

FORECLOSURES BY PROPERTY OWNERS' ASSOCIATIONS

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INTRODUCTION

No other issue affecting property owners' associations³ is more controversial than the right to foreclose. By its very nature, the right to foreclose on a person's home can invoke strong emotions by the homeowner and the association's board members (and legislators), especially if the amount of the delinquent assessments pales in comparison to the property's market value.

Tales of overzealous boards or managing agents demonstrate that some property owners' associations foreclose when it may not be the best course of action. The decision to foreclose should only be made after a thorough review of the potential benefits and downsides to the property owners' association.

In assessing the potential benefits of foreclosure, property owners' associations must determine what kinds of amounts are delinquent and whether they are collectable. Associations must keep in mind that not all amounts owed

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³ A "property owners' association" means "an incorporated or unincorporated association owned by or whose members consist primarily of the owners of the property covered by the dedicatory instrument and through which the owners, or the board of directors or similar governing body, manage or regulate the residential subdivision, planned unit development, condominium or townhouse regime, or similar planned development." Tex. Prop. Code Ann. § 202.001(2) (West 2014).

to property owners' associations are foreclosable; they must determine what if any delinquent amounts are secured by a lien and only proceed if the association's dedicatory instruments⁴ and Texas law permit the foreclosure remedy. In many cases, the true litmus test for the ability to collect, even with a valid lien in place, is the amount of equity in the property. This is because the property owners' association's lien is oftentimes inferior to the purchase-money lien and of course any ad valorem taxes. Moreover, even if the association pursues its lien, there will frequently be no third-party purchasers at the foreclosure sale with good funds willing to purchase the property, resulting in no sale or a purchase of the property by the property owners' association, which is never optimal. A host of issues beyond the scope of this paper arise when a property owners' association is the purchaser at its foreclosure sale.

Weighed against the benefits of foreclosure may be myriad downsides. Among them is the expenditure of funds in the collection process, which may not be recoverable. In the past, attorneys were permitted to pursue the collection of delinquent assessments for property owners' associations via a contingency-fee agreement; however this is no longer permitted today for associations subject to chapter 209 of the Texas Property Code.⁵ For a property owners' association subject to chapter 209 to collect its attorney's fees in the collection and foreclosure process, the association must be contractually obligated to pay for all

⁴ See *id.* §§ 202.001, 209.002(4).

⁵ *Id.* § 209.0064(c)(1).

attorneys' fees incurred for all actions taken in the collection of the delinquent account.⁶

But even with the potential pitfalls of the process, many property owners' associations simply could not collect assessments from some owners without the right to foreclose. A property owners' association without lien rights is left with the prospect of suing for a money judgment, which might not be worth more than the paper it's written on. Texas' sweeping exemptions make it a debtor's paradise, and locating non-exempt assets to seize via execution of a judgment is often a challenge.⁷

This article reviews when, under what circumstances, and how a property owners' association may foreclose on its assessment lien. First, this article addresses the non-judicial foreclosure process available to condominium associations. Second, this article will discuss the foreclosure processes a homeowners' association may invoke, and the relatively new expedited foreclosure process. Attached to this article are two flowcharts depicting the analysis of whether and how a condominium or homeowners' association may foreclose.

⁶ *Id.*

⁷ *See id.* §§ 41.001, 42.001–42.003.

NONJUDICIAL FORECLOSURE BY CONDOMINIUM OWNERS' ASSOCIATIONS

Structure of Condominium Law

Before delving into foreclosures by condominium owners' associations, a note should be made about the structure of Texas' condominium law. The majority of condominium association law is found in chapters 81 and 82 of the Texas Property Code. Chapter 82—the Texas Uniform Condominium Act (TUCA)—applies to condominiums for which the declaration is recorded on or after January 1, 1994.⁸ For condominiums created before 1994—the majority in Texas—only certain specific provisions of chapter 82 apply, so long as they do not conflict with the declaration.⁹ These retroactive gap-filler provisions include section 82.113, dealing with the association's assessment lien and foreclosure thereon.¹⁰ The majority of citations to chapter 82 below apply to condominiums created before 1994, unless they conflict with the declaration (filed before 1994).

Attachment, Perfection, and Priority of Condominium Owners' Associations' Assessment Liens

TUCA grants condominium owners' associations a continuing lien on units (and rents and insurance proceeds received by unit owners relating to the unit – for associations formed after January 1, 1994) to secure payment of assessments levied by the association.¹¹ Unless the association's declaration provides otherwise, "assessments" includes "regular and special assessments,

⁸ *Id.* § 82.002(a).

⁹ *Id.* § 82.002(c).

¹⁰ *Id.* (referring to Tex. Prop. Code § 82.113).

