of Texas has been to protect homestead property from creditors' claims.[146] In reviewing the evolution of the homestead laws in Texas, there has always been careful consideration and voter approval required for the addition of any debt that could penetrate the homestead's protective shield.[147] While the majority opinion argued that this position was the same as that taken in other states with homestead protection, those laws were not written in the same manner as the Texas Constitution and, as such, the comparison was misplaced.[148]

---

145. *Inwood II*, 736 S.W.2d at 637 (Mauzy, J., dissenting) (emphasis and alteration in original) (citing TEX. CONST. of 1850, art. XVI, § 50 (1845)). As indicated in the introduction to this Article, additional amendments were added since the 1973 version of the Texas Constitution. *See supra* Part I. The additional constitutional amendments specifically allow for other types of debts to validly attach if proper procedures are followed; however, no such amendment has ever been added for the assessment lien.

146. *Inwood II*, 736 S.W.2d at 637–38 (Mauzy, J., dissenting).

147. *Id.* at 638–39.

148. *Id.* at 639–40. The dissent cites to the provisions from Florida, Arkansas, Alabama, and Mississippi that the majority opinion relied upon. *Id.* at 639 nn.5–7. As evidenced by the specific language of those various state statutes and constitutions, none of those jurisdictions utilize the sweeping language used by the Texas Constitution, which prohibits "all debts" except those enumerated and provides that "no other lien [on the homestead] 'shall ever be valid.'" *Id.* at 641 (quoting TEX. CONST. art. XVI, § 50); *see also* ALA. CONST. art. X, § 205 (imposing homestead protection limits based on property value and size); ARK. CONST. art. IX, § 3 (enumerating seven exceptions to homestead protection); FLA. CONST. art. X, § 4 (including a homestead exception for the payment of assessments); MISS. CONST. art. IV, § 94 (reserving to the legislature the ability to regulate

The dissent further focused on the timing issue of the lien and homestead protection. Texas case law recognizes that the homestead protection may, under certain circumstances, be established as early as the time the property is acquired, even before any actual possession or occupation has occurred.[149] As the dissent noted, whether or not the lien involved is contractual in nature, it still must comply with the Constitution.[150] The owners of homestead property may not contractually place a lien on homestead property unless it is one of those permitted by the Constitution.[151] In the instant case, and in any other situation where an assessment lien is contractually entered into, "if the . . . lien attached at all, it did so *simultaneously* with the property's purchase. When a lien *arises simultaneously in time* to the impression of homestead character on the land, then *the homestead character of the property is superior.*"[152]

IV. THE PROBLEM WITH CHANGING THE CONSTITUTION WITHOUT CHANGING THE CONSTITUTION

"If the Constitution is to be amended to destroy or weaken an individual's homestead exemption, it should be done as prescribed by the Constitution."[153]

Rights that are provided for in the Constitution may not be weakened or removed by anything short of a constitutional amendment.[154] The judiciary cannot step in and re-write the Constitution as it sees fit. In order to amend any provision of the Texas Constitution, the legislature must follow the process set forth in article XVII, section 1.[155] Any proposed amendment

---

the sale of homesteads); ALA. CODE § 6-10-2 (2008) (detailing the homestead protection provided by the Alabama constitution); MISS. CODE ANN. § 85-3-47 (West 2010) (refusing to exempt nonpayment of taxes or assessments, and extending attachment of validly created judgment liens to the homestead).

149. NCNB Tex. Nat'l Bank v. Carpenter, 849 S.W.2d 875, 879 (Tex. App.—Fort Worth 1993, no writ); Gilmore v. Dennison, 131 Tex. 398, 115 S.W.2d 902, 902 (1938); Harkrider-Keith-Cooke Co. v. Smith, 284 S.W. 612, 614 (Tex. Civ. App.—Austin 1926, no writ).

150. *Inwood II*, 736 S.W.2d at 640 (Mauzy, J., dissenting).

151. *Id.* (citing Tex. Land & Loan Co. v. Blalock, 76 Tex. 85, 13 S.W. 12, 13 (1890)).

152. Inwood N. Homeowners' Ass'n v. Harris (*Inwood II*), 736 S.W.2d 632, 641 (Tex. 1987) (emphasis added) (quoting Frieberg v. Walzem, 85 Tex. 264, 20 S.W. 60, 61 (1892)).

153. *Id.*

154. Travelers' Ins. Co. v. Marshall, 124 Tex. 45, 76 S.W.2d 1007, 1010 (1934).

155. TEX. CONST. art. XVII, § 1.

must pass a vote in the Texas House of Representatives with a minimum of 100 affirmative votes.[156] This must be followed by at least twenty-one affirmative votes in the Texas Senate.[157] The proposed amendment is then submitted to Texas voters and a majority vote is required to pass the amendment.[158]

By virtue of the rationale utilized by the court in *Inwood*, this process was completely circumvented. While the process may sound complicated, it has been accomplished on numerous occasions throughout the state's history with respect to homestead amendments alone.[159] Particularly because of the significant impact of the assessment lien on the homestead and the historical importance of homestead protection in Texas, the same process should be used to address this issue. Homeowners deserve as much.

