

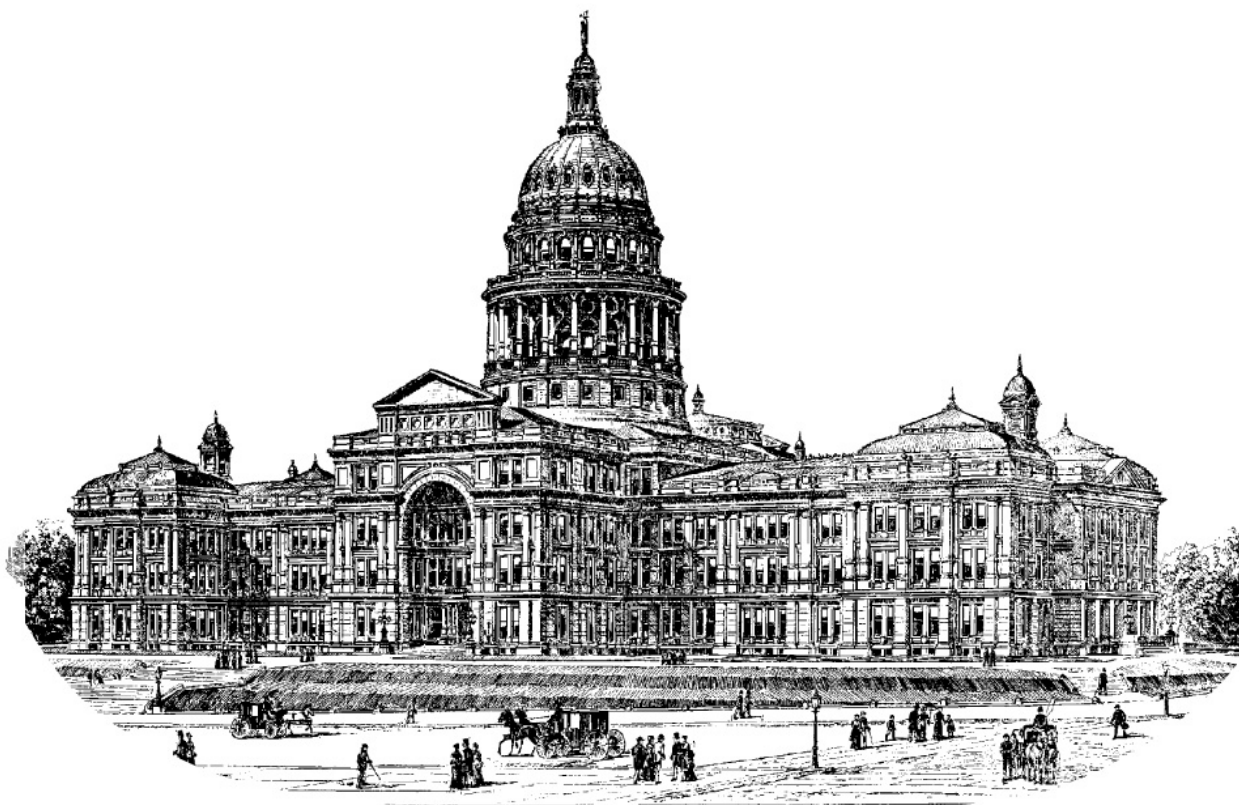


# INTERIM REPORT

## TO THE 83RD TEXAS LEGISLATURE

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HOUSE COMMITTEE ON  
**BUSINESS AND INDUSTRY**

DECEMBER 2012

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**HOUSE COMMITTEE ON BUSINESS & INDUSTRY  
TEXAS HOUSE OF REPRESENTATIVES  
INTERIM REPORT 2012**

**A REPORT TO THE  
HOUSE OF REPRESENTATIVES  
83RD TEXAS LEGISLATURE**

**JOSEPH "JOE" DESHOTEL  
CHAIRMAN**

**COMMITTEE CLERK  
MELISSA QUEVEDO**

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Committee On  
BUSINESS & INDUSTRY

December 18, 2012

JOSEPH "JOE" DESHOTEL  
Chairman

P.O. Box 2910  
Austin, Texas 78768-2910

The Honorable Joe Straus  
Speaker, Texas House of Representatives  
Members of the Texas House of Representatives  
Texas State Capitol, Rm. 2W.13  
Austin, Texas 78701

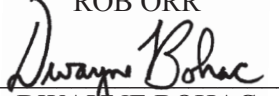
Dear Mr. Speaker and Fellow Members:

The Committee on BUSINESS & INDUSTRY of the Eighty-second Legislature hereby submits its interim report including recommendations and drafted legislation for consideration by the Eighty-third Legislature.

Respectfully submitted,

  
JOSEPH "JOE" DESHOTEL


  
ROB ORR

  
DWAYNE BOHAC

  
JOHN V. GARZA

  
HELEN GIDDINGS

  
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BURT R. SOLOMONS

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PAUL WORKMAN

Rob Orr  
Vice-Chairman

Members: Dwayne Bohac, John V. Garza, Helen Giddings, Sid Miller, Chente Quintanilla, Burt R. Solomons, Paul Workman

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## INTRODUCTION

The Honorable Joe Straus, Speaker of the Texas House of Representatives, appointed nine members to the House Committee on Business & Industry at the beginning of the 82nd Legislature. The committee membership was composed of: Representatives Joe Deshotel, Chair; Rob Orr, Vice Chair; Dwayne Bohac, John V. Garza, Helen Giddings, Sid Miller, Chente Quintanilla, Burt R. Solomons, and Paul Workman.

During the 82nd Legislative Interim, Speaker Straus assigned the committee on Business & Industry the following five charges:

1. Review existing lien laws in Texas and make recommendations for improvement.
2. Review the current statutory requirements to obtain real property by adverse possession in Texas. Recommend any changes to existing law that may be needed to ensure equitable real estate transfers in the state.
3. Examine current deed restriction laws and make recommendations to encourage efficiency in homeownership and conveyance.
4. Monitor the agencies and programs under the committee's jurisdiction and the implementation of relevant legislation passed by the 82nd Legislature, including the amendments to the Texas Property Code regarding homeowners associations.

This report represents the hearing conclusions and recommendations to the 83rd Legislature. The committee would like to express great appreciation to each member for their assistance and efforts throughout the interim. In addition, the committee would like to thank all participants who have provided important testimony and input throughout the process.

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**HOUSE COMMITTEE ON BUSINESS & INDUSTRY**

**INTERIM STUDY CHARGES**

- CHARGE 1:** Review existing lien laws in Texas and make recommendations for improvement.
- CHARGE 2:** Review the current statutory requirements to obtain real property by adverse possession in Texas. Recommend any changes to existing law that may be needed to ensure equitable real estate transfers in the state.
- CHARGE 3:** Examine current deed restriction laws and make recommendations to encourage efficiency in homeownership and conveyance.
- CHARGE 4:** Monitor the agencies and programs under the committee's jurisdiction and the implementation of relevant legislation passed by the 82nd Legislature, including the amendments to the Texas Property Code regarding homeowners associations.
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**CHARGE: 1**

**Review existing lien laws in Texas and make recommendations for improvement.**

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## **SCOPE OF COMMITTEE WORK:**

The committee of Business & Industry held a public hearing on Monday, August 27 of 2012. The committee heard testimony in regards to the Texas Property Code, Ch. 53, Mechanic's, Contractor's, or Materialman's Lien. In addition, the committee heard testimony on property tax lien transfers.

