Home Sweet Homestead? Not if You are Subject to a Mandatory Homeowners' Association!

Bridget M Fuselier
HOME SWEET HOMESTEAD?
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“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, 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.”

The above sentiment is how most people enter into the home buying process. Purchasing a home is the largest investment that 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, unfamiliarity, and, often times, a lack of knowledge. The home that will be created from that house will be the core of the family unit, or of an individual’s life. In many states, Texas included, property that meets the requirements for a “homestead” is provided additional protection because of the significant impact 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 the 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. 

1 MR. BLANDING BUILDS HIS DREAM HOUSE (Warner Bros. 1948).
foreclosure sale and the new owner threatened eviction if Captain Clauer and his family did not pay rent. Abuses such as this increase the animosity against HOAs and the power they yield. The Texas Supreme Court allowed such liens for unpaid HOA dues to have foreclosure power without going through the process of a constitutional amendment. 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 home buyers to truly understand the gravity of the mandatory owner’s association. In the event that a homeowner becomes delinquent, the HOA can foreclose without court involvement. This together serves as the right combination for devastating disaster.

This article revisits what the Texas Supreme Court did in 1987 that has gone unnoticed by most homeowners for more than twenty years. In the housing climate we live in today, homeowners should be especially concerned about the status enjoyed by the HOA assessment lien. Changes must be made to the current Texas laws to strike the proper balance between the homeowners’ rights and HOA’s. The basis for the changes in this article begins with the historical background for Texas Homestead protection. Additionally, the plain language of the Texas Constitution sets forth the homestead protection and illustrates the legislature’s concerted efforts to keep broad and strong protections in place, even in recent years. However, *Inwood North Homeowners’ Association, Inc. v. Harris*\(^3\) explains the legal theory the Texas Supreme Court used to allow such liens to attach to what everyone would otherwise consider homestead-protected property. There are problems with allowing the association dues to attach a lien to homestead property without obtaining approval by the voters through a

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\(^3\) 736 S.W.2d 632 (Tex. 1987).
constitutional amendment. Because of the problem that the *Inwood* rule creates, the disclosure requirements in the home-buying process are inadequate to truly inform purchasers about what a mandatory owner’s association really means. Finally, this article proposes a workable framework and solution to the practical reality these associations face, while balancing the interests of 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. In a short period of time, currency lost its value, many companies crashed, and fortunes were lost. Unemployment skyrocketed—especially in the West and South, with a loss of agricultural exports and crop failures. Public calls for banking reform increased anxiety and a six-year depression followed.⁴

While this may sound like a story ripped from recent headlines, this was the status of the economic situation in 1837, and Texas was being hit hard. As a result, Texas homestead laws were born.⁵ The homestead laws served a three-fold purpose: (1) to protect the women 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 instead of being dependent on others for their care and well-being.⁶

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⁴ See Interpretive Commentary, Tex. Const. art. 16, sec. 50 (1993).
⁵ 1018-3rd Street v. State, 331 S.W.2d 450, 453 (Tex. Civ. App.—Amarillo 1959, no writ)(panic of 1837 incited creation of Texas Homestead laws due to numerous farms lost by foreclosure). See also Inge v. Cain, 65 Tex. 75, 77-80 (1895)(analyzing expansion of homestead provisions from Texas Constitution of 1845 to adoption of 1876 Constitution).
Up until its independence in 1936, Texas had been under the rule of France, Spain, and Mexico at various points in time. Spanish civil law provided a 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.\(^7\) Spanish law also provided protections for the wife who, once married, was otherwise not allowed to own property.\(^8\) There was an exemption for antecedent debts against the property of colonists and empresarios under the laws of the Republic of Texas.\(^9\)

In 1839, the Texas legislature enacted the first statutory provision for homestead protection.\(^10\) The provision exempted 50 acres of land or one town lot and improvements not to exceed $500 in value. This provision was briefly repealed in 1840, but reenacted later that year.\(^11\) Since 1843, Texas has continually had constitutional homestead protections in place. In 1843, Congress also extended homestead protection into the probate process.\(^12\)

Texas adopted a new constitution when it joined the United States in 1845.\(^13\) The new constitution included a homestead provision which increased the amount of land protected to 200 acres; the value of land of an urban homestead, however, could not exceed $2,000.\(^14\) The joinder requirement was also created at this time.\(^15\) Under the joinder requirement, in an

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\(^7\) Tex. Const. art. XVI, § 50 interp. commentary (Vernon).
\(^8\) See Interpretative Commentary to Tex. Const. art. 16, sec. 50 (1993).
\(^9\) Id.
\(^13\) Tex. Const. art. VII, § 22 (1845). At this time, Texas enacted laws to liberally protect homestead claimants from foreclosure.
\(^14\) Id.
\(^15\) Id.
effort to provide the wife with some protection from her husband’s actions, the wife had to consent to the sale of the homestead property. Homestead protection only applied to families, however, and not to single individuals. The constitutions of 1861 and 1866 contained the same provisions.\textsuperscript{16}

The constitution of 1876, which is the current constitution, introduced the business homestead.\textsuperscript{17} 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 surviving spouse.\textsuperscript{18} In 1897, the legislature added a statute that protected proceeds of a voluntary sale of a homestead for 6 months after such sale.\textsuperscript{19}