V. THE LEGISLATURE'S PAST EFFORTS TO MINIMIZE *INWOOD*

The legislature has taken some steps to protect the homeowner in Texas and has tried unsuccessfully to provide even more protection. However, none of these efforts have been sufficient to prevent the true horror stories that a rogue homeowners' association can create.

In 1997, the legislature, in direct response to *Inwood*, considered a constitutional amendment that would "permit[] an encumbrance to be fixed on homestead property for an obligation to pay certain property owners' association fees," but that would not allow the forced sale of the homestead by the property owners' associations to collect delinquent assessments arising out of such fees.[160] This proposal never made it out of the Senate committee.[161]

In 1999, the legislature attempted to pass a constitutional amendment that specifically excluded "Cooperative Membership

156. *Id.*; *Inwood II*, 736 S.W.2d at 641–42 (Mauzy, J., dissenting).

157. TEX. CONST. art. XVII, § 1; *Inwood II*, 736 S.W.2d at 641–42 (Mauzy, J., dissenting).

158. TEX. CONST. art. XVII, § 1; *Inwood II*, 736 S.W.2d at 641–42 (Mauzy, J., dissenting).

159. For a discussion of the history of amendments to the Texas Constitution regarding homestead exceptions, see *supra* Part I.

160. Tex. S.J. Res. 38, 75th Leg., R.S. (1997).

161. *Bill Stages, Tex. S.J. Res. 38, 75th Leg., R.S. (1997)*, TEX. LEG. ONLINE, http://www.legis.state.tx.us/BillLookup/BillStages.aspx?LegSess=75R&Bill=SJR38 (last visited May 11, 2011).

Fees" from the list of exemptions in the Texas Constitution article XVI section 50(a)(6).[162] This proposal was voted on by the Senate but was never voted on by the House.[163]

The 2001 legislative session again saw efforts to supersede the *Inwood* decision's impact. That session saw both houses of the legislature attempting to pass a constitutional amendment to permit an encumbrance to be fixed on homestead property for an obligation to pay the property owners' association fees but without the remedy of a forced sale of the homestead.[164] This proposal was voted on by the Senate, but never made it out of the House committee.[165] Another effort in the 2001 session included proposed amendments to chapter 41 of the Texas Property Code. One amendment proposed a new provision, section 41.011, which would have made a debt for property owners' association fees an encumbrance that could properly be fixed on the homestead but that could only be collected at the time the homestead property is transferred.[166] This proposal did not make it out of either the Senate or House committees.[167]

VI. SOLVING THE PROBLEM AND PROVIDING DUE PROCESS

Foreclosing on a homestead for non-payment of association dues and maintenance fees is unconstitutional in and of itself. However, there are other problems with this whole process—problems that would exist even if the HOA lien was added to the list of liens constitutionally permitted to attach to homestead property.

---

162. Tex. S.J. Res. 37, 76th Leg., R.S. (1999).

163. *Bill Stages, Tex. S.J. Res. 37, 76th Leg., R.S. (1999)*, TEX. LEG. ONLINE, http://www.legis.state.tx.us/BillLookup/BillStages.aspx?LegSess=76R&Bill=SJR37 (last visited May 11, 2011).

164. Tex. S.J. Res. 53, 77th Leg., R.S. (2001); Tex. H.R.J. Res. 48, 77th Leg., R.S. (2001).

165. *Bill Stages, Tex. S.J. Res. 53, 77th Leg., R.S. (2001)*, TEX. LEG. ONLINE http://www.legis.state.tx.us/BillLookup/BillStages.aspx?LegSess=77R&Bill=SJR53 (last visited May 11, 2011); *Bill Stages, H.R.J. Res. 48, 77th Leg., R.S. (2001)*, TEX. LEG. ONLINE, http://www.legis.state.tx.us/BillLookup/BillStages.aspx?LegSess=77R&Bill=HJR48 (last visited May 11, 2011).

166. Tex. S.B. 1835, 77th Leg., R.S. (2001); Tex. H.B. 861, 77th Leg., R.S. (2001).

167. *Bill Stages, Tex. S.B. 1835, 77th Leg., R.S.*, TEX. LEG. ONLINE, http://www.legis.state.tx.us/BillLookup/BillStages.aspx?LegSess=77R&Bill=SB1835 (last visited May 11, 2011); *Bill Stages, Tex. H.B. 861, 77th Leg., R.S.*, TEX. LEG. ONLINE http://www.legis.state.tx.us/BillLookup/BillStages.aspx?LegSess=77R&Bill=HB861 (last visited May 11, 2011).

Texas allows for parties to contract for non-judicial foreclosure.[168] Unlike a judicial foreclosure, a non-judicial foreclosure circumvents court involvement and places the power of sale in the hands of a private individual or entity.[169] Such a non-judicial foreclosure proceeding, especially in the context of HOA assessment liens, deprives the homeowner of due process under the Texas Constitution.

A. *Notions of Fairness and Due Process*

Article I, section 19 of the Texas Constitution provides "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the law of the land."[170] This is distinctly different language from the United States Constitution, which provides: "No *State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any *State* deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[171] Thus, the federal Constitution includes express language that refers to the state acting or depriving, which means that state action is necessary for one to properly invoke the provision.[172] The Texas Constitution contains no such reference.[173] It can thus be argued that the Texas Constitution does not require "state action" to address due process concerns. While this argument has proven unsuccessful in the past, it has not been directly addressed by the Texas Supreme Court.[174]

When applying the state-action standard of the U.S.