¹¹ *See id.* § 82.113(a).

dues, fees, charges, late fees, fines, collection costs, attorney's fees, and any other amount due to the association by the unit owner or levied against the unit by the association."¹² A condominium association creates and perfects its assessment lien by recording the declaration in the real property records.¹³ The association need not record a Notice of Lien to perfect its interest, unless it is required by the declaration.¹⁴

In relation to other liens, a condominium owners' association's assessment lien is considered superior to most other liens, except (a) liens for real property taxes (and other government assessments), (b) liens recorded before the declaration was recorded, (c) liens for improvements or assignments of the right to insurance proceeds that were recorded before the date the assessment became delinquent, and (d) first vendor's liens or deed-of-trust liens that were recorded before the date the assessments became delinquent.¹⁵ Association assessment liens are superior to second-lien deeds of trust, home-equity loans, and reverse mortgages. Oftentimes, a lender in an inferior position to a condominium assessment lien will seek voluntary subordination of the assessment lien. In many cases this request is without consideration to the condominium association and without an obligation to escrow assessments, and thus is routinely denied.

¹² See *id.* § 82.113(a).

¹³ See *id.* § 82.113(c).

¹⁴ See *id.*

¹⁵ *Id.* § 82.113(b).

Availability of the Foreclosure Remedy

TUCA grants condominium owners' associations the authority to foreclose their assessment liens on units to recover unpaid assessments.¹⁶ Generally, it may do so judicially (by filing a lawsuit), or nonjudicially (without a court order).¹⁷ However, there are a few limitations on a condominium owners' association's right to foreclose.¹⁸ First, the condominium association cannot foreclose its lien for assessments consisting solely of fines.¹⁹

Second, the condominium's declaration may impose additional limitations on the type of foreclosure remedy available. For example, a condominium created before 1994 may limit the association to the remedy of judicial foreclosures.²⁰ Likewise, a condominium declaration may require the association to file a sworn Notice of Lien in the real property records before foreclosing.

Nonjudicial Foreclosure Process

TUCA authorizes a condominium association to nonjudicially foreclose on a unit to enforce its assessment lien.²¹ The nonjudicial foreclosure process is governed by chapter 51 of the Texas Property Code and the condominium's

¹⁶ *Id.* § 82.113(e).

¹⁷ *Id.*

¹⁸ The constitutional homestead-exemption limitation discussed later in this article does not pose a problem in the condominium context, as the association's lien statutorily attaches when the owner purchases the unit. *See id.* § 82.113(c).

¹⁹ *Id.* § 82.113(e). It is unclear whether a condominium association could get around this statute by foreclosing for fines and attorney's fees associated with these fines. *Cf. id.* § 209.009 (prohibiting foreclosure of a homeowners' association's assessment lien solely for fines and "attorney's fees incurred by the association solely associated with fines assessed by the association").

²⁰ *Holly Park Condo. Homeowners' Ass'n, Inc. v. Lowery*, 310 S.W.3d 144, 147 (Tex. App.—Dallas 2010, pet. denied).

²¹ Tex. Prop. Code § 82.113(e). The process for judicial foreclosure is discussed later in this article in relation to homeowners' associations.

declaration. The process consists of (1) appointing a trustee to represent the association as a trustee, (2) providing timely notice of the foreclosure sale, and (3) performing the foreclosure sale.

The condominium association must first appoint a person to act as a trustee for the purpose of conducting a non-judicial foreclosure sale of the property. Unless the association's declaration provides otherwise, TUCA authorizes the condominium's board of directors to resolve to appoint an officer, agent, trustee or attorney of the association to exercise the association's power of sale.²² Whether the declaration contains power-of-sale language, TUCA provides the association (and thus, the trustee) with the power of sale to nonjudicially foreclose.²³

The second step consists of providing notice of the foreclosure sale to the delinquent homeowner and the public. If the property is the homeowner's residence, the trustee must provide the homeowner by certified mail a "Notice of Default," stating that he or she is in default of the assessments due, identifying the defaulted amount, and providing a 20-day period to cure the default.²⁴ If the delinquent homeowner does not cure the default, the appointed trustee may begin the nonjudicial foreclosure process by providing the public and delinquent homeowner a Notice of Sale at least 21 days before the date of the foreclosure

²² *Id.* § 82.113(d).

