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Foreclosure by Homeowner Associations: Striking a Balance

The debate over whether homeowner associations should have the right to foreclose on private homes and, if so, under what circumstances has led to proposals to revise current law. Attention has been focused on the issue by the case of Wenonah Blevins, a widow in her early eighties, whose $150,000 home in Harris County was foreclosed on and sold for $5,000 because she failed to pay $814.50 in fees to a community association. Blevins sued the association and eventually got her home back.

Critics say the Blevins case shows the type of abuses committed by homeowner associations that sometimes foreclose on homes for small overdue assessments or for fines related to minor violations of deeds or rules. Supporters of the associations counter that they need the option to foreclose so that they can collect overdue assessments, enforce deed restrictions, and provide essential services.

The 77th Legislature in 2001 enacted legislation that, among other provisions, prohibited foreclosures in some situations, outlined the types of notice that associations must send to homeowners, placed some limits on when attorney's fees can be charged to homeowners, and established a right of redemption for foreclosed homes. A recent state appellate court decision also placed some limits on foreclosures by associations in Harris County. Some argue, however, that these changes do not go far enough in protecting homeowners from foreclosures and that additional legislation is needed.

A subcommittee of the Senate Intergovernmental Relations Committee is studying the appropriateness of foreclosure and other powers granted to property owner associations and is expected to issue a report with recommendations for the 78th Legislature. The Senate State Affairs Committee also studied the topic and issued a report to the 76th Legislature on the legal powers, duties, and structure of homeowner associations in Texas.

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Task Force Outlines Policy Options for Use of Motorized Vehicles in Riverbeds

Operating motorized vehicles such as four-wheel-drive trucks or jeeps, all-terrain vehicles, or motorcycles in riverbeds has become an increasingly popular form of recreation in Texas. Recreationists drive modified or specialized vehicles along gravel embankments, over rock obstacles, through mudholes, and sometimes through flowing water. However, conflict has arisen over the use of these vehicles in streambeds, especially along the Llano and Nueces rivers in Llano, Uvalde, and Zavala counties.

Environmental groups and property owners complain that motorized vehicles can contribute to erosion, destruction of fish and wildlife habitat, and poor water quality. They advocate banning such vehicles from state-owned streambeds throughout Texas. Vehicle users respond that state-owned streambeds are one of the few areas where they can pursue their chosen form of recreation and that periodic floods wash away any signs of vehicle activity in streambeds.

The controversy caught the attention of the 77th Legislature. SB 1335 by Brown included a provision authorizing the Nueces River Authority to limit or prohibit vehicle use within

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Homeowner associations' powers

In some areas, homeowner associations are formed to provide services for homeowners in exchange for mandatory assessments or dues. Associations can provide street lighting and garbage services, maintain common areas, build and maintain parks and swimming pools, and enforce architectural consistency. The associations are governed by the homes' deed restrictions and by the associations' articles of incorporation, bylaws, and rules. Deed restrictions and rules generally are enforced through a system of fines for infractions. An association typically is a nonprofit entity governed by a board elected by the homeowners to represent the owners and sometimes the developers.

Many associations exist in unincorporated areas where government services may be limited, but they also exist in incorporated areas. Discussions about homeowner associations in Texas often focus on Harris County because of the large number of associations in Houston, which lacks a zoning ordinance. Nationwide, about 47 million people live in residences governed by about 230,000 owner associations, according to the Community Associations Institute, a coalition of homeowner and condominium associations and others.

The authority of homeowner associations to foreclose on homes stems from a 1987 ruling by the Texas Supreme Court.

In general, homeowner associations are governed by the Property Code and by court rulings. The authority of the associations to foreclose on homes — the most hotly debated issue concerning the associations — stems from a 1987 ruling by the Texas Supreme Court.