168. Barrera v. Sec. Bldg. & Inv. Co., 519 F.2d 1166, 1172 (5th Cir. 1975); *see also* Armenta v. Nussbaum, 519 S.W.2d 673, 677 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (indicating that non-judicial foreclosure arises by private agreement).

169. GREGORY S. CAGLE, TEXAS HOMEOWNERS ASSOCIATION LAW: THE ESSENTIAL GUIDE FOR TEXAS 258 (2010).

170. TEX. CONST. art. I, § 19.

171. U.S. CONST. amend. XIV, § 1 (emphasis added).

172. *See id.* (restricting state action).

173. *See generally* TEX. CONST. art. I, § 19 (lacking any mention of state action).

174. *See* Barrera v. Sec. Bldg. & Inv. Co., 519 F.2d 1166, 1172 (5th Cir. 1975) (explaining appellant's argument that non-judicial foreclosure is "governmental" in nature and therefore constitutes state action); Armenta v. Nussbaum, 519 S.W.2d 673, 677 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (summarizing the plaintiffs' claim, which was that a certain "'statutory remedy' [was] carried out under color of state law.").

Constitution in cases involving racially restrictive covenants, the U.S. Supreme Court found the requisite state action when courts were used to enforce such covenants.[175] In the case of HOA liens, the court system is utilized to uphold the validity of the covenants that create the liens, to authorize the power of non-judicial foreclosure, and to potentially eliminate the possibility of a hearing before any such foreclosure occurs. In a manner comparable to the judicial system upholding the oppressive racially restrictive covenants, the judicial system today is used to uphold the unfair assessment lien coupled with the power of non-judicial foreclosure.

However, even if the Texas Constitution is interpreted to require state action and the level of court involvement is insufficient to constitute state action, the HOA can be compared to a quasi-governmental entity which should be required to go through the same process. Opponents to HOA reform cite the need for dues-collection procedures, claiming the associations provide all of the same types of services as do municipalities, which would, in fact, support treating the association like a governmental entity.[176] However, a governmental entity that provides such comparable services cannot utilize a non-judicial foreclosure proceeding to recover the unpaid taxes that are used to provide the services.[177]

While the city or county taxing authority may foreclose for small sums which would be comparable to the small sums due in some of the foreclosure-horror-story cases, to go through with such a foreclosure, the taxing authority must bring suit against the property owner and obtain a court judgment allowing the

175. *See* Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (holding that the judicial enforcement of racially restrictive covenants was an exercise of "state action" for purposes of the Fourteenth Amendment, and that any enforcement of those covenants violated the Fourteenth Amendment's requirement that no state deny its residents the equal protection of the laws).

176. *See* Andrei Lubomudrov, *Authority of HOAs in Texas Examined*, HOUSE RESEARCH ORG., INTERIM NEWS NO. 81-5, Aug. 12, 2010, at 5. According to Lubomurov, HOA supporters make the claim that HOAs provide services akin to those of municipal governments and need to ensure their ability to collect dues to pay for such services. *Id.*

177. Chapter 33 of the Texas Tax Code addresses delinquent property taxes. Section 33.41 specifically authorizes the judicial foreclosure proceeding. TEX. TAX CODE ANN. § 33.41(a) (West 2008).

foreclosure sale to occur.[178] Once that occurs, the sale may proceed.[179]

For a tax sale to be valid, several requirements must be met. When real property is sold pursuant to the foreclosure of a tax lien, the officer charged with selling the property must be the one to actually sell the property unless the taxing unit instructs otherwise.[180] Once the officer has received the order to sell the property, he must record the exact date and time of receipt of the order on the order itself.[181] "The officer shall calculate the total amount due under the judgment, including all" delinquent taxes, interest, fees, and the cost of the sale, and provide written notice of the sale to the delinquent tax payer.[182]

This mandatory notice—the one that comes after the lawsuit has been resolved—is comparable to that of a non-judicial foreclosure sale.[183] However, failure of the officer to send the notice or failure of the delinquent taxpayer to receive the notice will not by itself invalidate the tax sale or the title conveyed by the tax sale.[184] Once the property is either sold or bid off to a taxing unit, the officer conducting the sale must execute a deed to the property.[185]

Once a tax sale is complete, the delinquent taxpayer has a right of redemption.[186] The period of the right of redemption depends on the status of the property at the time the suit or the application for the warrant is filed.[187] If the property is deemed a residential

178. *Id.* § 33.41 (West 2008).

179. *Id.*

180. *Id.* § 34.01(a) (West 2008).

181. *Id.* § 34.01(b) (West 2008).

182. TEX. TAX CODE ANN. § 33.01(a) (West 2008); *see also id.* § 34.019(c) (West 2008) (requiring an officer to "give written notice of the sale . . . to each person who was a defendant to the judgment or that person's attorney").

183. *Compare* TEX. TAX CODE ANN. § 34.01(e) (West 2008) ("The notice must include: (1) a statement of the authority under which the sale is to be made; (2) the date, time, and location of the sale; and (3) a brief description of the property to be sold."), *with* TEX. PROP. CODE ANN. § 209.010 (West Supp. 2010) (requiring that after a foreclosure sale, "a written notice stating the date and time the sale occurred" must be sent to the lot owner with information regarding his right to redeem the property).