## **BACKGROUND**

### **Mechanic's, Contractor's, or Materialman's Lien**

The construction industry is structured as a downward ladder from the property owners, general contractor, subcontractors down to the suppliers. The general contractors and subcontractors have contracts that require payment for the work and materials provided to the construction project. "Each entity should be afforded protection by constitutional and statutory provisions, as well as recourse through the judicial system to enforce agreements between parties"<sup>1</sup>. For the purpose of this report the committee will focus on the statutory lien laws.

In 1790, statutory lien laws were created in the state of Maryland by Thomas Jefferson. Soon after, every state followed suit with similar legislation. Texas lien law has been in existence since the Republic of Texas. The Texas Constitution provides for a lien on real property for those who provide labor or material to improve the property and the legislature has responded to the constitutional requirement that it establish a "... speedy and efficient enforcement of said liens".<sup>2</sup> The state's mechanic's lien statute was redesigned in 1961 with the passage of The Hardeman Act and it is the current framework. In 1983, the Hardeman Act was codified in Chapter 53 of the Texas Property Code.<sup>3</sup>

The Mechanic's, Contractor's, or Materialman's Lien is a very complex chapter of the Property Code. Specific time limits are placed on giving notices in order for subcontractors and suppliers to perfect a valid lien. In order for a contractor, subcontractor, and supplier to maintain their legal rights against the property owner, they must be in compliance with all the technical requirements of the statute.

Since the enactment of the Hardeman Act, the statute has been amended on numerous occasions. While some of these amendments were justified to correct inequities and injustice in the Mechanic's Lien statute, others were so specific in nature that they appear to do nothing more than serve to complicate an already complicated statute and provide a patchwork character to the existing statute discussed below. The continued revisions of Chapter 53 erode the "speedy and efficient"<sup>4</sup> constitutional requirement. Since the 1983 codification, there have been 127 revisions to its sections.

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## **COMMITTEE FINDING:**

The construction industry is dependent on a credit based foundation; the materials and work are completed in advance of payment, based on prior working relationships with reliable or recommended business partners or, more often, with newly formed relationships for a particular project. The steps required to perfect a lien on a property may become detrimental to the subcontractor's future business with a general contractor, its customer.

During the course of construction, first tier (those with a direct contract with the general contractor) subcontractors and suppliers are required to notify the owner of any non-payment, regardless of the circumstances. The notifications must be timely made even if the money is not due under the contract or if there is an informal agreement of when a payment is to be made. The due date of the notice of nonpayment to the owner is totally governed by when the work was performed, not whether the payment for the work is due.

Accordingly, an owner may receive a notice of nonpayment even though the payment is not due, incorrectly indicating to the owner that the general contractor does not pay bills on a timely basis. Naturally, this unnecessarily causes tension and hard feelings between the subcontractor and its customer, the general contractor. This can create disputes when there is no underlying need for it. In this situation, therefore, a subcontractor must choose between foregoing its mechanic's lien rights or risk creating a bad relationship with its general contractor customer. Lien claimants should not be forced to make that choice.

The committee finds that through the years, "a construction company's need for good working relationships with others often outweighs its need or desire to engage in a dispute about a contract or to file a legal claim".<sup>5</sup> The choice to not use statutory lien provisions can result in potentially devastating financial consequences to subcontractors and suppliers as they are the ones who intentionally avoid placing their claim for payment. The committee cannot address the problems that arise from individuals who do not seek recourse through the proper avenues, but it can recommend a new lien law scheme that does not require lien claimants to make the choice between unnecessarily creating poor relationships with customers while still providing a means for an owner to have protection of its interest.

The committee must stress to all parties involved, the statutory laws have developed for each person's protection. A supplier or subcontractor should use the provisions to protect its interest in the industry. Also, those choosing to exercise their legal right by filing a lien should not be out-casted for future projects.

The committee will acknowledge that Chapter 53 of the Texas Property Code currently places stringent requirements upon subcontractors and material suppliers. Additionally, the suppliers or

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subcontractors who are not adequately familiar with the existing confusing statutory lien laws and continuous changes to provisions are apt to lose the right to secure payment because of the existing statute's confusing and complex nature. That result can be avoided by a new mechanic's lien scheme that is easier for construction industry personnel to understand and that is easier to follow.

EXAMPLE: An owner will ask for additional work to be performed for the construction project. The general contractor will implement the change by directing the subcontractors to commence the changed work in order to continue the project without delays. It is standard practice in the industry that the general contractor will also ask or demand that subcontractors not issue an invoice for their work until the owner submits an official change of work order to the general contractor. The subcontractors will typically continue to work and complete the changes in "good faith."

Due to the delay of official change of work order, the subcontractor may bill the general contractor three or four months after the changed work is complete. Before that billing is unpaid for an extended period, there is nothing to alert the subcontractor of the need to perfect mechanic's lien rights because the subcontractor's aged accounts receivable accounting records do not reflect a problem with nonpayment.

The deadline to give the owner notice of nonpayment is triggered by the date the work was performed, not by the date of the invoice for the work. This creates a possibility or even a probability that the notice deadline for the subcontractors has expired.<sup>6</sup> This effectively punishes subcontractors and suppliers that accommodate their customers request by delaying their invoicing until a later date that coincides with the owner's issuance of a change of work order. There should be a mechanic's lien scheme that will not place an accommodating subcontractor in jeopardy of losing its mechanic's lien rights.

The committee recognizes the cautions set forth by witnesses. Additional changes to bits and pieces of the statute may resolve special interest concerns, but ultimately causes more problems. As witness Robert Bass stated in the hearing "...part of the complexity is not the statute, the complexity is the industry; it is a complicated industry [further referencing the unknown official date of completion causing confusion for deadlines]...Legislation needs to reflect the industry."

The committee agrees that some provisions of the existing mechanic's lien statute are well stated. These provisions, such as the general contractor's current procedure to file a lien, do not contain antiquated and confusing language. Also, many provisions have been interpreted by

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established case law and provide a degree of certainty and familiarity for those who regularly deal with mechanic's liens. Provisions which meet both of these categories should not be changed.

Overall, the committee acknowledges Chapter 53 of the Texas Property Code is logical in concept, but the numerous amendments over the years have resulted in antiquated provisions. Many provisions are the result of the efforts of special interest groups seeking coverage of the statute for very narrow and specific interests.

Chapter 53 is now a confusing patchwork which lacks the continuity needed for a well-coordinated statutory scheme.

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## **RECOMMENDATIONS:**

1. Construct a new scheme for the Mechanic's, Contractor's, or Materialman's Lien. The following concepts form the basic framework of a new mechanic's lien law for Texas. It will simplify the mechanic's lien process and also provide owners with a means to prevent unwanted mechanic's liens of subcontractors and suppliers. A new scheme should maintain a mechanism to allow all segments of the industry to protect their interests.
  - A new lien law scheme should be devised that does not promote disputes simply because a subcontractor or supplier chooses to protect its lien rights.
  - The process for obtaining a lien should not be as treacherous for the claimant as exists in the current statute.
  - A "Notice of Commencement" of the project should be used. The notice should provide the subcontractors and suppliers with the identity and address of the owner, including additional project information, before the work on the construction site begins.
  - Perfecting Mechanism for Mechanic's Liens - The subcontractors and material suppliers would be required to notify the project owner that they will be providing labor and materials to the owner's project. This notice would be required to be sent to the owner, at its address in the Notice of Commencement mentioned above, within a specified time period after the subcontractors and suppliers begin their first work or deliver their first materials to the construction site. No other notice would be required of subcontractors and material suppliers throughout the construction process, except as mentioned below.
  - The claimants who met the above notice requirement would also need to file a document asserting a mechanic's lien with the County Clerk of the county where the project is located within a specified amount of time after the project is complete. After filing the document, a copy shall be sent to the owner and general contractor within a specified time.