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.\textsuperscript{20} In 1973, the scope of the homestead protection was finally expanded to single adults.\textsuperscript{21} In 1983, the homestead protection changed from protection of a specific value to protection of a certain number of acres. The urban homestead could be as large as one acre, while the rural homestead could be up to 200 acres for a family, or 100 acres for a single adult.\textsuperscript{22} In 1989, the

\textsuperscript{16} Tex. Const. of 1861, art. VII, § 22; Tex. Const. of 1866, art. VII, § 22.
\textsuperscript{17} Tex. Const. art. XVI, § 50.
\textsuperscript{18} Id.
\textsuperscript{20} Tex. Const. art. XVI, §51 (1970).
\textsuperscript{21} Tex. Const. art. XVI, § 51 (1973).
\textsuperscript{22} Tex. Const. art. XVI, §51 (1983).
legislature also took steps to more specifically define the distinction between a rural and an urban homestead.\textsuperscript{23}

Some of the most significant changes in homestead protections occurred during the 1990s. In 1995, Texas voters amended the Texas Constitution. That amendment triggered amendments to the Property Code, which expanded the list of exceptions to homestead protection to include owelty of partition judgments and a refinance of a lien on a homestead as liens permitted to attach to homestead property.\textsuperscript{24}

In 1997, the voters amended the constitution to further expand exemptions from the homestead protection. The 1997 amendments allowed for the home equity loan and reverse mortgage to be available to Texas property owners.\textsuperscript{25} It also allowed the valid attachment of a home improvement lien with specific requirements.\textsuperscript{26} The last amendments with respect to the content or extent of homestead law occurred in 1999. It made various changes to the urban homestead, including increasing its size.\textsuperscript{27} Despite some discussions in the legislature in recent years, the only changes made since 1999 have been fine-tuning the provisions already in place.\textsuperscript{28}

\textsuperscript{23} TX Property Code 41.002. This section was amended to add more specific criteria for assessing the urban or rural character of property, looking at specific factors like police and fire protection, along with the provision of other municipal services.

\textsuperscript{24} Tex. Const. art. XVI, § 50 (1995).

\textsuperscript{25} Tex. Const. art. XVI, § 50 (1997).

\textsuperscript{26} Id.

\textsuperscript{27} Tex. Const. art. XVI, § 50 (1999).

\textsuperscript{28} Tex. Const. art. XVI, § 50 (2001) (adding provision for converting personal property lien on manufactured home to real property lien and altering time regarding some work and material liens); Tex. Const. art. XVI, § 50 (2003) (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. Const. art. XVI, § 50 (2005) (imposing additional restrictions on reverse mortgages similar to those already in place for home equity loans, and allowing future advances for reverse mortgages); Tex. Const. art. XVI, § 50 (2007) (allowing owner to request an
While homestead protections are an important part of Texas law, also clear since 1882 is the idea that homestead laws should be liberally construed to provide the most protection possible to the debtor’s property. This will not, however, be done to the detriment of any pre-existing interest that had attached to the property before achieving homestead protection. On the other hand, Texas courts have clearly held that if liens attach simultaneously to the acquisition of the homestead property, unless they are one of the constitutionally permissible liens, they shall be subordinate to the debtor’s homestead claims.29

II. Express Provisions of Homestead Protection from the Texas Constitution and Texas Property Code

Article XVI, section 50 of the Texas Constitution begins today in the same way it did in 1987, when the Texas Supreme Court entered its decision in the Inwood v. Harris case. This language is the starting point for any discussion surrounding the lien for assessments imposed by a property owners’ association, as it is with any statement of any law.30 The court may also look to the legislative history, along with the conditions of the times, the evils intended to be remedied, and the goal sought to be accomplished.31

“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. . . .”32 Following this clear language,

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29 Freiburg v. Walzem, 85 Tex. 264, 266, 20 S.W. 60, 61 (1892).
32 Tex. Constitution, art. XVI, §50 (2007). 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
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 ones that should put the homestead at risk.\textsuperscript{33}

Conspicuously absent from this list is any reference to a lien for assessments paid to property owners’ associations. It is a well-recognized cannon of statutory construction that, when the language used exclusively enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of contrary legislative intent.\textsuperscript{34} Section 50 provides an express list, which has admittedly grown in past years, but anything not included in the list as an exception to the homestead protection is 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 continued desire to limit the debts that can attach to homestead property.\textsuperscript{35} The legislature took years to homestead property that would be otherwise protected. 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.

\textsuperscript{33} The list includes: (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 material 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; or (8) the refinance of a personal property lien on a manufactured home to a lien on both the home and the real property. \textit{See} Tex. Constitution, art. XVI, §50 (2007). These are the magic eight.


\textsuperscript{35} 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.” \textit{See} S.J.R. 46, 73\textsuperscript{rd} Regular Legislative Session (bill never made it out of senate
finally propose to the voters that home equity loans and reverse mortgages should be allowed to pierce the homestead protection, and that proposal still needed major revisions after its initial passage.

In 1997--the same year the 75th regular legislative session was busy addressing the pressing issue of the home equity loan on the Texas Homestead—Senator Ellis filed Senate Joint Resolution No. 38. In the Bill Analysis accompanying SJR 38, the purpose stated 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.” This seems to suggest that there was at least some concern and recognition of potential problems resulting from the Inwood decision.