²³ *Id.*

²⁴ *Id.* § 51.002(d).

sale.²⁵ (In addition to these pre-foreclosure notices, additional notices may be required under the Fair Debt Collection Practices Act,²⁶ which are beyond the scope of this article.) At any time before the foreclosure sale, the unit owner can avoid the foreclosure by paying all amounts due to the association.²⁷

The non-judicial foreclosure sale must be made by public auction between 10 a.m. and 4 p.m. on the first Tuesday of the month.²⁸ The foreclosure sale must take place at the designated area at the county courthouse in the county in which the property is located.²⁹ And the trustee must begin the foreclosure sale within three hours after the time stated in the Notice of Sale.³⁰

The association may bid for and purchase the unit being foreclosed on as a common expense.³¹ The amount owed to the condominium association is offset by the bid amount; thus the trustee need only pay any amount of purchase price in excess of the delinquent assessments.

At the conclusion of the sale, the appointed trustee will collect the purchase price from the highest bidder, and will execute a trustee's deed conveying the unit to the highest bidder. All excess proceeds are forwarded to the unit owner foreclosed on.

²⁵ *Id.* § 51.002(b).

²⁶ *See* 15 U.S.C. § 1692 *et seq.*

²⁷ Tex. Prop. Code § 82.113(j).

²⁸ *Id.* § 51.002(a).

²⁹ *Id.* § 51.002(a), (b)(1).

³⁰ *Id.* § 51.002(c).

³¹ *Id.* § 82.113(f).

Redemption

A condominium unit owner may redeem his or her foreclosed unit within 90 days after foreclosure.³² If the condominium association is the successful bidder at the foreclosure auction, unit owner must repay the association all amounts due to the association at the time of the foreclosure sale, plus interest, plus reasonable attorney's fees and costs, reasonable costs incurred by the association, and any assessments levied after the foreclosure sale.³³ During the 90-day redemption period, the person or entity that purchased the lot at the foreclosure sale may not transfer ownership of the lot to anyone other than the redeeming lot owner.³⁴

If a party other than the association was the successful bidder at the foreclosure auction, the unit owner must pay the purchaser the amount bid at the sale, interest at the rate of 6% on the amount paid from the date of sale to the date of redemption, all assessments paid by the purchaser after the date of foreclosure, and any reasonable costs incurred by the purchaser as the owner of the unit, including costs of maintenance and leasing.³⁵ The redeeming owner must also pay the association all assessments that are due as of the date of the redemption and reasonable attorney's fees and costs incurred by the association in foreclosing the lien.³⁶

³² *Id.* § 82.113(g).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* § 82.113(g).

³⁶ *Id.* § 82.113(g).

JUDICIAL FORECLOSURE BY HOMEOWNERS' ASSOCIATIONS

Attachment, Perfection, and Priority of Homeowners' Associations' Assessment Liens

In contrast to the statutory lien created by TUCA, homeowners' associations' assessment liens are creatures of contract: created by the association's declaration of covenants, conditions, and restrictions. Although the declaration will generally provide a lien to secure payment of general and special assessments, careful attention must be paid to determine what other obligations the lien may secure. For example in *Brooks v. Northglen Association*, the Texas Supreme Court held that a homeowners' association could not foreclose on late fees because the lien created in the declaration at the time of purchase did not secure late fees.³⁷

Like condominium assessment liens, homeowners' association liens are perfected by the filing of the declaration in the real-property records. The homeowners' association's assessment lien is superior to most liens recorded thereafter except for liens securing payment of taxes (including real property taxes).

Availability of the Foreclosure Remedy

Homeowners' associations generally have the authority to foreclose their assessment liens by expedited foreclosure (if the declaration contains power-of-sale language) or judicial foreclosure. (Also, where the declaration contains

³⁷ See *Red Rock Props. 2005, Ltd. v. Chase Home Fin., L.L.C.*, 2009 WL 1795037, at *4 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

power-of-sale language and the owner consents to opt out of the expedited-foreclosure process, the association may nonjudicially foreclose without court supervision.³⁸) However, there are several limitations on homeowners' association's authority to foreclose.

First, homeowners' associations must account for the homestead exemption granted by the Texas Constitution. Homestead protection in Texas dates back to the early 1800s and has since only expanded the reaches of its protection.³⁹ Article XVI, section 50 of the Texas Constitution states that "[t]he 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" ⁴⁰ To avoid the homestead exemption, a homeowners' association's assessment lien must attach on or before the homeowner took title to the lot.⁴¹ In light of this issue, careful attention must be paid to determine whether an association's assessment lien attached before the owner took title to the lot. (See the discussion above about when a homeowners' association's assessment lien attaches.)

Second, the Texas Property Code prohibits associations from foreclosing on unpaid debts that consist solely of fines and attorney's fees incurred by the association solely associated with fines assessed by the association.⁴²

³⁸ Tex. Prop. Code § 209.0092(c).