Under Texas Constitution, Art. 16, sec. 50, residence homesteads can be subject to foreclosure for failure to pay taxes, mortgages, home equity loans, and liens for repairs and renovation of the property. The Texas Supreme Court ruled in *Inwood North Homeowners' Association v. Harris* (736 S.W.2d 632) that this provision does not protect homeowners against foreclosure for failure to pay monthly assessments by homeowner associations.

Homeowner associations can foreclose through either judicial or nonjudicial means. In judicial foreclosure, the association files a lawsuit, and an eventual legal judgment leads to the foreclosure. In nonjudicial foreclosure, which must be authorized by the deed restrictions, no judicial determination is made.

Laws relating to restrictive covenants are found in Title 11 of the Property Code, with many chapters bracketed to apply to areas with different sized populations. Chapter 204, enacted in 1995, governs homeowner associations in Harris County.

In 2001, the 77th Legislature enacted SB 507 by Carona, et al., which added Property Code, chapter 209, governing homeowner associations. The act's provisions include:

- requiring associations to give homeowners specific types of notice before a board takes certain actions, but not if the association files a foreclosure lawsuit, and requiring boards to hold hearings with homeowners over some types of disputes;
- prohibiting foreclosures based solely on fines imposed by the association or to collect attorney's fees solely associated with fines;
- requiring notice to homeowners in some situations when attorney's fees will be charged to the homeowner;
- making owners not liable for attorney's fees incurred before a hearing that is required by the bill;
- limiting attorney's fees collected in nonjudicial foreclosures pursued for nonpayment of assessments; and
- giving a homeowner 180 days to buy back a home after foreclosure and establishing procedures for redeeming a home.

In April 2002, a state appellate court limited foreclosures by homeowner associations in Harris County, echoing the conclusion of a 1997 attorney general's opinion, LO 97-019. In *Brooks v. Northglen Association* (No. 06-01-00028-CV, April 18, 2002), the Sixth Court of Appeals in Texarkana ruled that homeowner associations

in Harris County cannot foreclose on property owners because of new assessments, late charges, or attorney's fees based solely on Property Code, chapter 204 (which applies only to Harris County) and imposed after a homeowner acquires a homestead interest. Homeowner assessments that are within the limits authorized by the deed restrictions can be enforced through foreclosure, the court said, because the assessments are "a covenant running with and affixed to the property before the owner acquired it." However, if the authority for an assessment is not found in the homestead's deed restrictions and the charges are imposed solely on the basis of Chapter 204, any increase in charges must occur through the proper procedures found in the deed restrictions for adjusting charges. Only if the association followed the proper procedures could an increase in charges be enforced through foreclosure.

No statewide data source exists for determining how often homeowner associations resort to foreclosures to collect charges on homeowners. Some homeowner activists in Houston who have compiled statistics for Harris County report about 12,700 court filings by homeowner associations in the county from 1985 through 2001. These are not actual foreclosure sales but court filings that could have led to foreclosures. The activists say their statistics may understate the number of court filings. It is difficult to determine the extent of nonjudicial foreclosures, since no public record of them exists.

Foreclosure debate

The foreclosure debate often is framed in terms of balancing the rights of homeowners with the authority of associations. Some argue that SB 507 did not go far enough in limiting and regulating the foreclosure powers of homeowner associations. Others argue that the legislation went a long way toward addressing homeowner concerns and should be given the opportunity to work before changes are enacted. The key questions are:

- Should associations have the power of foreclosure?
- If so, what limits should be placed on that power?
- What role should attorney's fees play in foreclosure?
- How much time should an owner have to buy back a foreclosed home?

For and against foreclosure powers. Some argue that homeowner associations should retain the right to foreclose on homes, while others say the right should be revoked. Still others argue that foreclosure lawsuits to stop substantial risks to public health and safety should be allowed, while the types of foreclosures should be restricted.