**Note:** The procedure outlined above allows owners a reasonable degree of protection from claimants asserting mechanic's liens on the owner's property. In this regard, the owner knows the only subcontractors and suppliers with the ability to perfect a mechanic's lien are the ones that sent notices to the owner at the beginning of their work or delivery of materials. From these notices, an owner will essentially have a list of subcontractors and suppliers working on its project that possess the potential to obtain a

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mechanic's lien in the future for nonpayment for their labor and materials.

The owner can use current contract procedures to require the general contractor to submit with its invoice details of subcontractor and supplier work. The owner can also contractually require the general contractor to submit lien releases and waivers from each subcontractor and supplier providing labor and materials during the period of time covered by the general contractor's invoice.

Accordingly, the owner can compare its list of potential lien claimants with the releases and waivers of lien with each invoice of the general contractor. This provides assurance to the owner that all potential lien claimants have been accounted for by lien releases and waivers, thereby providing protection to the owner against mechanic's lien claims against its property.

A general contractor would not be required to take any more or different steps to perfect its mechanic's lien than is required under the existing mechanic's lien statute.

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## Property Tax Liens

### Background Information:

In 1933, during the Great Depression, property tax lien transfers were first permitted by law (Vernon’s Ann. Tx. Civ. Stat., Article 7345a).<sup>7</sup> In 1979, the property tax lien transfer was codified into Section 32.06 of The Texas Tax Code by the legislature.

Property owners who are unable to make a lump sum payment or payment arrangements with the taxing entity have found relief with the Tax Lien Transfer Industry. A property owner can seek the assistance of the tax lien transferee by giving consent for the delinquent property taxes to be paid; thereby transferring the taxing entity’s lien to the transferee. By choosing the tax lien transfer, property owners have the opportunity to avoid escalating taxing unit penalties, interest, and collection legal fees which can increase a property owner’s tax bill as much as 48% in the first year of delinquency.<sup>8</sup> As shown from Table 3 of the Property Tax Lending Study Report by The Finance Commission:

Regular Penalty, Interest, and Collection Penalties for Delinquent Taxes				
On the first of each month:	Regular Penalty	Interest	Collection Penalties	Total Amount Due if Paid in Full in Respective Month
February	6%	1%		7%
March	7%	2%		9%
April	8%	3%		11%
May	9%	4%		13%
June	10%	5%		15%
July	12%	6%	15 to 20%	35.70% to 41.6%
August		7%	15 to 20%	36.85% to 42.80%
September		8%	15 to 20%	38% to 44%
October		9%	15 to 20%	39.15% to 45.20%
November		10%	15 to 20%	40.30% to 46.40%
December		11%	15 to 20%	41.45% to 47.60%
January of the following year		12%	15 to 20%	42.60% to 48.80%

Table 3: Assessment of regular penalties, interest, and collection penalties for delinquent taxes.

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The property owner is then responsible for making monthly payments to the transferee, with repayment terms ranging from two to ten years based on the agreement made between transferee and property owner.<sup>9</sup>

The property owners do have “other” routes which may or may not be available them in order to pay the property taxes:

Deferral of Payment: Elderly and Disabled property owners may seek a deferral of payment on homesteads. The deferral simply stops or prevents future penalties from being added to the account. The interest rate will be lower for remaining amount for due to the taxing unit. An additional penalty could be imposed if the amount owed by the property owner is not paid by the arraignment date.<sup>10</sup>

Split Payment: Some taxing units may allow payments to be made in two installments without the penalties and fees. The 1<sup>st</sup> payment must be made before December 1<sup>st</sup> of the year prior to taxes is due. Then 2<sup>nd</sup> payment of the remaining balance must be made by the first date of July. If 2<sup>nd</sup> payment is not made by due date, a late penalty, collection penalty, and interest may be charged<sup>11</sup>

Quarterly Installment Payments for Homestead Property: four payments can be made on the property taxes. The request must be made prior to delinquent date, 25% payment in advance and the remaining balances must be split into three final payments due on April 1<sup>st</sup>, June 1<sup>st</sup>, and August 1<sup>st</sup>. If at any point, the property owner is late in making payments on the arraigned dates, the unpaid amount is subject to penalty fees (6%) and interest rates (12%) per annum.<sup>12</sup>

Installment Arraignments: payment agreement can be made between the taxing unit and property owner providing a late penalty and interest accrue on the account during the repayment period.<sup>13</sup>

Partial Payments: a property owner may make partial payments to the taxing unit on account not based on a payment arraignment. During this time, the taxing unit may issue an assessment of delinquent fees including collection penalties and interest.<sup>14</sup>

Escrow Accounts: a taxing unit may enter into a contact which the property owner deposits money into an escrow account to provide for the payment of the property taxes.<sup>15</sup>

Credit Card Payment: a property owner may choose to pay his or her taxes with a credit card. If the property owner uses this method for payment, the taxing unit could charge a convenience fee.<sup>16</sup>

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According to the Property Tax Lien Study- Table 5 (shown below), tax lien transfers provide flexible plans at lower cost giving the property owners a change to regain control over their homestead.<sup>17</sup>

Payment Options		Annual Financial Impact to Property Owner <sup>1</sup>										Total Financial Impact			
		Original Tax Bill	Amt of Tying Unit's Fees <sup>2</sup>	Other Fees	Contract Rate	Term (Months)	Average Monthly Pmt Amt	2012	2013	2014	2015		2016	2017	
Tax Lien Transfer	February	\$0,000	\$560	\$786	14.37%	60	\$219	\$2,651	\$2,631	\$2,651	\$2,651	\$2,651	\$2,651	\$459	\$13,156
	July	\$0,000	\$3,328	\$1,112	14.37%	60	\$282	\$1,459	\$3,502	\$3,502	\$3,502	\$3,502	\$3,502	\$2,063	\$17,511
Remain Delinquent With Tying Unit	February	\$0,000	\$1,808	\$0,000	12.00%	60	\$0,000	\$0,000	\$0,000	\$0,000	\$0,000	\$0,000	\$0,000	\$0,000	\$16,608
	July	\$0,000	\$3,888	\$0,000	12.00%	66	\$0,000	\$0,000	\$0,000	\$0,000	\$0,000	\$0,000	\$0,000	\$0,000	\$17,688
Tying Unit Payment Plan	February	\$0,000	\$2,812	\$0,000	12.00%	36	\$237	\$4,884	\$2,846	\$2,846	\$474.30				\$10,012
	July	\$0,000	\$4,652	\$0,000	12.00%	36	\$287	\$3,749	\$3,561	\$3,561	\$1,761				\$12,652
Credit Card	February	\$0,000	\$560	\$234	17.90%	60	\$222	\$2,223	\$2,668	\$2,668	\$2,668	\$2,668	\$445	\$445	\$13,339
	July	\$0,000	\$3,328	\$283	17.90%	60	\$284	\$1,471	\$3,531	\$3,531	\$3,531	\$3,531	\$2,060	\$2,060	\$17,653

<sup>1</sup> Amounts rounded to nearest dollar, rounding differences may account for incremental variances in calculations

<sup>2</sup> Regular Penalties, Interest, and Collection Penalties

Table 5: A comparison of payment options ranging from tax lien transfer to the use of credit cards to pay delinquent property taxes. Other options may be available including the mortgagee paying the amount of the delinquent property taxes.