The Texas Property Code also includes a provision that sets forth the interests in land that are exempt from seizure. Section 41.001 incorporates within it the list of encumbrances that

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38 S.J.R. No. 38, 75th Regular Legislative Session (1997). The proposed language would have added to the list of debts that could validly attach to homestead property “an obligation to pay property owners’ association fees for maintenance and ownership of common facilities and services.” However, it went on to state that “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 senate committee, it was a busy year for the legislature. It was dealing with the issue of the home equity loan, which had been proposed in the past two legislative sessions.
39 Bill Analysis, SJR 38, 75th Regular Legislature (1997).
may be properly fixed on homestead property as provided by the constitution. 41 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. 42 Everything that the legislature has done concerning the homestead protection illustrates a concerted effort to continue protecting the homestead as originally intended since 1839.

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 in recent years. Homestead protections have always been liberally construed. The Texas Supreme Court was aware of these facts in 1987 when it decided Inwood, and carefully avoided any attempt at construing the constitutional provisions to include a lien for HOA assessments. Actually, there was very little constitutional analysis, except in the dissenting opinion. The court utilized a legal theory that provided a way around the constitutional issue. In relying on case law from other states that was distinguishable, and based on state laws that were not comparable to the Texas Constitution, another lien with very powerful teeth penetrated 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.

41 Id. § 41.001(b).
42 Id. § 41.001(c). This provision goes along with 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.” 284 S.W. 612 (Tex. Civ. App. 1926, no writ).
III. *Inwood North Homeowners’ Association, Inc. 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. 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. A “Declaration of Covenants and Restrictions” was already recorded in the records prior to the sale of the lots. The Declaration specifically provided that all of the property in the subdivision would be subject to an annual maintenance charge which was secured by a vendor’s lien on the lots.

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. The trial court awarded judgment against the homeowners and they appealed to the Houston Court of Appeals for the First District.

The Association argued that the lien attached to the lots before those lots achieved homestead status and, therefore, were valid. The Houston Court of Appeals held for the homeowners, reversing the trial court’s judgment. 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

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44 Id.
45 Id.
46 Id.
47 Id. (emphasis added).
foreclosure. 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 pay the sums due.

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

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.” Although these laws provide protection from debts other than those constitutionally permitted, an encumbrance that exists prior to establishing the homestead

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48 Id.
49 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. Id. at 128. 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 to 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 the Johnson v. First Southern Properties Case, argued by appellants, was distinguishable. 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 had used his percentage of ownership in the common elements to secure the payment of unpaid future 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. Id. at 128-129. “At most, the homeowners have committed themselves to an unsecured obligation to pay the assessment charged pursuant to the terms of their respective deeds and declarations.” Id. at 129.
50 736 S.W.2d 632, 634 (Tex. 1987).
51 Id.
status is properly attached and will not be impacted by the later acquisition of such status.\textsuperscript{52} While liberally construing homestead laws, the courts should not read them in such a way to avoid or destroy pre-existing rights.\textsuperscript{53}

The court incorporated this idea of pre-existing rights along with the constitutional right of freedom to contract. 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.”\textsuperscript{54} The court seemed to ignore the important and long-venerated public policy of protecting the family home, instead protecting the financial interests of the property owners’ association. Additionally, the court did not properly weigh all of the case law that stands for the rule of law that an individual may not contract away homestead protections.\textsuperscript{55} The homestead protection is a constitutional right in Texas. When constitutional rights are waived, that waiver must be knowing and voluntary in order to be enforceable.\textsuperscript{56} Given the way that the residential development process works, with the developer creating 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

\textsuperscript{52} Id. at 635.
\textsuperscript{53} Id.
\textsuperscript{54} Id. at 634.
\textsuperscript{55} See NCNB Texas National 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.”). See also Texas Land & Loan Co. v. Blalock, 76 Tex. 85, 89, 13 S.W. 12, 13 (1890). In 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. The Texas Supreme Court stated that “lenders must understand that liens cannot be fixed upon it [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 fact will enable parties to evade the law and encumber homesteads with liens forbidden by the Constitution.” Id. at 76 Tex. at 89, 13 S.W. at 13 (emphasis added).
\textsuperscript{56} Ulico Cas. Co. v. Allied Pilots Ass’n, 262 S.W.3d 773, 778 (Tex. 2008).
who will become the homeowners, little about the process can be said to be knowing or voluntary on the part of the home buyer.

B. Substance and Timing: What type of lien exists and when was it created?

The law recognizes different types of liens. However, 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. A lien does not provide title to the property that secures the debt or obligation, and does not confer any legal rights of property ownership to the lienholder. A lien is an interest acquired in the property of another, as it would be inconsistent to have ownership and lien interests in the same property. In order for a lien to be established, there must be: (1) a specific obligation to pay money; as well as (2) an agreement, instrument, or act giving a creditor superior right in the property. Texas courts have also stated that “to 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 envisioning an intent to secure a future debt.” Additionally, if a lien is obtained by agreement, any equitable lien that might be impliedly created is negated. Ordinarily, a lien is created by the owner of the collateral property or by someone authorized by the owner.