Supporters of the right to foreclose say:

Without the right to foreclose, homeowner associations would have no effective way to collect overdue assessments, enforce deed restrictions, provide essential services, and protect homeowners' investments. The services provided by homeowner associations — such as trash collection, pool maintenance, and safety patrols — reduce demand for services from cities and counties and help preserve, protect, and maintain neighborhoods. Foreclosure power, rather than other collection methods, is appropriate for homeowner associations because their duties are tied to the safety, security, and value of homes and neighborhoods. Without foreclosure power, associations could become mere "civic clubs" with a small number of members paying dues while a larger number refused.

People choose to buy homes in areas governed by homeowner associations and agree to abide by their rules. While the vast majority of homeowners pay the money they owe, associations need the flexibility to proceed to foreclosure if warranted. Many associations never, or almost never, file foreclosure suits, and then only as a last resort. Associations want homeowners to pay their fees so that the associations can perform their duties. Few foreclosure suits result in the sale of a home, because homeowners most often pay their delinquent obligations or settle the suits. Taxing authorities also foreclose on homes for debts large and small, and homeowner associations are comparable.

The Texas Supreme Court and other courts have upheld associations' right to foreclose, and the Legislature should not infringe on that right. Abuses of foreclosure authority by a few associations are isolated incidents that should not be used as an excuse to deprive all associations of a necessary tool.

Opponents of the right to foreclose say:

The Legislature should revoke the authority of homeowner associations to foreclose on homesteads. These associations should not have special legal powers to collect the debts owed them. The power to foreclose on a homestead should be allowed only in the few instances clearly enumerated in the Texas Constitution — for taxes, mortgages, and liens for repair and renovation of the property.

Other service providers such as doctors, lawyers, and mechanics cannot foreclose on homes to collect payments, even though they provide necessary and important services. Associations should have to use the same debt-collection methods as other creditors, such as collection agencies and small claims courts. Alternatively, the associations could be allowed to place passive liens, without foreclosure power, on the homes of those whose payments to the association are delinquent. In this case, the association would collect its debt if the home were sold, but it could not foreclose on the home.

The fact that many homeowner associations never file foreclosure lawsuits shows that associations can collect their assessments without foreclosure authority. Associations have abused their power to foreclose on homes, some for purposes of harassment or racial or ethnic discrimination. Some associations have taken homes in foreclosures for minor overdue amounts or minor deed infractions and have sold the homes for a pittance. For example, in a case in Houston, a dispute over an oil stain on a driveway — which many would call a minor infraction — led to a lawsuit that eventually was settled without a foreclosure, but only after almost $2,000 in legal fees had accrued.

Limits on foreclosure power. Some argue that if homeowner associations are to retain the right of foreclosure, the Legislature should place reasonable, fair limits on that power. In their view, SB 507 did not go far enough in protecting homeowners, and the act's prohibition of foreclosures in very limited situations does not address the problem of unfair foreclosures when a small annual assessment is late or disputed or when a foreclosure is based on fines as well as on an assessment.

Others say SB 507 placed appropriate, fair limits on foreclosures. For example, they say, the act prohibits foreclosures based solely on fines levied by the association or on attorney's fees incurred by the association solely associated with fines. This addresses some homeowners' complaints about foreclosures based on unpaid fines, but it preserves the foreclosure option when homeowners abrogate their agreement to pay their assessments, which are equivalent to taxes levied by a local government entity to pay for services that benefit all homeowners. Also, they say, SB 507 seeks to keep small disputes from escalating by requiring notice and hearings when boards take certain actions, and it gives homeowners a right of redemption to back buy their homes after foreclosure. The act does not impose notice requirements on foreclosure suits because the foreclosure statutes already require that homeowners receive adequate notice.