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## **Property Tax Lien Process<sup>18</sup>**

Texas law provides an ad valorem tax lien attaches to every parcel of real property in Texas on January 1st of every year. The taxes become delinquent on February 1st the year after they are assessed.

If the property chooses to use the property tax lending industry to resolve the delinquent tax issues, the following steps will apply:

The application for a property tax lien transfer consists of gathering general information about the property and property owner. Typically, tax lien transfer industry will not issue a transfer if the applicant is above the age of 65. Instead, the industry would make the individual aware of possible exemptions, tax deferral, or other avenues available.<sup>19</sup>

During the application process, closing fees and interest rates (up to 18%) are negotiated between the company and the property owner. The applicant will be made of any additional fees and how the cost will vary based on the size of the tax bill.

Upon approval of the application and terms, between the transferee and the property owner, the property owner signs the closing documents in the presence of a notary. This is a simplified step, as there are additional steps in the process involving third parties, including attorneys for legal review, document preparation, and title searches, and county clerks for recordation.

Shortly after closing, the transferee pays the entire amount of the tax bill which includes any and all penalties, fees, and interest directly to the assessor for each taxing entity.

The tax assessor then signs a document transferring the taxing entity's lien to the transferee. The transferee files that tax lien transfer in the county clerk's office. At this point, law requires transferees notify other lienholders the government lien has been transferred to the transferees.

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## **Foreclosure Process<sup>20</sup>**

In Texas, a property tax lender may foreclose on the lien on a property tax loan by one of the two methods:

### Judicial Foreclosure-

The property tax lender files a lawsuit against the property owner.

Judge renders an order. If the judgment is on behalf of the property tax lender; the property will then be available for public auction.

The highest bidder becomes the new successor of the property; which is still subject to the previous owner's right of redemption.

### Non-Judicial Foreclosure-

Default notice of 20 days to cure must be sent by certified mail to all interested parties.

If default not cured, a notice of "intent to accelerate" and "notice of acceleration" (the payoff balance) must be sent by certified mail to the property owner and the first recorded lien on the property.

Property Tax Lender must then verify the property owner did not ask for a deferral of taxes as Section 33.06 authorizes; then

Property Tax Lender must file an "Application for Order for Foreclosure under Texas Rules of Civil Procedure Rule 736" within the district court of the property in question.

The clerk will then issue separate citations to the property owner and any lien holders of the property, and any occupant of the property. A response to this citation is required within 38 days from the date of the citation was placed in the U.S. Postal Service.

If a response was filed in writing, the court must hold a hearing after a "reasonable notice" has been given to all interested parties. The burden of proof is placed on the property tax lien holder who is seeking the foreclosure.

If NO response is received by the court by the due date, the property tax lender may file a motion and proposed order to obtain default order granting the foreclosure.

The court then issues an order for or against the foreclosure.

The property owner may seek to obtain a temporary restraining order or file for bankruptcy to prevent foreclosure.

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The property tax lender must give notice to any pre-existing lien holders at least 60 days prior to the proposed date of foreclosure. The “notice of sale” must allow for a minimum of 21 days between filing date and date of sale. In addition the notice must: (1) be filed with the county clerk where the property is located; (2) the notice must be mail to the property tax borrower and any first lienholders; and (3) a post at the county court must be made where the sale would occur.

The foreclosure auction must take place within a specific time and date set forth at the county courthouse. (1) The highest bidder will be issued a foreclosure deed by the property trustee; (2) if the amount acquired during the auction exceeds the amount of the property tax lien, the remainder amount could then be applied to any additional lien holders and/or property owner who files an application to obtain the funds (3) if the amount is not claimed by additional lien holders and/or previous property owner, the remaining funds will be given to the state after a certain time frame.

**COMPARISON OF TIMELINES FOR TRANSFERRED PROPERTY TAX LIENS**  
 “EXPEDITED” PROCEEDINGS UNDER TRCP 736 VERSUS JUDICIAL FORECLOSURES UNDER CHAPTER 33, TAX CODE

SIMPLE NON-JUDICIAL*	TRCP 736 FORECLOSURE		CHAPTER 33 FORECLOSURE
Notice of Intent to Accelerate	Notice of Intent to Accelerate		Suit filed—service of process
<i>Wait 20+ days</i>	<i>Wait 20 days</i>		<i>Wait 21-28 days</i>
Notice of Acceleration/Notice of Foreclosure	Notice of Acceleration/File Application		Move to set for trial
<i>Wait 21 days</i>	<i>Wait for file-copied Application, ave. 14 days</i>		<i>Wait 45 days</i>
Sale	Service of Application/Notice		Judgment entered
<b>AVERAGE MINIMUM TIMELINE FROM 1<sup>ST</sup> NOTICE TO SALE: 45 DAYS</b>	<i>(Courts w/o hrg req't)</i>	<i>(All other courts)</i>	<i>Wait 30 days</i>
	<i>Wait 38 days; ave. 50</i>	<i>Wait 38 days</i>	Order of sale; posting
	Order granted	File Motion to Set Hearing	<i>Wait 21-45 days; ave. 30 days</i>
	Notice of Foreclosure	<i>Wait for hearing, ave. 30 days</i>	Sale
	<i>Wait 60-90 days, ave. 75</i>	Order granted	<b>AVERAGE MINIMUM TIMELINE FROM 1<sup>ST</sup> NOTICE TO SALE: 130 DAYS</b>
	Sale	Notice of Foreclosure	
	<b>AVERAGE MINIMUM TIMELINE FROM 1<sup>ST</sup> NOTICE TO SALE: 159 DAYS</b>	<i>Wait 60-90 days, ave. 75</i>	
	Sale	<b>AVERAGE MINIMUM TIMELINE FROM 1<sup>ST</sup> NOTICE TO SALE: 177 DAYS</b>	

\* Only applicable to certain transfers made before September 1, 2007. (See Section 4 to Senate Bill 1520.)

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## Right of Redemption

Despite the method of foreclosure, the property owner or mortgage servicer of a prior recorded lien has the opportunity to redeem the property from the successor.<sup>21</sup> If the property in question, was a residence homestead of the owner or agriculture land, the right of redemption may be exercised on or before the second anniversary on which the foreclosure deed was recorded.<sup>22</sup>

<b>Redemption Price</b>	
<b>Within the 1<sup>st</sup> Year</b>	<b>Within the 2<sup>nd</sup> Year</b>
<b>125% of the purchase price</b>	<b>150% of the purchase price</b>
<b>Cost permitted by Texas Tax Code, Sec. 34.21</b>	<b>Cost permitted by Texas Tax Code, Sec. 34.21</b>
<b>The legal judgment rate on that amount</b>	<b>The legal judgment rate on that amount</b>

Commercial property is subject redemption within the first 180 days after the foreclosure deed was recorded.

If the previous property owner expedites his or her rights to redemption, all existing liens on the property at the time of the tax sale remains in effect to the extent not paid from the sale proceeds.<sup>23</sup>

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## **Current Laws/Regulation**

The tax lien transfer industry is primarily governed by sections in the Texas Tax Code (32.06 & 32.065), the Finance Code (Chapter 351), and Texas Administrative Code (Title 7, Chapter 89). The codes listed above proscribe the required disclosures, notices, and foreclosure process. The tax lien transfers also have certain requirements and conditions which are stated in the above codes.

In 2007, the 80<sup>th</sup> Texas Legislature enacted the Property Tax Lender License Act created Chapter 351 of the Texas Finance Code.<sup>24</sup> The Office of Consumer Credit Commissioner (OCCC) serves as the regulatory body of the tax lien transfer industry. The OCCC oversees the licensing of transferees, conducts periodic comprehensive examinations of transferees, and requires that each licensed transferee submits an annual report. The OCCC also promulgates the content of certain required forms, disclosures and outlines allowable fees.

