

HOA's Relentless Assault on Texas Homesteads
Under the Radar
An Open Letter to Texas Legislators and Texas Homeowners
By Beanie Adolph¹ January 2017

Every legislative session, Texas legislators have to consider new HOA laws and work through numerous committee meetings and panels. Why does this keep happening? Why has past legislation not resolved the HOA issue?

The sources of these legislative requests are two-fold. One source is the HOA Industry's constant requests for more ways to take money and power from homeowners, but pleas also come from homeowners who have lost significant rights of privacy and control and have become subject to fines, fees, expanding deed restrictions, and foreclosure. Texas homeowners, in single-family, condos, or townhomes, need just laws that include open meetings and open records, repeal of Property Code Section 5.006, and an end to fines and foreclosures.

Some of the major legal events that allow a Texas HOA to exercise its power over homeowners:

1983 – A new HOA weapon – attorney fees

In 1980, a lawsuit between an HOA and a Texas homeowner was on an even playing field with respect to attorney fees – *i.e.*, each party paid its own attorney fees. **Today, and in fact, since 1983**, a new law² granted to a Texas HOA a powerful weapon against a homeowner – the right to recover the HOA's attorney fees while the homeowner has no complementary right.³

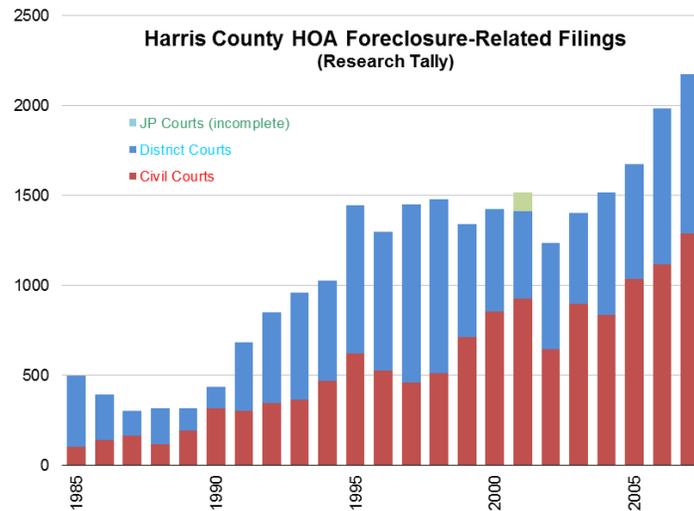
1987 – Loss of the homestead protection against HOA foreclosure

In 1980, the Texas Constitutional homestead protection prevented an HOA from foreclosing on a home. **Today, and in fact, since a Texas Supreme Court decision in 1987**,⁴ the Constitutional homestead protection is ignored for all HOA liens for assessments. There was no statewide election on an amendment to the Texas Constitution on whether to eliminate the homestead protection. There was no legislative vote on a new law to eliminate the homestead protection, with the accompanying committee hearings and ultimate governor signature. There was not even a court hearing where Texas homeowners in general or even one Texas homeowner presented arguments against the loss of the homestead protection. Texas homeowners lost their homestead protection in a Texas Supreme Court 3-2 decision, that reversed "judgments upholding the homestead protection by the trial court and the court of appeals", where only the HOA had an attorney and only the HOA presented arguments. No one argued for the Texas homeowners.

Now, Texas HOAs file thousands of foreclosure actions every year, causing many Texas homeowners either to abandon their homes or to lose their homes at foreclosure sale. HOA attorneys and HOA management companies reap untold profits every year from these foreclosure actions – all taken from Texas homeowners.

1995 – The HOA industry’s special focus on Houston

In 1980, without the consent of the homeowner, a Texas home could never be subjected to an HOA. Today, and in fact, since 1995, a 1995 law⁵ allows an HOA in Harris, Galveston, Brazoria, and Montgomery Counties to be forced on a nearby Texas homeowner without the homeowner’s consent. A Texas homeowner can own a home outright for forty years, and then, suddenly, without the homeowner’s consent, the homeowner can be subject to mandatory HOA dues, HOA rules that control the use and appearance of the home, and the risk of HOA fines and foreclosure. After 1995, foreclosure filings in Harris County rose from below 500 in 1990 to about 2200 in 2007. In Harris County from 1985 to 2007, HOA foreclosure filings totaled 25, 726.