Proposals to limit foreclosures include:

- allowing foreclosures only upon a vote of the association's membership or board;
- allowing foreclosures only when homeowners have failed to pay annual assessments that are mandated by deed restrictions *and* only when the amount owed exceeds a certain threshold;
- allowing foreclosures only for serious violations that threaten the health or safety of a neighborhood;
- requiring homeowners and association board members to meet informally or for a hearing before any foreclosure lawsuit is filed and mandating a specific time frame for resolving disputes before legal action could begin and attorney's fees begin to accrue;
- requiring that a homeowner receive a specific type of notice of any foreclosure suit by an association, including an initial series of letters sent to the owner by both certified and regular mail and, if necessary, notifying the owner by telephone or in person;
- establishing nonjudicial ways to resolve disputes, such as allowing a right to mediation or requiring mediation before attorney's fees could be charged in a foreclosure suit;
- confining any liens to the payment of dues and excluding penalties or legal fees;
- requiring cases with a disputed amount below a certain threshold — perhaps $5,000 — to go directly to justice of the peace courts;

- requiring a foreclosure proceeding to end if the homeowner pays late assessments and fees or agrees to a payment plan;
- requiring associations to allow a reasonable extension of the time to pay assessments for people with financial hardships, such as the loss of a job or serious illness or disability; and
- requiring that homes sold in foreclosures meet a minimum sale price, such as the appraised value less liens and back taxes.

Another issue is whether nonjudicial foreclosures should be allowed to continue. Those who oppose nonjudicial foreclosures say these proceedings avoid both judicial and public oversight, avoid the existing statutory limits on judicial foreclosures, and are subject to abuse. They argue that all homeowners should be entitled to their day in court when their homes are in danger of being taken from them. Others argue that nonjudicial foreclosures are a necessary tool for homeowner associations and should be continued when specifically allowed by deed restrictions.

Attorney's fees. Some argue that the Legislature should cap or otherwise regulate legal fees related to foreclosures because the fees that lawyers can earn give them an incentive to file lawsuits and to pass on exorbitant fees to homeowners. One proposal would limit attorney's fees to a fraction of the disputed amount, even as much as 100 percent.

In some cases, critics say, legal fees greatly exceed the amount of an original payment dispute. They say this can lead to foreclosure or to homeowners agreeing to pay even if they dispute the charges against them or cannot afford to pay the fees. As an example, they cite another case in Houston that began in 1995, when a homeowner who had been seriously ill with a brain tumor was sued by his homeowner association for $600 in dues that the owner said had been sent to an outdated address for the management company. The parties agreed to a payment plan for the late dues, but legal fees mounted as the case remained active, and the $55,000 home was foreclosed on and sold for $17,000. The association eventually agreed to set aside the foreclosure sale, and the owner got his house back, but only after paying $4,600 in legal fees.

Some argue, however, that SB 507 addresses concerns about excessive attorney's fees by limiting when associations can charge owners with attorney's fees when a hearing is requested and by limiting attorney's fees in nonjudicial foreclosures.

Others oppose direct regulation of legal fees in these cases, saying that the problem of attorney's fees would resolve itself if other measures restricting foreclosures were enacted. For example, a requirement for mediation or mandatory hearings in advance of a foreclosure action would delay the involvement of attorneys in these disputes, thus reducing the opportunity for attorney's fees to pile up. Others argue that some proposed solutions, such as mandatory mediation, are unworkable because mediation is not universally available or affordable.

Some advocate banning the practice of "deferred billing," in which the attorney seeks payment directly from the homeowner rather than from the association. They call for requiring associations to pay attorneys directly or requiring that any payment by homeowners for attorney's fees go to the association. Others argue that the Legislature should not ban a billing practice because of a few isolated abuses.

Proposals also have arisen to change the statute that some say authorizes an association to recover attorney's fees from a homeowner when the association wins a lawsuit but does not grant the same right to a homeowner who wins a lawsuit. Property Code, sec. 5.006 says that in actions arising from a breach of a restrictive covenant relating to real property, a court must award attorney's fees to a prevailing party that brought the lawsuit.

Redemption period. SB 507 gives a homeowner 180 days to buy back a home after foreclosure. Some argue that this period is not long enough for owners to obtain the money to rebuy their homes and that the period for redemption should be one or two years. Under Tax Code, sec. 34.21, homeowners have two years to buy back homesteads sold through foreclosures by taxing entities to recover delinquent tax payments.