The 80<sup>th</sup> Legislature also extended the right for a property transferee the ability to authorize a transfer of a tax lien for current taxes if the property owner had executed and recorded a tax lien transfer for one or more prior years on the same property. The tax lien could be transferred to a secondary market if: (1) the taxes were delinquent at the time of payment; or (2) the taxes were not delinquent at the time of payment but: (a) the property was not subject to a mortgage lien, or (b) a tax lien transfer authorized by the property owner had been executed and recorded for one or more prior years on the same property and the property owner had executed an authorization consenting to transfer the tax lien for both taxes on the property that were not delinquent and taxes on the property that were delinquent.<sup>25</sup>

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### **Committee Finding:**

The Tax Code, Subsection 32.06(b) states once a person pays the taxes and any penalties and interest imposed the collector “shall” issue a tax receipt to that transferee. Furthermore, the collector “shall” certify the taxes, penalties, interest and collection costs have been paid by the transferee on behalf of the property owner; in turn, the taxing unit’s tax lien is transferred to the transferee.

The committee concludes, the transfer does not create a new lien but merely transfers the taxing entity’s existing tax lien to the transferee; thereby establishing the ownership of the lien to the successor in interest which becomes a super priority lien.

*Does the transferred lien extend to and secure the closing cost associated with the property tax loan to the property owner, lien recordation fees or any other cost incurred before or after the tax lien transfer?*

The Texas Attorney General (OAG) states, “[no] judicial decision of which we are aware addresses this question. And, because the statutory text does not yield a clear answer, [Attorney General] cannot definitively resolve your question.” The OAG issued an opinion stating, in short, “[a] court could conclude that closing costs and lien recordation fees charged by a property tax lien transferee under section 32.06 of the Tax Code are secured by the transferred tax lien.”

Opponent to such charges have asked for an elimination of the priority lien status for any fee, interest charge or penalty for any tax lien transfer loan so that the priority lien extends only to the extent of the amount due the taxing authority on the date of transfer. The lien for any balance would be subordinate to any existing mortgage loan.<sup>26</sup>

Since the AG's opinion states the court "could" determine the fees can be included; an argument could be made to support the fees to be included while there is argument to support it was not the legislatures intent since the statute remains unclear. The committee is left with the decision of whether to create a bifurcated lien.

According to Mary Dogget with the Tax Property Title Lien Association, the charges and fees are “necessary to effectuate the collection and repayment of the taxes. If they were not secured by the priority tax lien, they would be uncollectible, and the transaction would be less effective method of tax collection.”

It is the committee's belief, a bifurcated lien would, in essence, detour the industry from making such loans. The "risk" for a property tax lender would be higher, thereby reflecting in the cost to the consumer (original property taxpayer) through increased interest rates.

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*Are the property tax lender's charges, interest rates, fees and other cost reasonable?*

The charges, interest rates and fees are part of an agreement between the property owner and the property tax lender. Ideally, the property own should shop around for the best “deal” available. As provided in the background for property tax liens, there are multiple routes a property owner may take to pay their property tax.

Senate Bill 762, of the 82<sup>nd</sup> Legislative Session, creates the foundation for more transparency on fees and a standardizing the assessable servicing fees. To date, the lender is limited to closing cost, tax-lien-release fee, payoff or statement of payment fee, and servicing fees.<sup>27</sup>

Additionally, the data collected for the Property Tax Lending Study indicates competition in the free market has brought the interest rate down. The highest cost found through the survey was the foreclosure cost.<sup>28</sup>

The committee must note the most costly of fees could be avoided by the property owner if the loan maintains in good standing through the course of the loan and does not fall into default.

*How many secondary market actors are in the industry? Also, is the secondary market licensed?*

At the August 27, 2012 committee hearing on property tax liens, hundreds of pages of recorded assignments of tax liens from licensed property tax lenders to secondary investors were provided to the House Business and Industry Committee by Robert Doggett. Although, at present, the number of secondary investors in Texas property tax liens who are not licensed is unknown.

While it is not illegal for a property tax lender to sell a transferred tax lien to another person, the law is clear only persons licensed by the Office of Consumer Credit Commissioner pursuant to Chapter 351 of the Finance Code may collect interest on transferred tax liens.

In testimony at the August 27, 2012 committee hearing on property tax liens, OCCC General Counsel Sealy Hutchings and Commissioner Leslie Pettijohn acknowledge of having some awareness of the secondary market in tax liens transfers. Mr. Hutchings agreed the Finance Code requires all lienholders to be licensed and said he believed the Commission has authority to issue a cease and desist order.

The committee has explicit concerns to a unlicensed secondary market. It has found through testimony, there is no clear data as to exactly how many individuals are acting on a secondary market. The business practices of the secondary market is still unknown since there is no reporting mechanism to the OCCC.

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*Is there sufficient notice given to the other lien holders who seek to lose interest if the property is foreclosed on?*

Some mortgage companies have expressed concerns to the committee in regards to notices. The claims of the "the big problem is that foreclosure of a tax lien transfer loan of a few thousand dollars can cause a substantial loss by an existing mortgage lender".<sup>29</sup>

To address these concerns the following recommendation was suggested:

Require the property tax lien could not be transferred until all existing mortgagees have been provided at least 30 day notice of an intent to make the loan or require consent of the mortgagee. If the tax lien transfer loans that did not meet the conditions; it would then become subordinate to any existing mortgage.<sup>30</sup>

After carefully reviewing the lien process along with the foreclosure process, in the committee's opinion, there is a sufficient amount of notices given to the mortgage companies. In addition, the mortgage company may still exercise their right of redemption; if the property is foreclosed on.<sup>31</sup>

*Are property owners who are in agreement with a taxing entity or property tax lender subject to foreclosure from mortgage companies?*

The committee finds property owners who are current on an installment agreement with a county taxing entity can still face foreclosure of their home by their mortgage lender for being technically "in default" on their property taxes.<sup>32</sup>

Most deeds of trust have provisions that declare the borrower in default if they have unpaid property taxes, triggering foreclosure even if the homeowner has an installment agreement with the taxing entity to pay the delinquent taxes.<sup>33</sup> While it is helpful for taxing entities to provide installment agreements to property owners, such a right is worthless if their mortgage lender can foreclose anyway.

The committee believes a change should be made to the Property Code in order to make property tax installment agreements meaningful to the majority of property owners who have a purchase money mortgage, home equity loan or reverse mortgage on their home.

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**Recommendations:**

The committee's intent is to render recommendations to ensure the rights of all parties in the industry and the consumers are protected. Overall, the Property Tax Lending Industry offers property owners a reasonable avenue for paying their delinquent property taxes. Due to the committee's findings, we only recommend the following changes to be made to the industry.

1. Add clarity to the statute to ensure the property tax liens includes the cost associated with acquiring, transferring, and servicing the liens.

Note: No additional amounts are intended to be added.

2. Require a reporting mechanism for transfers to the secondary market by property tax lenders. In addition, provide enhanced penalties for violations to deter unlicensed secondary market actors.
  3. Protect property owners from foreclosure by a mortgage lender when they are current on state-authorized property tax installment agreement.
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**CHARGE: 2**

**Review the current statutory requirements to obtain real property by adverse possession in Texas. Recommend any changes to the existing law that may be needed to ensure equitable real estate transfers in the state.**

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## **SCOPE OF COMMITTEE WORK:**

The committee of Business & Industry held a public hearing on Monday, October 8th of 2012. The committee heard testimony in regards to the current statutory requirements to obtain real property by adverse possession in Texas.