Below is a summary of some of the requests by the HOA Industry that were granted over the years. This does not include many other requests that have not been granted. These bills have been filed for certain areas defined by county populations and/or adjacent counties - not by name. There are 253 counties in Texas. By 2010, five counties had over 1,000,000 people; the smallest had 112. The general public does not know all county populations, but each legislator certainly knows those in his/her district, and can quickly determine if a bill will affect the district.

| Session | HOA Industry requests granted by the Texas Legislature |
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| 1983 ⁶ | Give HOAs the right to recover attorney fees even in small disputes, but do not give that right to the homeowner |
| 1985 ⁷ | Give HOAs the right to create and modify deed restrictions without the approval of all homeowners |
| 1987 ⁸ | Expand the HOA right to create and modify deed restrictions without approval of homeowners to more counties |
| | Allow county attorneys to enforce deed restrictions |
| | Reverse existing law that narrowly limited deed restrictions so that now deed restrictions will be given a broad interpretation (when in doubt, the HOA wins) |
| | Reverse existing law that did not presume deed restrictions were reasonable – so that now a deed restriction is presumed to be reasonable and the homeowner must |

| Session | HOA Industry requests granted by the Texas Legislature |
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| | <p>prove that a deed restriction is “arbitrary, capricious, and discriminatory”</p> <p>Reverse existing law to now allow an HOA to sue to enforce a deed restriction even if the formation documents do not grant that right</p> <p>Reverse existing law to now allow an HOA to recover up to <u>\$200 per day</u> in “civil damages” for each deed restriction violation</p> |
| 1995 ⁹ | <p>Give HOAs power to force an HOA on any homeowner</p> <p>Give HOAs power to create architectural rules and other rules without consent of all homeowners</p> <p>Give HOAs power to create and modify deed restrictions without an opt out right for dissenting homeowners</p> <p>Allow deed restrictions to continue even after replatting (for counties over 65,000)</p> |
| 1997 ¹⁰ | <p>Do not let homeowners restrict the rights of the developer or architectural control committee UNLESS the developer or architectural control committee agrees</p> <p>For one specific subdivision in Harris and Galveston Counties, allow the HOA to extend the assessments by a majority vote</p> |
| 1999 ¹¹ | <p>Protect an HOA from any penalty for failing to provide title certificates and other documents to a homeowner</p> <p>Allow an HOA to charge fees for documents that a homeowner is entitled to see</p> |
| 2001 ¹² | <p>Protect the HOA from any liability for failing to disclose to purchasers that an HOA exists or that a management company is engaged</p> <p>Allow an HOA to charge fees for any homeowner to see records</p> <p>Allow an HOA to hide attorney communications from the homeowners</p> <p>Allow an HOA to close real deliberations in board meetings to exclude homeowners</p> |
| 2003 | Expand Chapter 204 |
| Before 2005 | Expand the right to create and modify deed restrictions without the approval of all homeowners to any city with more than 100,000 people |
| 2005 ¹³ | Expand the right to create and modify deed restrictions without the approval of all homeowners to all areas of any county next to Houston or Dallas |
| 2007 ¹⁴ | <p>Give civic associations in the Houston area architectural control rights</p> <p>Overcome the law against perpetuities and give HOAs a way to make deed restrictions last forever.</p> <p>Give HOAs a way to modify deed restrictions that do not allow modification.</p> <p>Give HOAs a way to make it very difficult for homeowners to see records and allow HOAs to charge fees for letting a homeowner see records.</p> <p>Allow HOAs outside Houston and many HOAs in Houston to bar a homeowner from voting in an HOA election by citing the homeowner for violations OR by simply claiming that the homeowner owes assessments, fees, or fines (including attorneys fees).</p> <p>Change Chapter 204 to allow a specific subdivision in Galveston County to override limits on the HOA’s power to create, modify and extend deed restrictions</p> |
| 2009 ¹⁵ | <p>Change Chapter 204 to allow an HOA to modify or amend deed restrictions even where the express language of the restriction or the formation documents precludes modification or amendment</p> <p>Reverse prior law so that deed restrictions that allow for an extension are now</p> |