³⁹ See *Inwood N. Homeowners' Ass'n v. Harris*, 736 S.W.2d 632, 637–38 (Tex. 1987) (reviewing the early history of Texas homestead laws).

⁴⁰ See Tex. Const. art. XVI, § 50(a).

⁴¹ See *Inwood*, 736 S.W.2d at 635.

⁴² Tex. Prop. Code § 209.009.

Finally, the association's declaration may further limit the types of available foreclosure remedies. As noted above, a homeowners' association may foreclose via judicial foreclosure or expedited foreclosure. But the latter is only available if the declaration contains power-of-sale language.⁴³ Furthermore, the declaration may require a sworn Notice of Lien be filed before the association proceeds with an expedited foreclosure.

Judicial Foreclosure Procedure

Before 2011, a homeowners association could foreclose its valid lien by judicial or nonjudicial means. But to protect homeowners, in 2011 the Texas Legislature amended the Texas Property Code to require homeowners' associations to conduct all foreclosures under some court supervision.⁴⁴

Today, a homeowners' association may enforce its assessment lien by expedited judicial foreclosure (assuming the declaration contains power-of-sale language) or judicial foreclosure. While nonjudicial foreclosure is a faster, less expensive procedure, the recent amendments benefit homeowners' associations as well. A court-ordered foreclosure significantly decreases the risk that the foreclosure will be challenged for lack of due process or abuse by the association. Furthermore, if an association is unsure as to whether the subject property is the

⁴³ *Id.* § 209.0092(a); Tex. R. Civ. P. 735.1.

⁴⁴ See Tex. Prop. Code § 209.0092(a). As discussed later in this article, a homeowner may opt out of the expedited-foreclosure rules, allowing the homeowners' association to proceed with a nonjudicial foreclosure. See *id.* § 209.0092(c).

owner's homestead, the judicial process allows the owner to assert (or waive) the homestead exemption as an affirmative defense.⁴⁵

The judicial foreclosure process consists of two parts: (1) obtaining a judgment for judicial foreclosure authorizing an Order of Sale to be issued,⁴⁶ and (2) having a county official (a sheriff or constable) conduct a judicial foreclosure sale.

At trial, the Association has the burden to prove: (1) the property is subject to the declaration; (2) the declaration authorizes the association to levy assessments against the homeowner's property; (3) the homeowner has not paid the levied assessments; (4) the amount of delinquent assessments and other amounts owed; and (5) the declaration creates an assessment lien in favor of the homeowners' association securing payment of delinquent assessments and other amounts owed.⁴⁷ If the association prevails at trial, the court will enter judgment awarding the association a monetary award and ordering a foreclosure of the lien in order to satisfy the award.⁴⁸ Upon entry of judgment, the clerk of the court

⁴⁵ See *Watson v. Tipton*, 274 S.W.3d 791, 800 (Tex. App.—Fort Worth 2008, pet. denied).

⁴⁶ If a homeowner owns more than two delinquent lots, a homeowners association may permissively join the claims and bring one action to foreclose upon both liens. Tex. R. Civ. P. 51; see also *Nipper-Bertram Trust v. Aldine Indep. Sch. Dist.*, 76 S.W.3d 788, 790 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (underlying judgment covered two properties on which a school district brought suit to foreclose on tax liens: "[t]he [signed] judgment . . . covered the two properties -- Lots 6 and 7. . . . Thereafter, the clerk of the court issued one order of sale for both lots and the constable held a tax sale.").

⁴⁷ See *Vill. Green Homeowners Ass'n, Inc. v. Leeder*, 2011 WL 721260, *2 (Tex. App.—San Antonio 2011, no pet.); *Sloan v. Owners Ass'n of Westfield, Inc.*, 167 S.W.3d 401, 406 (Tex. App.—San Antonio 2005, no pet.).

⁴⁸ See Tex. R. Civ. P. 309.

prepares an “Order of Sale” which directs the sale of the property by public auction.

Before the sale, the sheriff or constable must give the homeowner a written Notice of Foreclosure Sale by personal delivery or mail and must publish the notice in a newspaper.⁴⁹ The notice must state the authority under which the sale is to be made, the time of levy, the time and place of sale, and a brief description of the property to be sold (including the number of acres, original survey, locality in the county, and the name by which the land is most generally known).⁵⁰

The sheriff or constable sells the foreclosed property at the courthouse of the county where the property is located, on the first Tuesday of the month.⁵¹ Upon sale to the highest bidder, the proceeds of the sale are first applied to the judgment awarded to the association, and any surplus is remitted to the homeowner.