## **BACKGROUND:**

A common law doctrine of gaining legal ownership of another person's real property through certain circumstances is known as adverse possession. The purpose of adverse possession was to establish a legal avenue to resolve disputes and cure defects in real estate titles. Adverse possession also list statute of limitations on possible litigation over ownership and possession.

Essentially, an adverse possession rewards a person who possesses and uses the land productively of another for a certain period of time. The original property owner's failure to exercise and defend his or her property rights during the time frame may result in the permanent loss of the property interest.

The Texas Civil Practices & Remedies Code governs the rules of adverse possession. The adverse possession is defined by statute as "an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person." Public land and Government Entities are not applicable to this statute (Section 16.030)

## **Rules and Limitations**

Tran v. Macha (Tex. 2006) the Texas Supreme Court states, the adverse possession "doctrine itself is a harsh one, taking real estate from a record owner without express consent or compensation." In order to prevent frivolously use of this legal avenue, the statute sets forth rules and conditions which the adverse possessors and original property owners must observe to secure his or her claim to the real property. Statute of limitations does not affect a property owner during a time period of disability.<sup>34</sup>

The statute specifically renders the following to be considered a disability: (1) anyone younger than 18 years of age, regardless of whether the person is married; (2) of unsound mind; or (3) Serving in the United States Armed Forces during time of war.<sup>35</sup>

The statute also gives an exception to the rule, as provided by Sections 16.027 and 16.028, after the termination of the legal disability; a person has the same time to present a claim to the property.

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## Statutes of limitations

May be "tacked" or combined by various successive possessor of the property so long as there exists a direct legal connection between each holder and his successor.<sup>36</sup>

Three Year Limitation Period<sup>37</sup>. "A person must bring suit to recover real property held by another in peaceable and adverse possession under title or color of title not later than three years after the day the cause of action accrues"

Five-Year Limitation Period<sup>38</sup> – "A person must bring suit not later than five years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another".

- A. The section lists the requirements of the possessor to have: (1) Cultivates, uses, or enjoys the property; (2) Pays applicable taxes on the property; and (3) Claims the property under a duly registered deed.
- B. The statute further clarifies that a claim can not be based on forged records such as the deed or power of attorney.

Ten-Year Limitation Period<sup>39</sup>- "A person must bring suit not later than 10 years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who cultivates, uses, or enjoys the property".

Further requirements:

- A. Limitations to land acquired without a title instrument is limited 160 acres; unless the real property actually enclosed.
- B. If a duly registered deed is applicable to redemption of the real property; the boundaries extend to the specifications of the deed.

## Two types of Twenty-Five-Year Limitation Periods-

Section 16.027 provides a 25 year statute of limitation to bring suit to the possessor to recover real property "regardless of whether the person is or has been under a legal disability."

Section 16.028 allows a 25 year statute of limitation based on a title instrument, even if that instrument is void on its face or in fact, "regardless of whether the person is or has been under a legal disability".

The list above consists of major limitations placed on adverse possession; as there are other restrictions and limitations placed policies and procedures for adverse possession.

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**Legal action:**

The burden of proof falls on the backs of the original property owner if he or she is seeking to reclaim interest in the real property. Whereas, an adverse possessor could file suit to stake his or her claim to the real property formally.

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**COMMITTEE FINDING:**

The committee heard public testimony from Mr. Bryan Ricke. Unfortunately, it is the committee's understanding, Mr. Ricke's situation does not apply to the current statutory requirements to obtain real property by adverse possession in Texas.

The committee is aware of the growing problem in the Dallas Fort Worth Metro area of individuals who have successfully and unsuccessfully tried to use adverse possession as a method to gain a real property title.<sup>40</sup>

Be that as it may, adverse possession does have its benefits individuals and title companies to clean a title of real property. Therefore, the committee believes, there is substantial amount of existing case law to differentiate if the individuals are indeed able to use current statute on adverse possession.

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**RECOMMENDATIONS:**

The committee stands silent to any changes to the Texas Civil Practices & Remedies Code which governs adverse possession.

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**CHARGE: 3**

**Examine current deed restriction laws and make recommendations to encourage efficiency in homeownership and conveyance.**

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**SCOPE OF COMMITTEE WORK:**

The committee of Business & Industry held a public hearing on Monday, October 8th of 2012, to address current deed restriction laws and make recommendations to encourage efficiency in homeownership and conveyance. Although, no one person attended the hearing to testified "specifically" for this charge, the committee did have testimony in regards to HOAs and deed restrictions within Charge 4.

Therefore, the committee has decided to combine the background information, committee's finding, and recommendations for both charges to prevent the monotony of repetitive information.

Please proceed to Charge 4.

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**CHARGE: 4**

**Monitor the agencies and programs under the committee's jurisdiction and implementation of relevant legislation passed by the 82<sup>nd</sup> Legislature, including the amendments to the Texas Property Code regarding homeowners associations.**

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## **SCOPE OF COMMITTEE WORK:**

The House Committee on Business and Industry met and heard public testimony on the following charge on Monday, October 8<sup>th</sup> of 2012.

Over the years, the committee has evaluated numerous reports on Home Owners Associations (HOAs). The due diligent of each report, has allowed us to identified concerns and issues arising from the functions and powers of the HOAs. The 82<sup>nd</sup> Legislative Session brought significant changes to the HOAs and additional protection was given to homeowners.

Please note, it is not the committee's intent to bombard the reader with information prior reports contain; therefore, some sections may be brief in overview.

The committee sought to find out the effects of the amendments to address HOAs passed to the Texas Property Code.

## **BACKGROUND INFORMATION:**

### **Homeowners Associations**

Deed restriction are private, contractual covenants which limit land use. Deed restrictions are placed on real property by affirmative action of the owner of the real property, for the benefit of that property only, with a typical intent to enhance the value of that real property. Deed restrictions affect subsequent owners of the real property for a stated term, and for any extensions. There are no limitations on the nature of the deed restrictions except for compliance with laws and public policies.<sup>41</sup>

#### *Legal Frame Work/ Powers & Responsibilities*

HOAs are set up to govern residential subdivision made up of different types of homes such as townhomes, duplexes, and/or single family homes. HOAs use restrictive covenants and deed restrictions "by the associations' articles of incorporation, by laws, and rules. Deed restrictions and rules generally are enforced through a system of fines for infractions."<sup>42</sup> These documents lay the ground works for the way the HOA will operate; from the method of governance to requirements for board members to voting procedures, etc.<sup>43</sup>

HOAs maintain common ground property, issue violations citations, along will collecting assessment fees. Any disputes which arises due to the "violations" maybe disputed in civil court or settled through alternative measures such as mediation.

HOAs are governed by the Property Code and by court rulings (Inwood North Homeowners' Association v. Harris (736 S.W2d 632). The court ruling brings has been a "hot topic" for many years, since it allows HOAs to foreclose on homesteads for assessment fees.

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## 2011 Homeowners Association Legislation Summary

### Affecting Non-Condo HOAs

#### Amending the Declaration – Effective 9/1/2011 SB 472

A declaration may be amended by a vote of 67 percent of the total votes allocated to property owners (except during the declarant control period). If the declaration contains a lower percentage, the percentage in the declaration controls. (Example: If the declaratory instrument provides for amendment by 100% of the total votes, an amendment can pass with only 67% of the owner votes)

#### Board Members and Declarant Control –Effective 1/1/2012 HB 2761

*Transfer of Declarant Control-* When a developer sells 75% of the lots that may be created in a subdivision, 1/3 of the board must be elected by owners other than the declarant. If the declaration does not provide the maximum number of lots that may be created, home owners elect 1/3 of the board 10 years after the declaration is recorded. Most importantly, this bill does not distinguish lot sales to builders as opposed to lot sales to end users.