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59 50 Tex. Jur.3d Liens §12 Property of Lienholder. See also Robinson v. Cleveland State Bank, 282 S.W. 860 (Tex. Civ. App.—Beaumont 1926, writ dism’d w.o.j.).
60 Calvert v. Hull, 475 S.W.2d 907 (Tex. 1972); Nelson, 193 S.W.3d 624. In Calvert, the Texas Supreme Court stated that it is a matter of Texas law that a lien affixes to property when a corresponding obligation to pay a debt arises. 475 S.W.2d 907, 911.
62 GXG, Inc. v. Texacal Oil & Gas, 977 S.W.2d 403 (Tex. App.—Corpus Christi 1998, no writ).
63 Continental Credit Corp. v. Norman, 303 S.W.2d 449 (Tex. Civ. App.—San Antonio 1957, writ ref’d n.r.e.).
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.” As the Houston Court of Appeals for the First District stated, although referred to in the Declarations as a vendor’s lien, the lien in question had nothing to do with the purchase price; rather, it was for assessments and fees arising after the purchase of the land. The Texas Supreme Court did agree that indeed the assessments could not be considered a vendor’s lien, 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.

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

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, and that is what they did. The court’s

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65 See Inwood, 707 S.W.2d at 128.
66 See Inwood, 736 S.W.2d at 634 (citing to Maryland Casualty Co. v. Willig, 10 S.W.2d 415, 419 (Tex. Civ. App.—Waco 1928, writ ref’d).
67 Id. at 634.
68 Id.
69 Id. 635. See also Tex. Land & Loan co. v. Blalock, 76 Tex. 85, 89 (1890) (disallowing foreclosure on a homestead, despite debtors having told lender it was not their homestead).
opinion focuses on the timing of the contractual lien rather than liberally construing homestead protections and upholding public policy consistently protected for centuries. 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. The court stated that “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. The remedy of foreclosure is an inherent characteristic of the property right.”\textsuperscript{70} This interpretation allowed the court to hold “the lien in the present case to be superior, and worthy of protection against the homestead claim.”\textsuperscript{71}

With that stroke of a pen, the court allowed the mandatory homeowners association to circumvent the ever-present and important homestead protection. In the court’s decision, the concepts of the covenant running with the land and a lien were muddled and confused. The very basis for the court’s reasoning is flawed. 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.

\textbf{C. Lien vs. Covenant: Different Bundles of Sticks}

A covenant is entirely different than a lien. Covenants originated hundreds of years ago in English common law as real covenants. Later, the English common law also developed the concept of the equitable servitude. While both types of covenants still exist in American jurisprudence, the equitable servitude is what is most commonly utilized today. Real covenants provide rights in one landowner to require another landowner to do or refrain from doing

\textsuperscript{70} Id. at 636.
\textsuperscript{71} Id. at 636-37.
something on or with his land, which can be enforced by an award of damages.\textsuperscript{72} An equitable servitude allows for equitable relief rather than damages.\textsuperscript{73} 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.\textsuperscript{74} Both real covenants and equitable servitudes are created as contracts, but are considered property rights if their required elements are satisfied.\textsuperscript{75}

Covenants, whether real or equitable, involve contractual promises that will continue to burden and benefit land as it passes through successive owners. The heart of each one is a promise to do or not to do something related to land. While negative promises have always been upheld if they indeed were found to touch and concern the land, courts have had a more difficult time with the affirmative promise.\textsuperscript{76} But, whether affirmative or negative, the covenant is a promise to do or not do something. The homeowner promises that the land will only be used for a single family residence, or the homeowner promises not to park cars in the street, or the homeowner promises to pay fees and assessments for maintenance and upkeep of common areas in the community. In the HOA context, the covenant or promise is to pay the fees that are due. 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.

\textsuperscript{73} Id. at 233.
\textsuperscript{75} Id.
\textsuperscript{76} See Murphy v. Kerr, 5 F.2d 908, 911 (8th Cir. 1925).
These promises are entirely different from the lien discussed above. The lien is a security interest which allows the land to be used as collateral or security for a debt or obligation; the covenant, by contrast, is regulating the benefits and burdens placed on land in the form of promises to do or not to do something. Common restrictions involve architectural standards (e.g., only brick structures, no metal roofs, garages cannot face the street), usage of the property (e.g., residential purposes, single family residences only), and, in modern times, affirmative promises to pay dues/assessments. The restrictive covenants are not in any way a pledge of collateral to secure a debt. That is the role of a lien. Simply because the 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. What happens when a person purchases a home in a neighborhood with a mandatory homeowner’s 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 the first person to purchase this home or the fiftieth person, he or she buys the house without any outstanding debt to the homeowners’ association.\textsuperscript{77} The covenants indicate that there is an obligation to pay the assessments for maintenance and upkeep, and the buyer agrees to that promise. From that day forward, they will be charged fees and have an obligation to pay them. However, on the

\textsuperscript{77} While there could be outstanding association dues at the time a subsequent buyer would be purchasing a home, at closing a resale certificate is provided which will put the new purchaser on notice of any outstanding debt. 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. 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.
day that the purchaser takes title to the property, there is no outstanding debt—no money owed. There is a promise to pay in the future. This is fundamentally different from all other situations where a lien has been constitutionally permitted to attach to homestead property. In looking at the other constitutionally permissible liens that attach, even to homestead property, they are liens for outstanding debts that exist. The key difference is that, with the HOA lien, there has been nothing advanced to the homeowner that must be repaid. 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 that the homeowner will receive after he or she buys the house. For example, when the person enters into the financing arrangement with a local bank to provide the purchase money for the 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. The bank has parted with money and, in exchange for parting with that money, they get a lien on the property that the buyer acquires using that money. In the instance of a mechanic’s lien, the contractor puts labor and materials into property to make improvements. The contractor is parting with things 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 judgment or tax liens permitted by the constitution, the 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. Something of value—the land—has already changed hands, so the lien is in place to ensure the money is repaid. For taxes, the lien comes into place when the taxes owed become past due. Again, money that was owed has not been 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. There is no doubt the recorded declarations contained a promise that assessment liens would be paid by each lot owner, and that gave the association the right to impose a lien to ensure the payment of such assessments. While the promise may be set forth in writing, touches and concerns the land, is intended to run with the land, and is properly recorded—providing at least constructive notice to the burdened property owners—that does not, in and of itself, create the contractual lien.78

