

2013 Platform

Introduction. Homeowners associations (HOAs) tax and foreclose if the homeowner does not pay whatever is demanded. HOAs fine and sue if the homeowner does not do whatever is commanded. Some HOAs intervene between utility service providers and the customers and yet are not regulated as utility service providers or governments. The privatization of traditional governmental functions including infrastructure, utilities, and road maintenance has led to many abuses. An HOA has been given governmental powers but without the limitations of a legitimate government. HOAs do not operate under laws designed to protect citizens from government in other contexts (city, county, state, federal).

For example, HOAs conduct elections but don't follow the same election rules that other governments must follow. HOAs grant exceptions to taxes (HOAs call property taxes "assessments") or the rules of the community but don't have to tell the other members about it. HOAs are allowed to play favorites in secret which is unfair, and provides incentives for bribes and inappropriate quid pro quo. HOAs collect information and will release it to whom they want, in the form they want (a critic or person wishing to challenge the HOA cannot get information). HOAs have relationships with private attorneys such that enforcement actions make the attorneys large profits, and impose fees grossly disproportionate to small debts and violations that may exist (and even where violations do not exist, but it is too risky for home owners to dispute). These attorney fee schemes enrich the HOAs and attorneys on the backs of the homeowners. HOAs have more incentives to foreclose with few risks as compared to a lender holding a nonperforming home loan. Management of HOAs is big business, as is the development of subdivisions with HOAs. HOAs managers and attorneys give kickbacks to developers so HOAs are imposed on new developments from the inception.

The HOA Reform Coalition proposes the following considerations for the Texas 2013 Legislative Session:

PRIORITY ONE: Increase in procedural protections to prevent wrongful

foreclosure. Many members strongly wish to prohibit an HOA from foreclosing in general, but would agree to an exception to the general rule. Members wish that the language be modeled off of what is currently in the homestead protection found in the Texas Constitution (Art. XVI, Section 50(a)) which provides a general rule, but lists specific exceptions. This structure will decrease the use of creative arguments made by clever lawyers trying to foreclose when it was never intended. This, and other new protections, should apply to condominium owners as well as owners of single family homes in HOAs.

The exception allowing foreclosure should only exist if all are true:

- (1) if the homeowner is behind in taxes ("assessments") after applying all payments according to the appropriate priority (funds received apply to the assessments first);

- (2) the assessments in default must be a significant specified amount, and that amount must have been in default at least 120 days;
- (3) the homeowner has not entered into a payment agreement with the HOA or has materially defaulted on a payment agreement;
- (4) the homeowner is not eligible for a deferral under the Tax Code (over 65 or disabled and eligible to receive SSI);
- (5) the homeowner has received notice by regular mail and certified mail of the default and been given 120 days to cure or make a payment plan without imposition of attorney fees or other charges;
- (6) the board of the HOA has approved the foreclosure by a 2/3 vote of the board at a public meeting; and
- (7) the foreclosure was judicially approved.

PRIORITY TWO: Remove Incentives to Foreclosure. There are also other incentives and abuses occurring in the foreclosure process. Insiders can buy even fully paid-for homes for minimal amounts. As compared to a lender, HOAs have more incentive and less disincentive to foreclose. Attorneys representing HOAs similarly have no incentive to prevent a foreclosure and also stand to make more money if they go forward. One way to address it is having minimum prices. Thus, if a HOA posts a property for foreclosure sale, the minimum price for any foreclosure sale must be at least 50 percent of the appraisal value of the property according to the tax records (or more recent professional appraisal) less any debts secured by the home that the buyer takes subject to. In other words, if there is a \$100,000 home, and a \$30,000 mortgage that will survive the HOA foreclosure sale (the new buyer obtains title subject to a mortgage lien after the HOA foreclosure), then the minimum bid for the home must be \$35,000 (Calculation: $100 - 30 = 70$, $70 \times .5 = 35$). Also, if a foreclosure sale occurs there must be a cap on fees if it is uncontested (similar to the FHA cap on foreclosure costs currently applicable to thousands of foreclosures of FHA properties in Texas).

PRIORITY THREE: Payments plans should be available for job loss, family death or illness, divorce or legal separation and other comparable hardship. In certain situations, homeowners deserve a minimum of one year with no administrative charges or attorney fees. Homeowners may need a greater extension upon sufficient showing of reasonable need. HOA assessments are taxes and property taxes have a variety of exceptions, exclusions and deferrals.