Redemption

Following a foreclosure sale, the former owner of the foreclosed lot or a lienholder may redeem his property—i.e., undo the foreclosure and regain ownership of the property—under certain limited circumstances. The owner has 180 days from the date the association mails the post-foreclosure notice of

⁴⁹ See Tex. R. Civ. P. 647.

⁵⁰ *Id.*

⁵¹ Tex. R. Civ. P. 646a.

redemption rights to redeem the property.⁵² However, if the owner does not redeem within 90 days after the association mails the notice, a lienholder of record may redeem the foreclosed property within the 180-day redemption period. During this 180-day period, the person or entity that purchased the lot at the foreclosure sale may not transfer ownership of the lot to anyone other than a redeeming lot owner.⁵³

If the association purchased the lot at the foreclosure sale, the lot owner or lienholder can redeem the property by paying the association: all amounts due to the association at the time of the foreclosure sale, plus interest; costs incurred by the association in foreclosing its assessment lien and conveying the foreclosed lot back to the owner, including reasonable attorneys fees; any subsequent assessments levied on the lot; any reasonable costs incurred by the Association during its ownership of the lot; and the purchase price paid by the Association at the foreclosure sale less any amounts due that were satisfied by the foreclosure sale proceeds.⁵⁴

If a redeeming lot owner (or lienholder) pays the Association all of the required amounts within 180 days, the Association must immediately execute and deliver to the lot owner (or lienholder) a deed transferring ownership of the foreclosed lot.⁵⁵ The owner (or lienholder) may file a cause of action against the

⁵² Tex. Prop. Code § 209.011(b).

⁵³ *Id.* § 209.011(c).

⁵⁴ *Id.* § 209.011(d).

⁵⁵ *Id.* § 209.011(f).

association to compel conveyance if the association fails to do so.⁵⁶ However, if the lot owner (or lienholder) does not redeem the foreclosed lot within 180 days, the association must record an affidavit in the real property records stating that the former lot owner (or the lienholder) did not redeem the foreclosed property during the redemption period.⁵⁷

For lots purchased at the foreclosure sale by a person or entity other than the association, the former owner (or the lienholder) must pay the association: all amounts due to the association at the time of the foreclosure sale, less the foreclosure sales price received by the association from the purchaser; interest; costs incurred by the association in foreclosing the lien and conveying the property to the redeeming lot owner, including reasonable attorney's fees; any unpaid assessments levied against the property by the association after the foreclosure sale; and taxable costs.⁵⁸ The redeeming lot owner (or lienholder) must also pay the purchaser: any assessments levied against the property after the foreclosure if paid by the purchaser; the purchase price paid by the purchaser; the deed-recording fee; the amount paid by the purchaser as ad valorem taxes, penalties, and interest after the foreclosure sale; and taxable costs.⁵⁹

⁵⁶ *Id.*

⁵⁷ *Id.* § 209.011(n).

⁵⁸ *Id.* § 209.011(e).

⁵⁹ *Id.*

EXPEDITED JUDICIAL FORECLOSURE BY HOMEOWNERS' ASSOCIATIONS

Application of Chapter 209 of the Texas Property Code

The expedited foreclosure process only applies to property owners' associations covered by chapter 209 of the Texas Property Code. Chapter 209 applies to (a) residential subdivisions⁶⁰ that are "subject to restrictions or provisions in a declaration that authorize the property owners' association to collect regular or special assessments on all or a majority of the property in the subdivision" and (b) property owners' associations⁶¹ that "require mandatory membership in the association for all or a majority of the owners of residential property within the subdivision subject to the association's dedicatory instruments."⁶² However, condominium associations are excluded under from chapter 209.⁶³

Certain provisions in chapter 209 do not apply to "a property owners' association that is a mixed-use master association that existed before January 1,

⁶⁰ A *residential subdivision* is a subdivision, planned unit development, townhouse regime, or similar planned development in which all land has been divided into two or more parts and is subject to restrictions that: (A) limit a majority of the land subject to the dedicatory instruments, excluding streets, common areas, and public areas, to residential use for single-family homes, townhomes, or duplexes only; (B) are recorded in the real property records of the county in which the residential subdivision is located; and (C) require membership in a property owners' association that has authority to impose regular or special assessments on the property in the subdivision." *Id.* § 209.002(9).

⁶¹ In chapter 209, a *property owners' association* means "an incorporated or unincorporated association that: (A) is designated as the representative of the owners of property in a residential subdivision; (B) has a membership primarily consisting of the owners of the property covered by the dedicatory instrument for the residential subdivision; and (C) manages or regulates the residential subdivision for the benefit of the owners of property in the residential subdivision." *Id.* § 209.002(7).

⁶² *Id.* § 209.003(a), (b).