A contractual lien is created by the language of an agreement that evidences the parties’ intent to create a lien.79 There is only one party to the agreement when the declarations are drafted and recorded—the developer. The language contained in the declarations is therefore that of the intent and desire of the developer in creating the master planned community. 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. 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. When the acceptance of the

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78 In the *Inwood* opinion, the Court cites to a Florida case for support of its decision. The Florida Supreme Court stated in *Bessemer v. Gersten*, 381 So.2d 1344, 1348 (Fla. 1980), that “homeowners in accepting the deed with actual or constructive notice of the lien provisions of the declaration of restrictions, manifests the intent to let the real property stand as security for the debt. . . .The 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 respondents (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 respondent’s homestead right.” *Inwood v. Harris*, 736 S.W.2d 632, 636 n.1 (Tex. 1987).

79 *Inwood*, 736 S.W.2d at 634 (citing Dabney v. Schutze, 228 S.W. 176, 177 (Tex. Comm’n App. 1921, judgment adopted).
deed occurs, in most instances, the homestead status is also achieved. After that, a lien cannot attach, even one contractually created, unless it is permitted to attach by the constitution.

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 property with the additional homestead layer in several different factual scenarios. The prior Court decisions made it abundantly clear that, under Texas law, if a lien 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. 80

So, in the situation where a person has an outstanding judgment against him and he purchases property that immediately becomes impressed with the homestead status, even that pre-existing judgment lien cannot attach. 81 However, the court is willing to allow the assessment lien for a debt that does not yet exist to attach before the purchaser buys the land which has the homestead status immediately impressed. These views are fundamentally inconsistent.


81 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.”); Wallis v. Wendler, 27 Tex. Civ. App., 65 S.W. 43, 45 (Tex. Civ. App.—Nov. 20, 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 of these opinions, the courts recognized that the liens were clearly in existence for some time before the homestead property was acquired. However, these pre-existing liens were not allowed to attach. There was no “relation back” concept introduced as 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 id.
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 facts and circumstances necessary exist, property becomes homestead protected. 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 penetrate that protection.

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

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

The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale for 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 the 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.  

As the dissent highlighted, the public policy of the state of Texas has been to protect homestead property from creditors’ claims. In reviewing the evolution of the homestead

82 Id. at 637 (citing Tex. Const. Art. XVI, §50 (1845, amended 1973) (emphasis added). As indicated in the introduction to this article, additional amendments were added since this 1973 version of the Texas Constitution. The additional constitutional amendments specifically allowed 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.
83 Id. at 637-38.
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. While the majority opinion argued that this position taken by Texas was the same as that taken in other jurisdictions with homestead protection, those laws were not written in the same manner as the Texas Constitution, and, as such, the comparison was misplaced.

The dissent further focused on the timing issue of the lien and homestead protection. Texas case law recognizes that the homestead protection may be established as early as the time the property is acquired, even before any actual possession or occupation has occurred, under certain circumstances. As the dissent noted, whether or not the lien involved is contractual in nature, it still must comply with the constitution. The owners of homestead property may not contractually place a lien on homestead property unless it is one of those permitted by the constitution. In the instant case, and in any other such 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

84 Id. at 638-39.
85 Id. at 639-40. The dissent cites to the provisions from Florida, Arkansas, Alabama and Mississippi that the majority opinion relied upon. As evidenced by the specific language of those various state statutes and constitutions, none of those jurisdictions utilize the sweeping language that the Texas Constitution does, which prohibits “all debts” except those enumerated and provides that “no . . . other lien on the homestead shall ever be valid.” See Ala. Const. art. X, § 205; Ala. Code § 6-10-2; Ark. Const. art. IX, §§ 3, 6; Fla. Const. art. X, § 4; Miss. Const. Art. IV, § 94; Miss. Code Ann. § (85-3-47 (West 2010).
time to the impression of homestead character on the land, then the *homestead character* of the property is superior.”

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.” – Justice Mauzy

Rights that are provided for in the Constitution may not be weakened or removed by anything short of a constitutional amendment. 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. Any proposed amendment must pass a vote in the Texas House of Representatives with a minimum of 100 affirmative votes. This must be followed with at least twenty-one affirmative votes in the Texas Senate. Then the proposed amendment is submitted to the voters in the state and a majority is required to pass the amendment.

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. 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 that.