184. TEX. TAX CODE ANN. § 34.01(d) (West 2008). Under the notice requirement for foreclosure of other liens resulting in a non-judicial foreclosure, a notice that does not comply with the statute renders the sale void. *See* Phipps v. Fuqua, 32 S.W.2d 660, 662 (Tex. Civ. App.—Amarillo 1930, writ ref'd) (holding that failure to comply with notice requirements renders a foreclosure sale void).

185. TEX. TAX CODE ANN. § 34.01(m) (West 2008).

186. *Id.* § 34.21 (West Supp. 2010).

187. *See id.* § 34.21(a) (providing for a right of redemption period of two years for

homestead at that time, there is a two-year right of redemption from the date the purchaser's or taxing unit's deed is filed for recording.[188] If the property is not a residential homestead at that time, the redemption period is 180 days.[189] After a tax sale, the delinquent taxpayer also has a right to contest the validity of the tax sale.[190] To contest the sale, the delinquent taxpayer must: (1) deposit with "the court an amount equal to the amount of the delinquent taxes, penalties, and interest [set out] in the judgment of foreclosure," plus the costs of the tax sale, or (2) file an affidavit stating an inability to pay, pursuant to Rule 145 of the Texas Rules of Civil Procedure.[191]

B. *The Current Foreclosure Process for Unpaid HOA Dues*

While it is hard to imagine a circumstance where a homeowner would be unaware that she has not made her mortgage payments in a timely manner, it is entirely conceivable that one may not realize that she has failed to make a few months of HOA dues. And there is also the possibility that the HOA could make a mistake in accounting for payment of HOA dues, which would mean the homeowner is not even delinquent, even though the association believes she is.

The current system allows for foreclosure for unpaid association dues and does not set forth any minimum dollar amount, nor does

---

land used as a residence homestead or designated for agricultural use); *id.* § 34.21(e) (stating that property other than that used as a residence homestead or designated for agricultural use may not be redeemed later than 180 days after the purchaser's deed was filed for record).

188. *Id.* § 34.21(a).

189. TEX. TAX CODE. ANN. § 34.21(a) (West 2008). Interestingly, the Tax Code differentiates between properties used as a residence versus a non-residence and provides a significantly longer redemption period for the residence property. *See id.* (providing the different redemption periods for property used as the owner's residence homestead); *id.* § 34.21(e) (West 2008) (providing a right of redemption for property not used as the residence homestead or land designated for agricultural use). The redemption statute for HOA foreclosures does not make such a distinction. *See* TEX. PROP. CODE ANN. § 209.011 (West Supp. 2010) (allowing the owner of property in a residential subdivision the right of redemption within 180 days "after the date the association mails written notice of the sale to the owner and the lienholder"). The omission of this distinction may result from the fact that, in most circumstances, property foreclosed on will clearly be the residence of the individual. However, that fact did not result in the longer period being utilized but rather the shorter. There is a redemption period available, but it will be 180 days in all instances whether the property is used as a residence or not. *Id.*

190. TEX. TAX CODE. ANN. § 34.08 (West 2008).

191. *Id.*

it require the dues to be past due for any certain period of time.[192] Additionally, if the governing documents allow, the association may utilize a non-judicial foreclosure process in the event of delinquent dues.[193] This non-judicial foreclosure process is particularly problematic because there is no requirement of actual notice or personal service on the delinquent homeowner.[194] While Texas Property Code section 209.006 appears, at first glance, to provide some notice to a homeowner before the foreclosure process begins, a closer look indicates otherwise.[195] The foreclosure process is governed by Texas Property Code section 51.002, and, prior to notice, if the property subject to the assessment is used as a residence—as would necessarily be the case if the property were a homestead—the Texas Property Code requires the association to give the homeowner a twenty-day period to cure any default.[196] Once the period to cure passes, the

192. *See* TEX. PROP. CODE ANN. §§ 209.001–209.011 (West 2007 & Supp. 2010) (outlining the procedure for foreclosure of a property due to unpaid homeowners' association assessments). The association documents may provide for such limitations but usually do not provide any such restrictions on the power of the association. While there are concerns that requiring a threshold dollar amount could present problems with respect to the statute of limitations, that problem can be addressed with a specific extended statute of limitations to apply in this instance.

193. *See* GREGORY S. CAGLE, TEXAS HOMEOWNERS ASSOCIATION LAW 254 (2010) (stating that homeowners' associations in Texas may foreclose assessment liens through "non-judicial foreclosure procedures if expressly authorized to do so by their Declaration or Texas law").

194. The foreclosure procedure comes from Texas Property Code section 51.002, which provides the requirements for notice of default and notice of the foreclosure sale. TEX. PROP. CODE ANN. § 51.002(b), (d) (West Supp. 2010). In both instances, the notice is required to be sent by certified mail and, once placed in the mail, the notice is sufficient. TEX. PROP. CODE ANN. § 51.002(b), (d)–(e) (West Supp. 2010). There is no requirement that the property owner actually have knowledge of the default or the sale. *See* TEX. PROP. CODE ANN. § 51.002(d) (West Supp. 2010) (requiring written notice by certified mail); TEX. PROP. CODE ANN. § 51.002(e) (West Supp. 2010) (stating that notice by certified mail is completed once deposited in the mail).