#### Board Members Qualifications – Effective 9/1/2011 SB 472 & 1/1/2012 HB2761

(Two provisions in separate bills contain the same provision. As such, the earlier date controls)

*No Qualifications-* Voids provisions in governing documents that restrict an owner's right to run for the board. (Example: This will void provisions such as term limits, not allowing spouses to serve at the same time and not allowing delinquent account owners to serve)

*Exception-*If board is presented with evidence that a board member has been convicted of felony or crime involving moral turpitude, the board member is immediately ineligible to serve on the board of the property owner's association and automatically removed.

#### Association Websites- Effective 1/1/2012 HB 1821

If an HOA maintains a website or the HOA manager maintains a website on behalf of the HOA, all dedicatory instruments must be available on the site.

#### Association Records- Effective 1/1/2012 HB2761

*Open Records-*Owners are entitled to access HOA records. Owners must submit written requests via certified mail describing the books and records requested in sufficient detail to the mailing address of the association or representative listed in the management certificate. Within 10 business days from a written request the HOA must either (1) provide the copies to the owner; (2) provide available inspection dates; or (3) provide written notice that the documents cannot be

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produced within 10 days along with a date within an additional 15 days on which the records can be copied or inspected. Owners must pay for cost of copies, such cost not to exceed \$.10 per copy.

*Records Production and Copying*-HOA boards must adopt a records production and copying policy that prescribes the cost the association will charge for compilation, production, and reproduction of information requested. The charges may include reasonable cost of materials, labor, and overhead. This policy must be recorded as a dedicatory instrument. Importantly, all HOAs will need to adopt and record this policy prior to January 1, 2012 or HOAs will not be allowed to charge for these cost.

*Document Retention*-HOA's composed of over 14 lots shall adopt a document retention policy. The policy must include the following: (1) governing documents (retained permanently); (2) financial books and records (seven years); (3) owner account information (five years); (4) contracts with a term over one year (four years after expiration of contract); (5) board and owner meeting minutes (seven years); (6) tax returns and audit records (seven years).

#### Board Meetings-Effective 1/1/2012 HB2761

*Open Meetings*- Regular and special board meetings must be open to the owners, subject to the board's rights to adjourn a board meeting and reconvene in a closed session for discussion on specific actions such as (1) actions involving personal (2) pending or threatened litigation, (3) contract negotiations, (4) enforcement actions, (5) confidential communications with the association's attorney, (6) private owner information or matters requested to remain confidential by the affected parties and by agreement of the board. Following any such executive session, any decision made must be summarized and placed in the minutes general terms without disclosing information what was to remain confidential.

*Notice*- Advance notice of board meetings must be provided to owners. This can be accomplished by posting notice 72 hours in advance on the association's common property and sending the notice by email to each owner who has registered an email address with the association. Notice is not required if the board meets by phone or email to consider routine administrative matters or in the case of an emergency.

#### Association Meeting-Effective 1/11/2011 SB 472 1/1/2012 HB2761

(Two provisions in separate bills contain the same provision. As such, the earlier date controls)

*Right to Vote*- Every property owner is entitled to vote. Provisions in governing document that disqualifies a property owner from voting in the election of board members or any issue affecting an owner's rights and responsibilities are void. (Example: If the governing documents include a provision that delinquent owners cannot vote, this provision is void)

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*Electronic and Absentee Ballots*- Owners may vote in person, by proxy, electronically, or via absentee ballot. This bill outlines specific procedures for voting by “absentee” or “electronic” ballot and limits the use of these ballots.

*No Secret Ballots*- Votes cast in an election or vote must be in writing and signed by the member. The only exception is if the election is uncontested. Electronic votes constitute as written and signed ballots.

Association Meetings-Effective 1/1/2012 HB 2761

*Annual Meeting Required*-HOA boards must annually call a meeting of the members. Failure to call an annual meeting authorizes a committee of owners to call a meeting to elect directors.

*Notice*- HOAs must give 10 to 60 days notice of an election or vote.

*Recount*- Owners have the right to demand a recount within 15 days after the vote. In the event a recount of a vote is requested, the process for a recount is outlined in this bill. An owner requesting a recount is responsible for all the cost associated with the recount unless the recount changes the results of the vote.

Delinquent Assessments- Effective 1/1/2012 HB1228

*Payment Plan required*- HOAs with more than 14 lots must adopt a payment plan for delinquent assessments. This plan must be recorded in the real property records. Terms of the plan should be from 3 to 18 months.

*Priority of Payments*-Payments received shall be applied to an owner’s debt in the following order: (1) delinquent assessments; (2) current assessments; (3) any attorney’s fee or third party collection cost associated solely with the assessment; (4) other attorney’s fees; (5) fines; (6) other amounts.

*Third Party Collections*- An HOA may not hold an owner liable for the fees of collection agent unless the association provides a 30 day notice to the owner via certified mail. The notice must contain owner of the delinquency and provides the option to enter into a payment plan.

*Collection Fee Arrangements*- Delinquent owners are not liable for the fees of a collection agent if the obligation for payment by the association is in any way contingent on the amount recovered or if the agreement fails to require the associations to pay the agent’s fee.

*Notice of Assessment Lien*- A legal instrument affecting title to real property and must be prepared by an attorney.

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### Elimination of Non-Judicial Foreclosure-Effective 1/1/2012 HB 1228

*Notice to Lienholders Required-* Associations must give written notice of the amount of the delinquency to any lienholder of record and provide a 60 day opportunity to cure prior to commencing foreclosure of an assessment lien.

*Judicial Foreclosure Required-* Absent an agreement with the owner to the contrary (which must be obtained at the time of foreclosure), all HOA assessment lien foreclosures must go through an expedited judicial foreclosure process.

*Removal or Adoption of Foreclosure Authority-* Homeowners holding at least 10 % of all the voting interest in the association may proceed with a petition to require the HOA to hold a vote. 67% of the votes in the association can allow the associations to adopt or remove a foreclosure provision in governing documents.

### Resale Certificates –Effective 1/1/2012 HB 1821

*Contractual notice-* the required contractual notice dealing with the inclusion of property in an HOA has been expanded to include information related to resale certificates.

*Content-* content of the certificates has been modified slightly. All lawsuits to which the HOA is party must be included. Purchasers requesting resale certificates must provide proof of a contract. Associations have 60 days to prepare the resale certificates. Fees can be collected from home purchasers for providing the resale certificates. Resale certificates must be prepared no more than 60 days to delivery. Such certificate must reflect any upcoming special assessments.

### **Summary of Legislation Affecting ALL HOAs– Single Family and Condos**

#### Record All Dedicatory Instruments- Effective 1/1/2012 HB1821

A governing document that is not recorded by January 1, 2012 will not be effective. This means all governing documents must be recording including declaration, certificates of formation, bylaws, rules and regulations, community policies, architectural guidelines, etc. HOAs should review governing documents and record any document which has not been recorded prior to January 1, 2012.

#### Transfer Fees- Effective NOW, HB8

All private transfer fees payable to the HOAs, certain administrative or transfer fees payable to the management company, and transfer fees collected by tax exempt 501©3 entities are authorized. This law voids other private transfer fees.

(Example: A restrictive covenant requiring a payment to a developer every time a lot is sold is void.)