— by Kellie Dworaczyk

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state-owned bed and banks of the Nueces River; however, the bill died in the House Natural Resources Committee. The Joint Interim Committee on Water Resources and the House State Recreational Resources Committee have studied the issue during the interim.

The Texas Parks and Wildlife Commission in 2001 created a task force of stakeholders to address the issue. After seven months of work, the task force held a public meeting July 12 to discuss policy options that include a statewide ban on the use of motorized vehicles in state-owned streambeds; authorizing local political entities to manage vehicular activity in the streambeds; establishing a permit program for vehicle use; and developing alternative sites for motorized-vehicle recreation.

Currently, no state agency has clear authority to regulate the use of motorized vehicles within state-owned streambeds.

The task force is expected to issue its final recommendations for legislation in early August, and the House State Recreational Resources Committee has scheduled a public hearing for August 14.

Regulatory authority and enforcement

The state owns the beds and waters of the rivers experiencing heavy motorized-vehicle activity, such as the Llano, Nueces, Canadian, and San Jacinto rivers, and the public has a right to use and travel on them. However, the banks and uplands next to state-owned streams usually are owned privately. Determining the boundaries between public and private property in these areas is a complex task for land surveyors. On many Texas rivers, it can be difficult to determine where public property ends and private property begins.

Various state agencies have jurisdiction over specific activities within state-owned streambeds, but no agency has clear authority to regulate use of motorized vehicles in these areas. River authorities, for example, lack such powers under their enabling statutes. Parks and Wildlife Code, sec. 1.011 authorizes the Texas Parks and Wildlife Department (TPWD) to regulate the taking of fish and wildlife and the disturbance of sand and gravel in state-owned streambeds. According to TPWD, its regulatory program is designed to issue permits for large-scale or commercial removal or disturbance of sand or gravel, often involving more than 1,000 cubic yards of material. Under Water Code, chapter 26, the Texas Natural Resource Conservation Commission (TNRCC) regulates the discharge of pollutants into state waters, sets water-quality standards, and issues permits for wastewater discharge. According to TNRCC, it issues permits for discharges that usually are larger than and not as diffuse as spills or leaks from individual vehicles. The General Land Office (GLO) manages land and underground minerals dedicated to the Permanent School Fund, including about 1 million acres of state-owned riverbeds and lake bottoms. GLO executes leases for mineral exploration below the riverbeds and issues right-of-way easements for projects such as pipelines, utility lines, or roads that cross state-owned streams.

Generally, an activity that is illegal in a public area also is illegal in a state-owned streambed. Law enforcement officers, including game wardens, state troopers, and local authorities, can enforce the Penal Code along Texas rivers. Game wardens have reported criminal violations related to motorized-vehicle activity in the Frio and Nueces rivers, although they say that picnickers and recreationists in canoes, inner tubes, or kayaks account for most violations. However, many violations in remote or inaccessible locations may go unreported.

Policy options

The most aggressive option identified by the Parks and Wildlife task force would be a statewide ban on the use of motorized vehicles in state-owned streambeds, coupled with authorizing a state agency to regulate such activity. Alternatively, some have advocated authorizing local political entities to manage vehicle activity in the streambeds; establishing a permit program for vehicle use; and developing alternative recreational sites.

Supporters of a statewide ban say:

Motorized vehicles can harm streambeds and destroy fragile river ecosystems. Some rivers in Texas suffer under a nearly year-round crush of off-road vehicle groups and individual drivers. The vehicles leak engine fluids into the rivers, loosen chunks of granite while "crawling" over rock obstacles, contribute to erosion along river banks, and destroy fish and wildlife habitat. Motorized vehicles also harm water quality in rivers, many of which provide drinking water for downstream communities. Along the Nueces River, for example, this has resulted in a steady decline of vegetation, tire tracks and ruts running through fish-spawning beds, and signs of oil spills and other discharges.