195. Texas Property Code section 209.006 states that, before filing suit against an owner "other than a suit to collect a regular or special assessment or [to] foreclose under an association's lien," notice and time for hearing must be provided. TEX. PROP. CODE ANN. § 209.006 (West 2007). Therefore, an association is not even required to give a homeowner notice and an opportunity to cure pursuant to this section before filing suit to collect an assessment or to foreclose a lien due to unpaid assessments. *See* Haas v. Ashford Hollow Cmty. Improvement Ass'n, 209 S.W.3d 875, 885 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

196. Texas Property Code section 51.002(d) requires a lien holder, including the holder of a contractual lien, to provide twenty days to cure the defect before taking steps to accelerate the debt and foreclose. TEX. PROP. CODE ANN. § 51.002(d) (West Supp.

association may (if allowed by the governing documents) proceed with a non-judicial foreclosure, using the process outlined in the Texas Property Code.[197]

Once the time to cure has passed, for the non-judicial foreclosure to properly proceed, the statute requires only that notice be sent by certified mail, return receipt requested, to the debtor, and that notice be filed with the county clerk and posted at the county courthouse.[198] Neither this notice nor the notice of default, however, ensures that the debtor–homeowner will receive actual notice of the foreclosure sale. Everything is sent through the mail without any requirement of personal service.[199] And, if the notice is sent only by certified mail and not regular mail as well, there is no guarantee that the party will ever receive it. Certified mail requires a signature for delivery, which may be difficult to obtain during the normal business hours of the postal system.

So, an owners' association can send a letter providing notice of the default and then send a notice of the foreclosure sale, with no procedural guarantee that the debtor–homeowner has actually received these notices or had the opportunity to make herself aware of the circumstances. Depending on the particular requirements of an association's documents, it is hypothetically possible for an owner to be one month past due, then receive a

2010). In the instance of unpaid association dues, there would not be an amount to accelerate, but there would be the opportunity to cure the past due amounts. However, this time to cure does not require the association to provide a right for a hearing or an appeal of that decision before moving forward. *Cf.* TEX. PROP. CODE ANN. § 51.002(d) (West Supp. 2010) (requiring only that the debtor be notified that he is in default and has twenty days to cure the default before there is notice of sale). This would need to be examined in conjunction with the association documents. If the residents are given more time to cure or a process to follow in the association documents, then that must be followed, similar to the situation where a deed of trust gives more time to cure than the statute requires. However, if such provisions are not included in the documents, the law does not require any process.

197. *See* TEX. PROP. CODE ANN. § 51.002 (West Supp. 2010) (outlining the process for non-judicial foreclosure); GREGORY S. CAGLE, TEXAS HOMEOWNERS ASSOCIATION LAW 254 (2010) (noting that homeowners' associations are allowed to foreclose on assessment liens through non-judicial foreclosure proceedings if their declarations allow them to do so).

198. TEX. PROP. CODE ANN. § 51.002(b), (e) (West Supp. 2010).

199. *See* TEX. PROP. CODE ANN. § 51.002(e) (West Supp. 2010) ("Service of a notice under this section by certified mail is complete when the notice is deposited in the United States mail, postage prepaid and addressed to the debtor at the debtor's last known address.").

notice of default with twenty days to cure (thirty days past due + twenty days to cure = fifty days). The notice of foreclosure could then be sent, and the sale could take place twenty-one days thereafter (fifty days + twenty-one days = seventy-one days). In other words, for a homeowner's failure to pay a few hundred dollars in dues, a HOA can sell her house a mere seventy-one days after that money becomes due. Does this not sound like someone being deprived of her property without due process? The process seems even more unfair when compared against the process that goes into a tax foreclosure sale, as set forth above.[200]

The legislature has created provisions for notice following a foreclosure sale.[201] Section 209.010 requires notice to be sent not later than thirty days after the date of the sale.[202] For this notice requirement to be fulfilled, written notice must be sent by mail to the debtor who was foreclosed upon, along with any lien holder of record; there is, however, no actual notice requirement.[203] The homeowner may have no idea that his home has just been purchased at a foreclosure sale for a nominal amount. The association may then sit quietly while the 180-day redemption period expires.

The statutory provision for the redemption of the property allows the owner to redeem not later than 180 days "after the date the association mails written notice . . . to the owner and the lienholder."[204] A lienholder is given the opportunity to redeem the property as early as ninety days after the sale, if the property owner has not already redeemed.[205] Once the redemption period expires, the association may sell the property to anyone for a

200. *See* TEX. TAX CODE ANN. § 34.21 (West Supp. 2010). If a property owner is delinquent in payment of property taxes, the tax foreclosure cannot proceed in a non-judicial process; rather, it must occur through a judicial foreclosure proceeding. *See* TEX. TAX CODE ANN. § 33.41(a) (West 2008) (stating that once a tax on a property becomes delinquent, suit to foreclose must be filed "in a court of competent jurisdiction for the county in which the tax was imposed").