| Session | HOA Industry requests granted by the Texas Legislature |
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| | deemed to allow for unlimited extensions |
| | Expand the right to create and modify deed restrictions without the approval of all homeowners to certain gated communities |
| | Give HOAs even more protection for failure to record certificates identifying management companies |
| 2011 ¹⁶ | Let HOAs continue to apply homeowner assessment payments first to attorney fees, charges, costs, and damages (so long as HOAs do not call it a fine) and therefore continue to foreclose for debts that are not normal assessment debt |
| | Give HOAs more time and more reasons to delay providing resale certificates and other documents for a purchase and allow the HOAs to charge a fee for the certificates and documents |
| | Allow HOAs to regulate rain barrels, rain harvesting devices, solar panels and roofing materials, the American flag, and religious displays |
| 2013 ¹⁷ | Further limit the homeowner's right to display an American flag |

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² Texas Property Code Section 5.006.

³ The statute generally allows only the first party to file the suit to recover attorney fees.

⁴ In the 1987 Texas Supreme Court *Inwood* decision, three majority justices (against two dissenting justices -- Justices Mauzy and Gonzalez) held that the Texas Constitutional homestead protection did not protect a homeowner from foreclosure by an HOA for delinquent assessments, reversing judgments upholding the homestead protection by the trial court and the court of appeals. Justice Mauzy recommended in his dissent in *Inwood*:

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 in article XVII, section 1. What is required is passage of a *642 proposed amendment by at least 100 affirmative votes of the members of the House of Representatives and at least twenty-one affirmative votes of the members of the Senate, and a majority vote of all the people of this State who choose to vote at a public election held for that purpose. TEX. CONST. Art. XVII, § 1 (1845, amended 1972). A strict construction of our Constitution requires this result. I would require no less.

⁵ Texas Property Code Chapter 204.

⁶ Property Code Section 5.006

⁷ Texas Property Code Chapter 201. The statute allows creation of new deed restrictions by 50% approval and modification of existing restrictions by 75% approval. However, an owner can affirmatively opt out of a new deed restriction under Chapter 201.

⁸ Property Code Chapter 202; Acts 1987, 70th Leg., ch. 712.

⁹ Property Code Chapter 204; Acts 1995, 74th Leg., ch. 1040. House Bill 2152 passed on the third reading May 27, 1995. The bill was then sent to the Senate. Senator Gallegos moved that Senate Rule 7.18 and the Constitutional Rule requiring bills to be read on three several days be suspended and that H.B. 2152 be placed on its third reading and final passage. The motion prevailed by the following vote: Yeas 31, Nays 0. The bill was read third time and was passed by a viva voce vote. The Senate passed the bill May 27, 1995. The bill was enrolled May 28, 1995, and sent to the Governor May 29, 1995.

¹⁰ Property Code Chapter 201.0051; Acts 1997, 75th Leg., ch. 1249.

¹¹ Acts 1999, 76th Leg., ch. 1198.

¹² Acts 2001, 77th Leg., ch. 926.

¹³ Acts 2005, 79th Leg., Ch. 1004 (H.B. 638).

¹⁴ Acts 2007, 80th Leg., R.S., Ch. 711 (H.B. 2218), now 204.011(d); Acts 2007, 80th Leg., R.S., Ch. 1367 (H.B. 3674); Acts 2007, 80th Leg., R.S., Ch. 767 (HB 3518) now 204.003(b) and (c).

¹⁵ Acts 2009, 81st Leg., R.S., Ch. 87 (S.B. 1969), now 204.003(d); Acts 2009, 81st Leg., R.S., Ch. 821 (S.B. 1672); Acts 2009, 81st Leg., R.S., Ch. 148 (S.B. 1919).

¹⁶ Acts 2011, 82nd Leg., R.S., Ch. 1282 (H.B. 1228); Acts 2011, 82nd Leg., R.S., Ch. 1142 (H.B. 1821); Acts 2011, 82nd Leg., R.S., Ch. 263 (H.B. 1278).

¹⁷ Acts 2013, 83rd Leg., R.S., Ch. 1389 (H.B. 680).