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88 Id. (citing Frieberg v. Walzem, 85 Tex. 264, 267, 20 S.W. 60, 61 (1892)) (emphasis added).
90 Tex. Const. art. XVII, § 1.
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, attempted to pass a constitutional amendment “permitting an encumbrance to be fixed on homestead property for an obligation to pay certain property owners’ association fees, but would not allow the forced sale of the homestead by the property owners associations to collect delinquent assessments arising out of such fees.”92 This proposal never made it out of the Senate committee.93

In 1999, the legislature attempted to pass a constitutional amendment that specifically excluded “Cooperative Membership Fees” from the list in the Texas Constitution article 16 section 50(a)(6).94 This proposal was voted on by the Senate, but was never voted on by the House.95

The 2001 session again saw efforts to change the Inwood 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 without permitting forced sale of the homestead.96 This proposal was voted on

by the Senate, but never made it out of the House committee.97 Other efforts in the 2001 session included proposed amendments to Chapter 41 of the Texas Property Code. This amendment would add a new provision, section 41.011, which would have made a debt for property owners’ association fees one for which an encumbrance could properly be fixed on the homestead, but which encumbrance could only be collected at the time the homestead property is transferred.98 This proposal did not make it out of either the Senate or House committees.99

VI. Solving the Problem and Providing Due Process

Aside from the fact that foreclosing on a homestead for non-payment of association dues and maintenance fees is unconstitutional in and of itself, there are other problems with the whole process, even if the HOA lien were added to the list of liens constitutionally permitted to attach to homestead property.

Texas allows the power of non-judicial foreclosure to be contracted for by the parties.100 Unlike a judicial foreclosure, a non-judicial foreclosure places the power of sale in the hands of a private individual or entity, to exercise in its discretion, using a trustee, without court

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100 Barrera v. Security Building & Investment Co., 519 F.2d 1166 (5th Cir. 1975); Armenta v. Nussbaum, 519 S.W.2d 673 (Tex. Civ. App.—Corpus Christi 1975, writ ref’d n.r.e.) (non-judicial foreclosure arises from private arrangement).
approval or involvement. Such a non-judicial foreclosure proceeding, especially under these circumstances, deprives the homeowner of due process under the Texas Constitution.

A. Notions of Fairness and Due Process

Art. 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.” This is distinctly different language from the US 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.” The U.S. Constitution includes express language that refers to the state acting or depriving, which contemplates that state action is necessary for one to properly invoke the provision. The Texas Constitution contains no such reference. It can thus be argued that the Texas Constitution does not require “state action” to address due process concerns. While this argument has proved unsuccessful in the past, it has not been directly addressed by the Texas Supreme Court.102

Even in applying the state-action standard of the U.S. Constitution in cases of racially restrictive covenants in our nation’s history, the U.S. Supreme Court found the requisite state action in that the courts were used to enforce such covenants.103 In the case of HOA liens, the court system is utilized to uphold the validity of the covenants that create the liens, the power

101 Cagle, §7.7.2, p. 258.
102 See Barrerra v. Security Building & Investment Co., 519 F.2d 1166 (5th Cir. 1975); Armenta v. Nussbaum, 519 S.W.2d 673 (Tex. Civ. App.—Corpus Christi 1975, writ ref’d n.r.e.).
103 See Shelley v. Kramer, 334 U.S. 1 (1948) (Error! Main Document Only), holding that the judicial enforcement of racially restrictive covenants was an exercise of “state action” for purposes of the 14th Amendment; any enforcement of those covenants violated the 14th Amendment’s requirement that no state deny its residents the equal protection of the laws).
of non-judicial foreclosure, and 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-government 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 support treating the association like a governmental entity.\(^{104}\) However, the governmental entity which provides such comparable services cannot utilize a non-judicial foreclosure proceeding to recover unpaid taxes that are used to provide the services.\(^{105}\)

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 foreclosure sale to occur.\(^{106}\) Once that occurs, then the sale may proceed.

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

\(^{104}\) See House Research Organization, “Authority of HOAs in Texas Examined,” Interim News (Aug. 12, 2010) at p. 5. In this article, 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.

\(^{105}\) Chapter 33 Texas Tax Code addresses delinquent property taxes. Section 33.41 specifically authorizes the judicial foreclosure proceeding. See also Duval County Ranch Co. v. State, 587 S.W.2d 436, 444 (Tex. Civ. App.—San Antonio 1979, writ ref’d n.r.e.).

the one to actually sell the property, unless the taxing unit instructs otherwise. Once the officer has received the order to sell the property, he must record the exact date and time on the order that he received it. The officer must 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.

This mandatory notice, the one that is coming after the lawsuit portion has been completed, is comparable to that of a non-judicial foreclosure sale. However, failure of the officer to send the notice or failure of the delinquent tax payer to receive the notice will not by itself invalidate the tax sale or the title conveyed by the tax sale. 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.

Once a tax sale is complete, the delinquent tax payer has a right of redemption. 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. If the property is deemed to be a residence 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 record. If the property is not a residence homestead at that time, the redemption period is 180 days. After a tax sale, the delinquent taxpayer also has a right to

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107 Tex. Tax Code Ann. § 34.01(a) (Vernon 2001).
108 Id. at § 34.01(b).
109 Id. at § 34.01(c).
110 Id. at § 34.01(e).
111 Id. at § 34.01(d). 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.
112 Id. at § 34.01(m).
113 Id. at § 34.21.
114 Id. at § 34.21(a).
115 Id. Interestingly, the tax code differentiates between property used as a residence vs. non-residence and provides a significantly longer redemption period for the residence property. The redemption statute for HOA
contest the validity of the tax sale. 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.

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 payments. 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, although the association believes she is.