⁶³ *Id.* § 209.003(d); see *Bagelman v. Peach*, No. 03-10-00406-CV, 2011 WL 2462026, at *5 (Tex. App.—Austin June 16, 2011, no pet.); *Disante v. Duarte*, 292 S.W.3d 733, 734 (Tex. App.—Dallas 2009, no pet.).

1974, and that does not have the authority under a dedicatory instrument or other governing document to impose fines.”⁶⁴ However, these excepted provisions govern association records,⁶⁵ elections and quorum,⁶⁶ and alternative payment schedules for certain assessments.⁶⁷ Thus a property owners’ association governing a master planned community may be covered under chapter 209, even though the community features public commercial areas in addition to residential areas.⁶⁸

Expedited Foreclosures Generally

As noted above, homeowners’ associations may foreclose their assessment liens via the expedited-foreclosure process if the declaration grants the association the power of sale.⁶⁹ A homeowners’ association is not permitted to nonjudicially foreclose outside the expedited-foreclosure process, unless the owner consents to opt out of the expedited-foreclosure process.⁷⁰

The expedited foreclosure process is a mandatory mechanism for a homeowners’ association to obtain judicial authorization to foreclose on its assessment lien.⁷¹ The process set forth in Rules 735 and 736 of the Texas Rules of Civil Procedure provide for an application, possible hearing, and ruling by the court. No discovery is conducted and testimony may be presented by affidavits.

⁶⁴ Tex. Prop. Code § 209.003(e).

⁶⁵ See *id.* §§ 209.003(e), 209.005(c).

⁶⁶ See *id.* §§ 209.003(e), 209.0056–209.0058, 209.00592.

⁶⁷ See *id.* §§ 209.003(e), 209.0062.

⁶⁸ It is the authors’ opinion that this provision only applies to the Las Colinas community.

⁶⁹ *Id.* § 209.0092(a); Tex. R. Civ. P. 735.1.

⁷⁰ Tex. Prop. Code § 209.0092.

⁷¹ *Id.*

If the association's application for expedited foreclosure is granted, the court will permit the association to foreclose its lien under the declaration and chapter 51 of the Texas Property Code.⁷² The court's order on the application is not appealable.

The Application for an Expedited Order of Foreclosure

To initiate an expedited judicial foreclosure proceeding, an association must file a verified application called an "Application for an Expedited Order" (an "Application") in a court located in the county in which all or part of the property is located.⁷³ An Application may also be filed in probate court with jurisdiction over the lot that is part of the decedent's estate.⁷⁴ The Application must be styled "*In re: Order of Foreclosure Concerning [mailing address of property] under Tex. R. Civ. P. 736,*"⁷⁵ and it must additionally:

- (1) identify the name and last known address of the Association (referred to as the "Petitioner" under Rule 736);
- (2) identify the name and last known address of each person obligated to pay the unpaid assessments secured by the association's assessment lien who has a current ownership interest in the lot to be foreclosed (referred to as the "Respondent" under Rule 736);
- (3) identify the lot to be foreclosed by its legal description and commonly known street address;
- (4) state that the lien to be foreclosed is a property owners' association assessment lien under Section 209.0092 of the Texas Property Code;
- (5) describe the authority of the association to seek foreclosure of the assessment lien;

⁷² These are the same provisions governing nonjudicial foreclosures by condominium associations.

⁷³ Tex. R. Civ. P. 736.1(a).

⁷⁴ *Id.*

⁷⁵ The Rule appears to be an exception to the new privacy rules enacted in Rule 21c of the Texas Rule of Civil Procedure.

- (6) identify, as of a specific date not less than 60 days prior to the date the Application is filed, the number of unpaid regular and special assessments owed by the Respondent to the association and the amount required to cure such Respondent's default;
- (7) state that all requisite notices to cure such Respondent's delinquent assessment account have been mailed to each person as required under applicable law and the declaration and that any applicable opportunities to cure such delinquent assessment account have expired;
- (8) state that before the Application was filed, any other prior action required to be performed under applicable law and the Declaration was performed; and
- (9) conspicuously state that: (a) legal action is not being sought against the occupant of the property, unless the occupant is also named as a respondent in the application; and (b) if the petitioner obtains a court order, the petitioner will proceed with a foreclosure of the lot in accordance with applicable law and the terms of the lien sought to be foreclosed.⁷⁶

Additionally, the Application must include an affidavit of material facts to be signed by a representative of the association describing the basis for the foreclosure.⁷⁷ The affidavit must be attached with copies of the association's dedicatory instrument establishing the assessment lien and each notice that was required to be mailed to the Respondent before the Application was filed.⁷⁸ Upon filing of the Application, the court clerk will issue a citation for each identified Respondent and the occupant of the lot to be foreclosed on.⁷⁹

⁷⁶ Tex. R. Civ. P. 735.1, 736.1(d).