201. TEX. PROP. CODE ANN. § 209.010 (West Supp. 2010). This provision does provide a redemption period, but there are strings attached. *See id.* § 209.011 (allowing the owner to redeem the property after its sale, but requiring that the owner first make additional payments to the purchaser).

202. *Id.* § 209.010(a).

203. *Id.* § 209.010(b).

204. *Id.* § 209.011(b).

205. TEX. PROP. CODE ANN. § 209.011(b) (West Supp. 2010).

significant profit.[206]

After the redemption period has passed, the new owner—whether the association or a third party—can begin a forcible entry and detainer proceeding to have the prior owner removed and to take possession of the property.[207] The new owner must send the debtor–homeowner a notice to vacate, which must be actually served on the debtor in compliance with the Texas Rules of Civil Procedure.[208] Once the proceeding is completed, the new owner can take possession.[209] Conceivably, the first time in the process the debtor could receive actual notice is when the purchaser files a forcible entry and detainer action.[210] Nothing before that time requires that the homeowner actually receive notice that foreclosure proceedings have commenced. Again, does that sound like due process?

C. *Providing the Fix for Due Process*

In actuality, because of the unconstitutionality of the lien on homestead property, the best solution would be to allow the association a lien without the power to foreclose. This would fix the lack of due process while preserving the right of the association to foreclose.

1. More Meaningful Disclosure to Purchasers of Property in Mandatory Owners' Associations

More steps need to be taken at the beginning of the purchasing process, at which point people often purchase property with a mandatory owners' association without realizing exactly what is involved and expected. This Article's introductory quote illustrates that many home buyers purchase with their hearts rather than their heads.[211] A variety of forms and disclosures are utilized in the residential real estate transaction, but too often people rush through paperwork without really comprehending what is involved and the legal implications therein.

206. *See generally id.* § 209.011 (explaining the redemption requirements and procedures).

207. *Id.* § 209.011(a).

208. TEX. PROP. CODE ANN. §§ 24.005–.0051 (West 2007).

209. *Id.*

210. *Id.*

211. *See supra* note 1 and accompanying text.

In the context of a residential real estate transaction, Texas Property Code section 5.008 requires a seller to disclose if the buyer is subject to payment of assessments.[212] Additionally, there is a separate notice document that must be provided to a purchaser to give notice of mandatory membership in a property owners' association.[213] The notice includes language stating, "Your failure to pay the assessments could result in a lien on and the foreclosure of your property."[214] However, this notice needs to give a description of the process involved in foreclosing for unpaid assessments, and should also specifically state that foreclosure is allowed even on property that is the person's homestead. Many people may not realize the HOA assessment lien can result in foreclosure on the homestead. And, while ignorance of the law is no excuse, a more meaningful understanding of the law only helps the process. There should also be an explanation of the notice and redemption process that exists following a foreclosure. Furthermore, an additional explanation should be provided that such assessments are non-waivable, and that, even if the resident does not utilize the common areas of the neighborhood, the assessment is a valid, binding obligation that goes along with property ownership.

A more plain-language and comprehensive notice document, given to the purchaser before completing the purchase of such a property would help further underscore the magnitude of the obligation and the severity of the consequences for non-compliance.

2. Threshold Requirements for a Foreclosure Action

When is a foreclosure action warranted? Certainly not when a relatively small sum of money is due that is otherwise insignificant when compared to the value of the property being taken. Monetary threshold amounts are used in other states, and we can look to the laws of those states for guidance. Arizona requires judicial foreclosure, and either a delinquency of $1,200 or that the debtor be in default for at least one year, whichever occurs first.[215] Finally, California allows non-judicial foreclosure, but only if the

212. TEX. PROP. CODE ANN. § 5.008(a)–(b) (West Supp. 2010).
213. *Id.* § 5.012 (West 2007).
214. *Id.* § 5.012(a).
215. ARIZ. REV. STAT ANN. § 33-1807(A) (2007).

debtor is in default for a period of one year and the association is seeking $1,800 or more in delinquent assessments.[216] Florida does not require a minimum threshold, but demands a judicial foreclosure proceeding as well a minimum amount of time in default of forty-five days.[217]

Some critics oppose the requirement of a threshold dollar amount.[218] In some instances the amount of monthly dues is a small sum because of a large number of residents in the development. By requiring a threshold amount, there is concern that the statute of limitations for recovery of the funds would expire before the threshold amount is met.

In order to address criticisms of opponents of threshold dollar requirements, the statute of limitations for recovery of HOA assessments could be extended to four years. This extension would prevent an association from being barred from recovering by having to wait for a sufficient amount of assessments to accrue. Even in the instance of a resident only owing thirty dollars per month in assessments, if the $1,200 threshold amount were used along with a four-year limitations statute, concerns of claims being time barred would be adequately addressed.[219]

3. Requirement of a Judicial Foreclosure Proceeding

While the process of a judicial foreclosure will be more time-consuming and costly, when looking at the circumstances surrounding this issue, it is the most equitable manner in which to handle foreclosures for past-due HOA dues. Associations legitimately argue that they need the power of foreclosure as leverage to force homeowners to pay their dues.[220] After all, the association needs regular revenue to pay for services and maintain the property for the benefit of all of the neighborhood residents.