PRIORITY FOUR: Attorney fee parity. Clarify homeowner attorney fees and other remedies and defenses. Homeowners need to recover attorney fees if they prevail when sued by a HOA. Homeowner rights to sue their HOAs should not be limited by procedural barriers, whether in deed restrictions or elsewhere. Practices that enable unequal treatment should be forbidden. The

court should have discretion to award part or all of the attorneys fees as the court deems just regardless of who wins, as is done under the Declaratory Judgment Act.

PRIORITY FIVE: Clarify the existing law regarding HOA director liability, and statutes of limitations. Currently directors of non-profit associations can only be sued for serious violations, and have special protections shared with all unpaid directors of non-profits. Although this almost never leads to litigation, existence of the potential claim discourages the most egregious violations. Existing limits on powers to amend deed restrictions should be respected (at least up to a stated supermajority), and minimum limits should be set on the power to amend deed restrictions. The current four year statute of limitations is long enough for these governments to start collection and any valid enforcement activities.

PRIORITY SIX: Remove the loophole in Sections 209.006 and 209.007 of the Property Code so homeowners get notice before an HOA can foreclose or fine a homeowner. Homeowners understand the potential need for rapid action if a true emergency exists (one that threatens health, welfare, or safety), thus the time to cure should be limited in these situations, but notice should still be given. Landlords must be given notice of a problem, regardless, so they can try to fix it before tenants can sue them. It makes sense for all property owners, not just landlords. Under current law, HOAs can (and routinely do) simply use a lawyer loophole to avoid giving homeowners notice of a problem and opportunity to cure.

PRIORITY SEVEN: Additional limitations on, if not preclusion of, HOA imposed fines and fees, and improper restrictions on private property.The concept of private fines, legislated, enforced, and interpreted by under-the-radar HOA boards is anathema to homeowners. Governments should impose fines only for the serious offenses. If they must be allowed as under proposed Property Code 209.007, they ought to be limited to activities that constitute a nuisance under Texas law, and the Justice Court needs power to enforce statutory caps and to ensure records production that guards against discriminatory enforcement. Some HOAs have begun imposing attorney fees not expressly authorized by deed restrictions, billing homeowners for work purportedly done in response to homeowner actions not forbidden by the deed restrictions, and the law should clarify that such fees amount to forbidden fines. Homeowners oppose restrictions and other rules that require binding arbitration, that limit their ability to criticize the HOA board, and that mandate providers of utilities or other services even after homeowners take the board from developer representatives.

PRIORITY EIGHT: Clarify the rights to open meetings and records. Texas Government Codes 551 and 552 have worked successfully for the Woodlands and for Clear Lake City as well as other entities. Homeowners in all Texas HOAs should have this protection. Directors should not be allowed to use semantics (such as “working” or “administrative” sessions) to avoid open meetings, and statutory provisions can clarify notice required for meetings, which should be held near (if not among) homes. While homeowners in some circumstances want disputes heard privately, those who

prefer an open session should be allowed that choice so neighbors can hear what may be discussed. Remedies for violations need to be strengthened.

PRIORITY NINE: State Agency Oversight, and a repository for basic information concerning HOAs based on annual reports.

Web-based reporting, maintained by an appropriate state agency, benefits both potential homebuyers as well as homeowners who seek to assure that their HOA does not covertly abuse powers. HOAs that have web sites also should include common information required for resale certificates (the costs for which should be capped). Homeowners and other elected officials need to know how many HOAs are in Texas, where they are, who is running them and other basic information. Homeowners also need to be able to complain to one statewide governmental agency that can compile complaints, and distribute basic information to homeowners about their rights, limit HOA abuses so homeowners are not faced with hiring an attorney to protect their home.

PRIORITY TEN: More control for homeowners during development period, and must be an end to development period.

While developers have an interest in a development being sold, home owners have an interest in being treated fairly, and have an actual voice in the government that is taxing, fining and foreclosing on them. The right to taxation must come with fair representation. As a development ages, more control and authority must be granted to homeowners, and at some point the development period must end (rather than be perpetually in the development period).

Conclusion. Homeowners seek statewide protection from a host of abuses that have long ago been addressed for all other forms of government. Extraordinary powers given to HOAs should be replaced with more limited powers to address what HOAs really need, as opposed to the power they want.