Preliminary investigations and other studies clearly show the destructiveness of motorized vehicles in streambeds. A comparison of two sites along the Nueces River, conducted for the Nueces River Authority, found far fewer environmentally-sensitive species present at a popular spot for motorized vehicles than at a similar site with no vehicular activity. A preliminary investigation by TPWD found that motorized-vehicle traffic had destroyed vegetation along the banks of the Nueces, contributing to soil erosion and destabilization.

Owners of property next to state-owned streambeds have observed criminal activities associated with use of motorized vehicles. Many vehicle operators have trespassed on private property. Illegal activities such as drug use, discharge of firearms, and public sex acts have been especially troublesome along the Llano River.

Opponents of a statewide ban say:

The public has a right to enjoy Texas' rivers, whether traveling by foot, canoe, kayak, or in a motorized vehicle. Because about 97 percent of Texas land is owned privately, state-owned riverbeds are among the few areas where those who cannot afford to buy their own property may drive their vehicles freely away from roads, traffic, and stop lights. Many local residents along Texas rivers have traveled by motorized vehicles to their families' favorite swimming holes or fishing spots for decades. In some cases, motorized vehicles may be the only feasible way for disabled or elderly citizens to reach the wild and scenic parts of a river.

Most users of motorized vehicles are responsible operators. Organized groups of users minimize their impact on the environment by adhering to guidelines such as the "tread lightly pledge," which recommends slow crossing of streams only at low-water points and prohibits unnecessary spinning of a vehicle's wheels. Most users prefer to drive along gravel floodplains adjacent to the water. The state should not overreact to violations by a few "bad apples" by banning this form of recreation for the many other conscientious operators.

Little conclusive evidence exists to support the claim that motorized-vehicle activity in streambeds necessarily harms river ecology. The task force's report acknowledges the lack of in-depth, Texas-specific scientific investigations of this issue. Some studies have shown that severe weather events have a greater impact on water quality than does even concentrated motorized-vehicle activity. The periodic floods common to many Texas rivers wipe out traces of vehicle activity in riverbeds.

State vs. local control. Advocates of a strong state role say that authorizing a state agency to regulate activities in state-owned streambeds to ensure safety and balanced use would provide an avenue to address similar issues that might arise in the future. They warn that local management of these activities could lead to more conflicts because of the many jurisdictional boundaries crossing rivers. For example, where county boundaries follow the course of a river, motorized vehicles could be allowed on one side of the river bed and banned from the other.

Others respond that authorizing local political entities such as counties, home-rule cities, or river authorities to manage motorized-vehicle activity in state-owned streambeds would avoid a "one size fits all" approach to the issue. Local control, they say, would allow the mainly rural communities near rivers that are environmentally suitable for vehicle activity to benefit from visiting

recreationists' spending on lodging, vehicle repair, gasoline, and food.

Permit program. Obtaining a permit to drive in state-owned streambeds could require paying a fee, attending safety and training courses, passing a test, or displaying a window sticker. Such a program, advocates say, could limit the environmental risk of vehicle activity in riverbeds while allowing local residents access by vehicle to their favorite areas along a river. Rivers could be designated as open for vehicular access when environmental conditions permitted and as closed when vehicular activity was inappropriate. Opponents argue, however, that a permit program would not stop the destruction of river habitat by motorized vehicles and could require poorer local residents to pay hefty fees and to attend training courses simply to drive down to their favorite family picnic areas.

Alternative sites. Developing alternative sites for motorized-vehicle recreation could reduce the number of motorized vehicles on state-owned streambeds. For example, GLO has suggested leasing underused land in the Permanent School Fund or other state-owned real property that might be appropriate for vehicular recreation to TPWD or to motorized-vehicle user groups. Opponents contend, however, that environmental damage to Texas rivers would continue unabated during the lengthy process of studying, identifying, and developing appropriate alternative sites.

— by Travis Phillips

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