

- SUBJECT:** Notice of foreclosure to lienholders of property in an HOA
- COMMITTEE:** Business and Industry — favorable, without amendment
- VOTE:** 7 ayes — Deshotel, Orr, Bohac, Giddings, S. Miller, Quintanilla, Workman
- 1 nay — Garza
- 1 absent — Solomons
- WITNESSES:** For — Harvella Jones, The National Homeowners Advocate Group, LLC, The Texas Homeowners Advocate Group, The National HAGS Coalition; Aletha Ray, The National Homeowner Advocate Group; Yvonne Silva (*Registered, but did not testify*: Janet Ahmad, Home Owners for Better Building, HOA Reform Coalition; Pat Carlson, Texas Eagle Forum; Lynn Walshak, HOA Reform Coalition; Irene Adolph; Nancy Hentschel)
- Against — David Smith, Texas Neighborhoods Together; Jude Wiggins, Texas Neighborhoods Together, GHNA (*Registered, but did not testify*: Jason Delgado, Spectrum Association Management; Carey Helm, Texas Community Association Advocates)
- BACKGROUND:** Property Code, ch. 209, the Texas Residential Property Owners Protection Act, applies to all mandatory homeowners' associations (HOAs) and establishes requirements for association records, voting, attorneys' fees, foreclosing on property, and other procedures. Sec. 209.009 prohibits an association from foreclosing on a property owner for an assessment lien that consisted only of fines that the association assessed or attorney's fees related to the fines.
- Property Code, sec. 51.002 establishes procedures for the sale of property under a power of sale conferred by a deed of trust or other contract lien. The sale must be publicly offered in an auction held the first Tuesday of a month. In general, the sale must take place at the county courthouse in the county where the land is located.
- DIGEST:** HB 1228 would prohibit a property owners' association from foreclosing on a property for nonpayment of an assessment lien unless it first provided

written notice of the total amount of delinquency to the first lien holder or the lien holder next in priority, if the assessment lien was first. The recipient of the notice would have 60 days to cure the delinquency before an association could initiate a judicial foreclosure or post a notice to auction the property. A notice under the bill would have to be sent by certified mail to the lien holder of record in the associated property deed.

The bill would take effect September 1, 2011, and would apply only to foreclosure proceedings initiated on or after its effective date.

**SUPPORTERS
SAY:**

HB 1228 would correct a lapse in current law that allows property lien holders to unknowingly lose their interest in a property due an association foreclosure.

The power of HOAs to foreclose derives primarily from a 1987 Texas Supreme Court ruling in *Inwood North Homeowners Association v. Harris* that a provision in the Texas Constitution restricting foreclosures on residential homesteads does not protect homeowners from foreclosure for not paying monthly HOA assessments. In Texas, HOAs may execute either judicial or nonjudicial foreclosure, depending on the association's declaration. In a judicial foreclosure, the association files a lawsuit and tries to get a judgment against a property owner. In a nonjudicial foreclosure, which must be specially authorized in an association's declaration, an HOA must provide notice to a homeowner through certified mail, and if the homeowner does not pay the assessments owed, the HOA may offer the house for sale at an auction for the amount of outstanding assessments, without an order from a judge.

If there is a superior lien on a property, such as a mortgage lien from a bank, then whoever purchases the foreclosed property does so subject to that lien. Superior lien holders are guaranteed payment from a foreclosure sale. A subordinate lien holder, however, could lose its interest in the property if a foreclosure sale did not generate enough funds to satisfy those interests.

While most associations, in their restrictive covenants, establish assessment dues as subordinate liens, there are some that allow assessment dues to assume the status of superior liens. In these instances, subordinate lien holders may lose their interest without any knowledge that an association had initiated foreclosure proceedings. This is a particular

problem in nonjudicial foreclosures, which do not entail formal court proceedings and are subject only to minimal notice requirements.

HB 1228 would require HOAs to provide foreclosure notice to superior lien holders or to subordinate lien holders if the assessment lien was superior. This would allow those entities enough time to determine if they wished to take action to forestall an imminent foreclosure, such as by settling the delinquent dues. The bill would be prospective and would not impede an HOA from foreclosing beyond the 60-day window.

Similar requirements currently obligate associations to notify lien holders following a foreclosure sale, so the bill would not impose any requirements that associations have not already proved capable of satisfying without unreasonable expense. Providing notice before and after a foreclosure is important, since lien holders need to know for different purposes both if the property may be foreclosed and if a foreclosure occurs.

OPPONENTS
SAY:

HB 1228 would impose upon associations an administrative burden that could lead to additional expenses that would be transferred to homeowners. While noticing requirements appear simple on paper, they rarely are in practice. Some properties have multiple lien holders — for instance, mechanics liens and liens for home improvements — that can be a challenge to track down. The additional time required to track down this information, moreover, increases the period during which an association is unable to collect assessments from a delinquent homeowner.

The vast majority of associations allow liens to only be in the superior position. Superior lien holders would, moreover, have little interest in receiving a foreclosure notice, since they almost always will recover their interest when the property is sold. Under the bill, all associations would have to send notice on account of those very few that would be affected by a foreclosure. The bill would cast a wide net to catch a rare fish.

Current law in the Property Code requires an association to notify all lien holders within 30 days following a foreclosure sale of a property. The bill would establish a similar requirement of 60 days before a foreclosure sale. Establishing notice requirements to the same parties before and after a foreclosure sale would be an unnecessary and duplicative administrative inconvenience for associations.

OTHER
OPPONENTS
SAY:

HB 1228 would start the 60-day notification window from the date that the lien holder “receives the notice.” This is a problematic requirement, since the association cannot control or verify when a lien holder receives a notice. The bill should be amended to change this to after the date when the “notice was mailed to the recipient.” The mailing date would be readily verifiable and would be within the association’s control. The bill could add a few days to the notification window to make up for the additional time in the mail, if needed.

Other provisions in the bill regarding notice could have unintended consequences. For instance, the bill does not provide for when an association cannot locate a lien holder’s address in a recorded instrument. The bill should be amended to excuse notice requirements for lien holders that do not have their addresses in recorded instruments.