---

216. CAL. CIV. CODE § 1367.4(c) (Deering Supp. 2011).

217. FLA. STAT. ANN. § 720.3085(4) (West 2010).

218. *See* Stephen M. Kirkland, *Pending Legislation Regarding Non-Judicial Foreclosures and Executive Session Meetings*, PETERS & FREEDMAN, L.L.P. (2002), http://www.hoalaw.com/WPnews/?p=75 (explaining the problems caused by threshold amount requirements for delinquent homeowner assessments as a prerequisite to non-judicial foreclosure).

219. At that rate, the homeowner would owe $360 per year and the $1,200 amount would be reached after forty months. This threshold amount would be based purely on dues owed and would not include attorneys' fees, late charges, or interest.

220. Andrei Lubomudrov, *Authority of HOAs in Texas Examined*, HOUSE RESEARCH ORG., INTERIM NEWS, NO. 81-5, Aug. 12, 2010, at 5.

But requiring the association to follow the procedural protections afforded by a judicial foreclosure adequately balances a homeowner's rights against those of the association. Implementing a mandatory judicial foreclosure process can serve three goals: (1) it ensures actual notice to the homeowner through service of process; (2) it will allow for the most fair resolution of any disputes involving HOA assessments; and (3) it still preserves associations' ability to use foreclosure as leverage to collect unpaid dues.

Associations commonly argue that they need a right to foreclose in order to ensure homeowners pay the required dues.[221] As a companion argument, the associations claim that the additional expense of the judicial foreclosure will make the process impractical, if not impossible, to use regularly.[222] However, the reality is that a foreclosure action by an HOA is uncommon. Many HOAs do not proceed with foreclosure actions because their assessment liens are second in time to the senior purchase money lien. While the HOA could foreclose, the property would be taken subject to the mortgage still owed.[223] This naturally makes foreclosure an impractical option in most instances, which means that the HOA's threat of foreclosure may be used to coerce property owners into paying the dues even though the actual process is rarely utilized. The instances where foreclosures occur are the cases where the mortgages are paid in full and the unpaid dues are a small amount of money in comparison to the value of the home.[224] These are the cases reported in the news where people

221. *Id.*

222. GREGORY S. CAGLE, TEXAS HOMEOWNERS ASSOCIATION LAW 258 (2010).

223. Andrei Lubomudrov, *Authority of HOAs in Texas Examined*, INTERIM NEWS (HOUSE RESEARCH ORG.), NO. 81-5, Aug. 12, 2010, at 5. Because the assessment lien is created in the declaration, which is recorded prior to any property being sold to individual owners, the assessment lien is perfected before a purchase money lien is recorded by the lender. However, in almost all cases, the declarations used for Texas homeowners' associations provide language subrogating the assessment lien in priority, allowing the purchase money mortgage and tax liens to take priority. GREGORY S. CAGLE, TEXAS HOMEOWNERS ASSOCIATION LAW 253 (2010).

224. *See* Andrei Lubomudrov, *Authority of HOAs in Texas Examined*, INTERIM NEWS (HOUSE RESEARCH ORG.), No. 81-5, Aug. 12, 2010, at 5 (noting that "associations need flexibility to proceed with foreclosure if it is warranted[, but] HOAs rarely file foreclosure suits"); *All Things Considered: Not So Neighborly Associations Foreclosing on Homes*, National Public Radio (June 29, 2010), http://www.npr.org/templates/story/story.php?storyId=128078864 (discussing an instance where a home valued at $300,000 with no other liens was foreclosed on by a HOA due to delinquent assessments).

do not have adequate notice of what is transpiring and are not treated in an equitable manner.[225] By adding the requirement of a judicial foreclosure, the additional time and cost will likely only come into play in the abusive situations, which are the ones that most clearly need to be eradicated.

4. An Alternative to Judicial Foreclosure

Even if this Article's recommendation to mandate a judicial foreclosure proceeding is not adopted, Texas law should provide more protection than it currently does. Currently, there is no procedural requirement for actual notice regarding the default or time to cure,[226] no requirement for a hearing or right to appeal before proceeding with foreclosure,[227] and no requirement for actual notice of the sale.[228]

Even if service of process is not the appropriate vehicle to provide actual notice of default and sale, there are other means that can be used to more effectively provide notice to the homeowner than certified mail. In *Jones v. Flowers*,[229] the United States Supreme Court examined the issue of due process in the context of a property tax dispute.[230] In *Jones*, the mortgagee paid property taxes up until the mortgagor paid off the mortgage, at which point taxes were no longer paid.[231] The taxing authority sent two certified letters to the mortgagor's address warning of a tax sale; however, the letters were returned unclaimed.[232] A notice of auction was published and no bids were made at the

225. *See All Things Considered: Not So Neighborly Associations Foreclosing on Homes,* National Public Radio (June 29, 2010), http://www.npr.org/templates/story/story.php?storyId=128078864 ("[Captain] Mike Clauer was serving in Iraq when he learned that his home was sold because of missed HOA dues.").

226. *See* Haas v. Ashford Hollow Cmty. Improvement Ass'n, 209 S.W.3d 875, 886 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (stating that homeowners' associations are not required to provide homeowners with notice or an opportunity to cure prior to filing a foreclosure suit); *see also* TEX. PROP. CODE ANN. § 51.002(d) (West Supp. 2010) (requiring that notice of default be sent to debtor by certified mail).