The current system allows for foreclosure of unpaid association dues and does not set forth any minimum dollar amount, nor does it require the dues to be past due for any certain period of time.\(^{116}\) Additionally, if the governing documents allow, the association may utilize a non-judicial foreclosure process in the event of delinquent dues.\(^{117}\) This non-judicial foreclosure process is particularly problematic because there is no requirement of actual notice foreclosures does not make such a distinction. That may be because, in most instances, the 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 will be 180 days in all instances whether property used as a residence or not.

\(^{116}\) See Tex. Property Code § 209.001-209.011 (Vernon 2007). The association documents could 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.

\(^{117}\) See Gregory S. Cagle, Texas Homeowners Association Law, §7.7 (2010).
or personal service on the delinquent homeowner.\textsuperscript{118} While Texas Property Code § 209.006 appears, at first glance, to provide some notice to a homeowner before the foreclosure process begins, a closer look indicates otherwise.\textsuperscript{119} However, because the foreclosure process is governed by Texas Property Code §51.002, if the property subject to the assessment is used as a residence—as would necessarily be the case if the property were homestead protected—the Texas Property Code requires the association to give the homeowner a twenty-day period to cure any default.\textsuperscript{120} Once the period to cure passes, if allowed by the governing documents, the association can proceed with a non-judicial foreclosure, using the process outlined in the Texas Property Code.

Once the time to cure has passed, for the non-judicial foreclosure to properly proceed, the statute requires only that a notice be sent by certified mail, return receipt requested, to the debtor, and that notices be filed with the county clerk and posted at the county courthouse.\textsuperscript{121} 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

\textsuperscript{118} The foreclosure procedure comes from Texas Property Code §51.002, which provides the requirements for notice of default and notice of the foreclosure sale. In both instances, the notice is required to be sent by certified mail and, once placed in the mail, the notice is sufficient. There is no requirement that the property owner actually have knowledge of the default or the sale. See Tex. Property Code §51.002(d), (e).
\textsuperscript{119} Tex. Property Code §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. 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 foreclose a lien due to unpaid assessments. See Haas v. Ashford Hollow Cmty. Imprv. Ass’n., 209 S.W.3d 875, 885 (Tex. App.—Houston [14\textsuperscript{th} Dist.] 2006, no pet.).
\textsuperscript{120} Tex. Property Code §51.002(d) requires a lien holder, including the holder of a contractual lien, to provide 20 days to cure the defect before taking steps to accelerate debt and foreclose. 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. 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, just like in 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.
\textsuperscript{121} Tex. Property Code §51.002(d).
requirement of personal service. 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 send a notice of the foreclosure sale, and there is no procedural guarantee that the debtor-homeowner has actually received these notices or had the opportunity to make himself aware of the circumstances. Depending on the particular requirements of the association’s documents, it would be possible for an owner to be one month past due, then receive a notice of default with 20 days to cure (30 days past due + 20 days to cure = 50 days). The notice of foreclosure could then be sent, and the sale may take place 21 days thereafter (50 days + 21 days = 71 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 71 days after that money becomes due. Does this 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, set forth above.\textsuperscript{122}

The legislature has added provisions for notice following a foreclosure sale.\textsuperscript{123} Section 209.010 requires a notice to be sent not later than 30 days after the date of the sale.\textsuperscript{124} For the notice to be valid, all that is required is that written notice be sent by mail to the debtor who was foreclosed upon, along with any lien holder of record; there is no actual notice

\textsuperscript{122} Tex. Tax Code\textsection34.21 (Vernon 2001). 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.

\textsuperscript{123} Tex. Property Code \textsection209.010. This provision does provide a redemption period, but there are strings attached.

\textsuperscript{124} Id. at \textsection209.010(a).
The homeowner may have no idea that his home has just been purchased at a foreclosure sale for a pittance. Then the association may sit quietly for the 180-day redemption period to expire.

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 lien holder. A lien holder is given the opportunity to redeem the property as early as 90 days after the sale, if the property owner has not already redeemed. Once the redemption period passes, the association may sell the property to anyone, and generally will make a significant profit.

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 take possession of the property. At that point, the new owner sends the debtor homeowner a notice to vacate, which must be actually served on the debtor in compliance with the Texas Rules of Civil Procedure. Once the proceeding is completed, the new owner can take possession. The first time in the process that the law requires that the debtor be given actual notice is in the forcible entry and detainer action. Nothing before that time requires that the homeowner actually find out about what is going on. Again, does that sound like due process?

C. Providing the Fix for Due Process

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125 Id. at §209.010(b).
127 Id. at §209.011.
128 Id. at §209.011(a).
129 Tex. Property Code §24.005-.0051.
130 Id.
In actuality, because of the unconstitutionality of the lien on homestead property, the true solution would be to allow the association a lien without the power to foreclose. However, the lack of due process can be fixed 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 on the front end, before people purchase property with a Mandatory Owners Association without realizing exactly what is involved and expected. As the quote at the start of this article illustrates, when purchasing a home, many buyers purchase with their hearts rather than their heads. A variety of forms and disclosures are utilized in the residential real estate transaction, but so often people rush through paperwork without really comprehending what is involved and the legal implications therein.