⁷⁷ Tex. R. Civ. P. 736.1(d)(6).

⁷⁸ *Id.*

⁷⁹ Tex. R. Civ. P. 736.3(a)(1).

The Owner's Response and the Hearing

A Respondent may contest the Application by filing a response in opposition. There, the Respondent may only argue: (1) why the Respondent is not obligated for payment of the lien; (2) why the number of months of alleged default or pay off amounts are materially incorrect; (3) why any document attached to the Application is not a true and correct copy of the original; or (4) if the Respondent has paid the amounts that the Association claims are unpaid.⁸⁰ If a response is filed, the court must conduct a hearing on the merits within 30 days of a request for a hearing, after providing reasonable notice to the parties.⁸¹ The Association has the burden to prove the grounds for granting the order sought in the Application.⁸² If proven, the court must grant the Application.

Motion for Default Order if No Response

If no response is filed, the Association may file a motion and proposed order to obtain a default order granting the Application.⁸³ The court must grant the Application, no later than 30 days after the motion for default order is filed, if the Application was properly served and complies with the requirements of Rule 736.¹⁸⁴

Foreclosure After the Order

Once an order is obtained granting an association's application for expedited order of foreclosure, the association may continue with a foreclosure

⁸⁰ Tex. R. Civ. P. 736.5(c)(2)-(5).

⁸¹ Tex. R. Civ. P. 736.6.

⁸² *Id.*

⁸³ Tex. R. Civ. P. 736.7(a).

⁸⁴ Tex. R. Civ. P. 736.7(b).

under the procedures set forth in chapter 51 of the Texas Property Code. This procedure is virtually the same as that followed by condominium owners' associations in nonjudicially foreclosing on units.

Like nonjudicial foreclosures by condominiums, a homeowners' association's foreclosure after the expedited foreclosure process involves: (1) appointment of a trustee; (2) notice of foreclosure sale; and (3) conducting the foreclosure sale.

The association must first appoint a person to act as a trustee for the purpose of conducting the foreclosure sale. The authority to appoint a trustee to exercise a power of sale against another person's property must be expressly granted in the Association's dedicatory instruments.⁸⁵

The second step consists of providing notice of the foreclosure sale to the delinquent homeowner and the public. The process here follows the same track of a Notice of Default and Notice of Foreclosure Sale outlined above with respect to condominium associations' nonjudicial foreclosures, as the same provisions in chapter 51 apply. Similarly, the foreclosure sale itself mirrors that of a nonjudicial foreclosure by a condominium association, as the same requirements apply. Like condominiums, homeowners' associations may purchase the lot at the foreclosure sale (unless prohibited by the declaration).

⁸⁵ In most cases, the trustee appointed by the HOA will be its attorney. Unlike condominium associations, the Texas Property Code does not grant homeowners' association's boards the authority to appoint a trustee.

Limitations on Foreclosable Attorney's Fees?

The Texas Property Code limits the amount of attorneys' fees the association may include in a **nonjudicial foreclosure sale**. Sections 209.008(f) and (g) provide:

(f) If the dedicatory instrument or restrictions of an association allow for nonjudicial foreclosure, the amount of attorney's fees that a property owners' association may include in a nonjudicial foreclosure sale for an indebtedness covered by a property owners' association's assessment lien is limited to the greater of:

(1) one-third of the amount of all actual costs and assessments, excluding attorney's fees, plus interest and court costs, if those amounts are permitted to be included by law or by the restrictive covenants governing the property; or

(2) \$2,500.

(g) Subsection (f) does not prevent a property owners' association from recovering or collecting attorney's fees in excess of the amounts prescribed by Subsection (f) by other means provided by law.

Section 209.0092 of the Texas Property Code—titled “Judicial Foreclosure Required”—requires all foreclosures by homeowners' associations to be subject to judicial action.⁸⁶ Therefore, it is the authors' belief that section 209.008(f) is limited to the rare instances in which the declaration contains power-of-sale language and the owner consents to opt out of the expedited-foreclosure process. However, to date there is no case law on this issue, and each attorney should independently evaluate the code sections and rules, and how and if they interrelate.

⁸⁶ Tex. Prop. Code § 209.0092.