227. *Cf.* TEX. PROP. CODE ANN. § 51.002(d) (West Supp. 2010) (requiring only that the debtor be notified that he is in default and has twenty days to cure the default before there is a notice of sale).

228. *See id.* (allowing for forms of notice that do not necessarily entail actual notice).

229. Jones v. Flowers, 547 U.S. 220 (2006).

230. *Id.* at 223.

231. *Id.*

232. *Id.* at 223–24.

sale.[233] After the sale, the taxing authority took title and subsequently sold the property to a third-party purchaser.[234] The mortgagor learned of the sale after the purchaser served the mortgagor's daughter with an unlawful detainer notice.[235]

The Court stated that, because the letters were returned unclaimed, the State was aware that Jones was likely no better off than if they had not sent any letters.[236] The Court concluded there was state action and that due process required more to be done to provide adequate notice of the impending foreclosure.[237] The Court stated that sending the letters by regular mail, posting notices on the door of the property, or addressing notice letters to "occupant" were additional reasonable steps that might serve to provide due process.[238]

If the legislature prefers an option other than a judicial foreclosure that would still provide a greater opportunity for the property owner to acquire notice of the foreclosure action, the suggestions of the United States Supreme Court in *Flowers* could provide that alternative. This could allow associations to continue to use the non-judicial process, which is faster and cheaper than the judicial foreclosure process. This acknowledges the association's interest in having a viable remedy. At the same time, using these other methods to notify the property owner of the delinquency and impending sale, coupled with the other pre-foreclosure remedies addressed above, would address the property owner's need for a more fundamentally fair process.

5. The Post-Foreclosure Notice and Redemption Period

The redemption period in Texas following a foreclosure appears to be more generous than other states. However, it really is not all that generous when one considers that, under the current procedures, the homeowner may not have any actual notice of what has transpired. While other states have shorter redemption periods, they have a higher dollar threshold amount or a longer

233. *Id.* at 224.

234. *Jones*, 547 U.S. at 224.

235. *Id.*

236. *Id.* at 230 (citing Malone v. Robinson, 614 A.2d 33, 37 (D.C. 1992)).

237. *Id.* at 234 (citing U.S. CONST. amend. XIV; Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 799 (1983)).

238. *Id.* at 234–35.

time period of default before the foreclosure remedy can be utilized.[239]

Even if the Texas legislature implements the other procedural changes recommended in this Article, the post-foreclosure notice and redemption periods should remain in the Texas Property Code. The post-foreclosure notice serves to inform the property owner of the ultimate result of the auction and allows the property owner to try to reclaim the property for a limited time. This combination of post-foreclosure notice and a redemption period provides the final step in ensuring a fair and balanced process. The notice and a redemption period, along with improved pre-sale notices, threshold-amount requirements to trigger the right to foreclose, and the use of a judicial proceeding or other acceptable alternative process to provide notice, will ensure that Texas homeowners will once again be adequately protected. A man's home—his castle—will again be properly fortified.

6. The Homeowners' Association vs. the Condominium Distinction

One final point to consider is the difference between a mandatory owners' association in a residential subdivision and association in a condominium development. The concerns of a condominium owner are different from those of a property owner in a residential subdivision. The condominium owner, while owning his unit just as an owner owns his home in a subdivision, also owns an undivided fractional share in the common elements of the condominium development.[240] Certain lender underwriting guidelines for condominiums that are not present in the subdivision context could justify treating collection practices differently.[241] Also, the common elements of the condominium directly affect all unit owners in that the assessments go toward

239. *See* ARIZ. REV. STAT ANN. § 33-1807(A) (2007) (allowing foreclosure when the homeowner is in default for a year or more or the amount owed is at least $1,200); CAL. CIV. CODE § 1367.4(c) (Deering Supp. 2011) (permitting foreclosure only where the homeowner owes at least $1,800 in assessments and has been in default for a period of one year or more).

240. TEX. PROP. CODE ANN. § 81.107 (West 2007).

241. *Cf.* Michele Lerner, *How to Jump Through Condo-Lending Hoops*, YAHOO! (Mar. 14, 2011, 6:00 AM), http://finance.yahoo.com/news/How-to-jump-through-brn-640332989.html?x=0&.v=1 (explaining that the Federal Housing Administration places strict guidelines on condominium associations).

keeping the structure itself in good repair, such as repairing the roof or elevator in the building where everyone lives. Those are different from assessments in a subdivision, which go toward maintaining a swimming pool or tennis court as part of the common property. Those amenities, while needing to be maintained to prevent deterioration and a negative impact on all of the individual properties, are not as essential to the development itself as are the common elements in a condominium.

VII. CONCLUSION

It is understandable that the HOA must be able to collect assessments in a timely manner to adequately maintain the amenities in the neighborhood and to provide services to the residents. At the same time, the homeowners are entitled to have their homestead interests protected by the laws of this state. The current status of laws regulating mandatory owners' associations is deficient, and the ability to foreclose on homestead property for nonpayment of HOA dues is unconstitutional. Much needs to be done to make the homebuyer more informed going into the process, and also to ensure the homeowner receives due process, while at the same time allowing appropriate remedies to the associations. The proper balance must be struck, and we have much work to do to achieve that balance.