In the context of a residential real estate transaction, the Texas Property Code section 5.008 requires a seller to disclose if the buyer is subject to payment of assessments. 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. The notice includes language stating “your failure to pay the assessments could result in a lien on and the foreclosure of your property.” However, this notice needs to take a step further and 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

131 Footnote 1, supra.
132 Tex. Property Code §5.008(b).
133 Tex. Property Code §5.012.
134 5.012(a).
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, 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? Not when there is only some small sum 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. If we look to the Florida and New Jersey statutes, judicial foreclosure proceedings are required, as is a five month or three month minimum in default, respectively.\(^\text{135}\) Additionally, even though non-judicial foreclosures are allowed in Arizona, California, and Massachusetts, these states require three to four months of being in default before proceeding with a foreclosure.\(^\text{136}\) Arizona and California also require a minimum dollar amount of delinquency as well, with Arizona requiring $1,200 and California requiring


Some critics oppose the requirement of a threshold dollar amount. In some instances the amount of monthly dues is a small sum per property due to the 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 so that an association would not be time barred from recovering by having to wait for a sufficient amount of assessments to accrue. Even in the instance of a resident only owing $30 per month in assessments, if the $1200 threshold amount were used along with a four year limitations statute, concerns of being time barred are adequately addressed.\(^{138}\)

3. **Requirement of Judicial Foreclosure Proceeding**

While the process of a judicial foreclosure will be more time-consuming and costly, in 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. After all, the association needs regular revenue to pay for services and maintain the property for the benefit of all of the neighborhood residents. But, preserving the right to foreclosure only in the judicial setting, with all of the procedural protections that a judicial foreclosure provides, adequately

\(^{137}\) *Id.*

\(^{138}\) At that rate, the homeowner would owe $360 per year and the $1200 amount would be reached after 40 months. This threshold amount would be based purely on dues owed, and would not include attorneys fees, late charges, or interest.
balances the homeowner’s rights against those of the association. Utilizing a judicial foreclosure process can serve three goals: (1) it ensures actual notice to the homeowner through service of process; (2) it ensures the most fair resolution of any disputes involving HOA assessments; and (3) it still preserves the association’s ability to use foreclosure as leverage to collect unpaid dues.

Associations commonly make this argument, claiming a need for a right to foreclose in order to ensure homeowners pay the required dues.139 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.140 However, 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.141 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, while the actual process is rarely utilized. The instances where foreclosures are utilized are the cases where the mortgages are paid in full and the unpaid dues are normally a small amount of money in comparison with the value of the home. These are the cases that people hear about, where stories are reported in the news illustrating the scenarios where people do not have adequate notice of what is transpiring and are not treated in an equitable

139 House Research Organization at p. 5.
140 Cagle at §7.7.1(C).
141 House Research Organization, “Authority of HOAs in Texas Examined,” p. 4 Interim News Number 81-5 (August 12, 2010). 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. See Gregory S. Cagle, Texas Homeowners Association Law, p. 253 (Two Harbors Press 2010).
manner.\textsuperscript{142} By adding the requirement of a judicial foreclosure, the additional time and cost will likely only come into play in those abusive situations which are the ones that most clearly need to be eradicated.

4. An Alternative to Judicial Foreclosure

Even if the Author’s recommendation to mandate a judicial foreclosure proceeding is not adopted, the 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, no requirement of a hearing or right to appeal before proceeding with foreclosure, and no requirement for actual notice of the sale.

Starting with an actual notice requirement for both the default and the sale, even if service of process is not utilized, there are other means that can be used to more effectively provide notice to the homeowner than certified mail. In Jones v. Flowers, the United State Supreme Court examined the issue of due process in the context of a property tax dispute.\textsuperscript{143} The Mortgagee paid the property taxes until Jones paid off the mortgage and then, after that time, the taxes were not paid.\textsuperscript{144} The taxing authority sent two certified letters to Jones, at his home address, warning of a tax sale; the letters were returned unclaimed.\textsuperscript{145} A notice of auction was published and no bids were obtained at the sale.\textsuperscript{146} After the sale, Flowers purchased the property from the taxing authority that took title from the auction. Jones

\textsuperscript{143} Jones v. Flowers, 547 U.S. 220 (2006).
\textsuperscript{144} Id. at 223.
\textsuperscript{145} Id. at 224.
\textsuperscript{146} Id.
learned of the sale after Flowers served Jones’s daughter with an unlawful detainer notice.\textsuperscript{147}

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.\textsuperscript{148} In this case, the Court concluded, there was state action and due process required more be done to provide adequate notice of the impending foreclosure.\textsuperscript{149} 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 available that might serve to provide due process.\textsuperscript{150}

If the legislature would like 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 U.S. Supreme Court in \textit{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. \textbf{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 amount or longer time period of default before the foreclosure remedy can be utilized.

Even if the Texas legislature implements the other procedural changes recommended below, 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 redemption period provides the final step in ensuring a fair and balanced process. Notice and a redemption period, coupled with the improved pre-sale notices, threshold requirements to trigger the right to foreclose, and the judicial proceeding or acceptable alternative process to ensure notice, will allow the homeowners of the state of Texas to once again be adequately protected. A man’s home—his castle—will again be properly fortified.

6. The Home Owners’ Association vs. the Condominium Distinction

One final point to consider is the differences between mandatory owners associations in a residential subdivision and associations 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. There are certain lender underwriting guidelines for condominiums that are not present in the subdivision context, which could justify treating
collection practices differently. Also, the common elements of the condominium directly affect all unit owners in that the assessments go towards keeping the structure itself in good repair, such as repairing the roof or elevator in the building where everyone lives. This is different from assessments in a subdivision that go towards maintaining a swimming pool or tennis court that is 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 state 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.