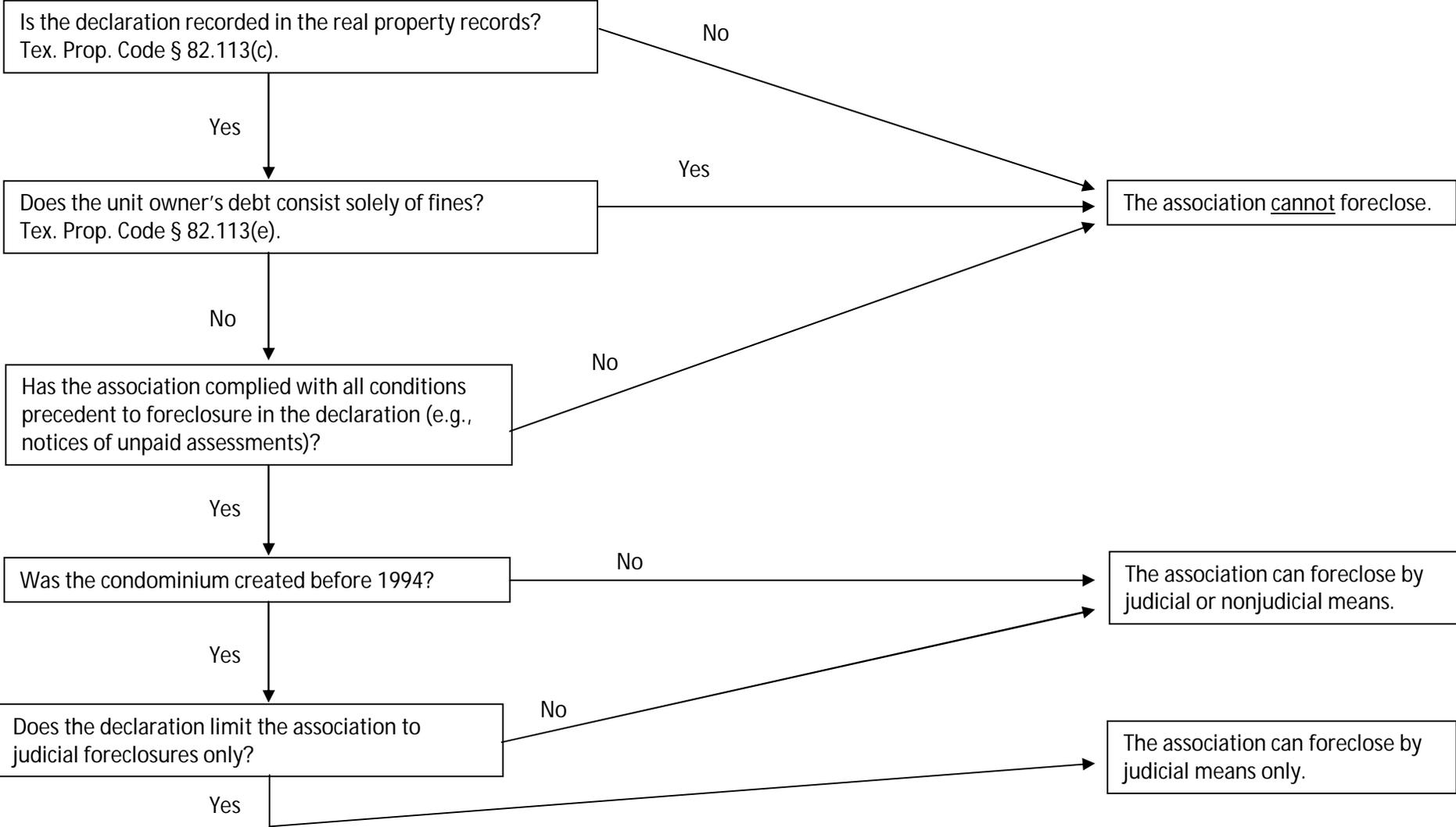
CONCLUSION

Foreclosure of assessment liens by property owners' associations is a complex and nuanced issue. This article has strived to shed some light on when a property owners' association has *the right* to foreclose. As discussed above, both condominium associations and homeowners' associations may judicially foreclose on their assessment liens. However, homeowners' associations (with power-of-sale language in their declarations) cannot ordinarily foreclose nonjudicially without a court order granting an application under the expedited foreclosure process. Only after obtaining this order can a homeowners' association proceed with a foreclosure pursuant to Chapter 51 of the Texas Property Code. In most instances a condominium association can proceed with a nonjudicial foreclosure.

But even if the association is authorized, the board—with help from its attorneys—must independently decide whether to exercise that right. Property owners' association boards should consider a multitude of factors in making the second, normative inquiry.

**NONJUDICIAL FORECLOSURE BY
CONDOMINIUM OWNERS' ASSOCIATIONS**

AUTHORITY TO FORECLOSE



**FORECLOSURE BY
HOMEOWNERS' ASSOCIATIONS (Non Condo)**

AUTHORITY TO FORECLOSE