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## Use Restrictions

### *Flags-Effective Now, HB2779*

Owners may display the US flag, the State of Texas flag, and military flags; however, an association may have rules related to the flagpole material and condition of the flag. Associations may also regulate the size, number, location of flagpoles, size of the flag, and prohibit owners from displaying the flag on common areas.

### *Religious Displays on Doors-Effective Now, HB362*

HOAs must permit owners to display religious objects on the front door or door frame of the owner's home if the display is motivated by a residents "sincere" religious belief. HOAs may regulate these displays if the HOA has or adopts a specific restriction requiring the item displayed or affixed to have a total size of no more than 25 square inches.

### *Solar Devices- Effective Now, HB 362*

HOAs cannot prohibit owners from installing a solar energy device on his house or lot. However, HOAs may regulate these devices if the HOA has or adopts specific provision related to the location of the device, requiring the device to be located on the owner's roof or in a fenced yard or patio and requiring the device not extend higher than the roofline or tall than the fence line.

### *Roofs-Effective Now HB 362*

HOAs must allow shingles which are wind and hail resistant, energy efficient or generate solar energy, if quality and appearance are comparable to the subdivision standard.

### *Rain Water Harvesting-Effective 9/1/2011 HB 3391*

Rainwater harvesting systems are permitted. HOAs may regulate these systems by adopting specific restriction related to the location, materials and color schemes of the systems.

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## **COMMITTEE FINDINGS:**

### ***Issues:***

In light of the recently passed legislation: "The HOA Reform Coalition has received too many calls for help because of HOA abuse to claim that the 2011 legislature solved HOA problems. In fact, because TCAA either supported or negotiated the bills, the result has been continuing stream of fines, fees, liens, harassment, and foreclosure filings"<sup>44</sup>

### ***Loop-Holes:***

While the legislation provides more avenues for the homeowner to amend covenants, the percentage of votes required to make such amendments are hard.

The amendments to the Property Code by the 82nd Legislature, excludes condo homeowners.<sup>45</sup>

Opponent to HOA's argue that builders and developers are still exempt from the requirements to provide notice that homeowners are essentially contracting with and joining an HOA. Re-sellers are required to provide this information well before closing. The genesis of an HOA home begins with the builder or developer, and a significant number of homebuyers procuring new homes are unaware of the HOA requirements. An HOA is used as a selling point and as such the "pluses" of an HOA are pointed out without the pitfalls. The current "buyer beware" language needs to be extended to include ALL sellers of HOA homes.<sup>46</sup>

### ***Foreclosures:***

In general, opponents and supporters arguments dealing with HOA's right to foreclose on a homestead remains the same. Some argue HOAs should retain the right to foreclose on a home, while others say the right should be revoked.<sup>47</sup>

In regards to the recently changed legislation, opponents say:

The lienholder files an application for an order allowing foreclosure. Importantly, no discovery is permitted and no cross claims, counterclaims, third party claims, or other independent claims for relief may be asserted. The only issue to be considered in a Rule 736 proceeding is right of the applicant to obtain an order to proceed with foreclosure of the lien. After an order is obtained, a person may proceed with the foreclosure process. [they] view this proceeding as a mere hiccup to the current process<sup>48</sup>

Opponents believe a mediation requirement, such as for the payment plan, should be required prior to foreclosure. Generally a board will hold a closed meeting to determine who the association will foreclose but a member is not given the opportunity to mediate this. In other words, the mediation process should take place "before" a lawyer is contacted as by the time a lawyer is contacted, mediation [is no longer] an option.<sup>49</sup>

Opponents who are against foreclosure on homesteads brought the "HOA Dunning System" to the attention of the committee members. This is a method used by various HOA's across the nation including on in Austin, Texas.<sup>50</sup>

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The "HOA Dunning System"<sup>51</sup>:

- The system is designed to locate and maintain contact with debts
- Report the debtors to Credit Bureaus
- Maintains HOAs supervision of the collection process via internet
- Requires homeowners to pay the HOA directly
- Recovery debt without high cost to HOA's (cheaper than attorney fees)
- The System itself not designed to foreclose (Although, HOA can still seek this route if amendments to their covenants is not sought.)

*Enforcement Provisions and Oversight:*

Brenda Johnson with the San Antonio Satellite Office of the National Homeowners Advocacy Group gave a statement which summarizes a major one concerns for many homeowners:

HOA legislation reads, feels, and looks good to the homeowner but is generally unenforceable. The legislation provides only one process for dispute resolution that simply is out of reach for almost all homeowners: our Courts

*Conclusion:*

During the hearing, Chairman Burt R. Solomons expresses his opinion on where the legislative body stands "at this point" in regards to a state agency oversight program. He does not foresee any changes to be made without the proper statistical data.

Rep. Helen Giddings followed Chairman Solomons' remark by stating "We are not pleased with where we are....it's just hard to strike a balance...". She continued by agreeing with the need for more data.

The committee as a whole, would like to express the same concerns with not having statistical data in regards to how many HOAs are in existence, where they are located, how many violations are truly in existence and most importantly, how many utilize the foreclosure to procure the amounts owed.

The committee is aware of data for a few counties which are available but a registry or a compiled report in which contains this information for ALL HOAs in the State of Texas is non-existent to date, or at least to our knowledge.

The committee among everyone else should recognize the HOAs role in our communities as a whole; not focus on what appears to localized issues. Real Estate Developers have over the years relied on HOAs to finance ongoing maintenance of common property. Also more importantly, developers have used HOAs to ensure the maintenance of privately built infrastructure due to the cities inability to fund such projects.<sup>52</sup>

Rep. John Garza, was a board member for the HOA in which he resides. He states, during the hearing, of being in the industry for many years within his district. Rep. Garza continues to declare many HOAs operate with little to no problems.

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The “horror stories” of HOA abuses over the years are still in existence but seem to be more limited. The committee hearings prior to date were filled with constituents who waited hours upon hours to share their personal experiences with the members. In short, we would like to conclude from today’s limited testimony; our continuous efforts have begun to create a more amicable environment for homeowners who reside in an HOAs.

The committee still faces the same concerns with protecting a homeowner’s homestead from foreclosure while granting the right amount of authority to the HOAs to recoup assessment fees to maintain its functions.

At this period of time, the committee would like to stress the importance of educating homeowners of their rights. If a community shares the same concerns with the HOAs foreclosure procedure, under the recently enacted HB1228, homeowners can band together to amend the subdivision HOAs governing documents to remove the foreclosure authority.<sup>53</sup>

The homeowners "are empowered to participated in their neighborhood's affairs and remove an association's board if it contradicts owner's wishes".<sup>54</sup> With the recent enactments, homeowners are all given the opportunity to remove the foreclosure process. The homeowners could reach out to their neighbors and board members to utilize the "HOA 'Dunning' System" in replace of the foreclosure proceedings.

Over the past years, the committee has tried to find a “balance” between HOAs and protecting homeowner’s property rights. However, the committee would like to reiterate a prior conclusion:

Government has a very limited role in interfering with such contracts, as long as such contracts do not violate either manmade or natural law. When potential homeowners contract to be part of an HOA through deeds of sale, they should not generally look to the government to protect them when they are unhappy with the bargain that they made.<sup>55</sup>

Even with ALL being said, the committee is still not satisfied with testimony elucidating a homeowners’ negative experience with HOAs who abuse their power.

The quote “[if] there is no penalty [for] disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation” from Alexander Hamilton’s Federalist papers was used to end Brenda Johnson’s testimony. The committee genuinely, appreciated this quote.

For, we do agree, yet at this time, we remain hesitant to assert further enactment of laws without proper research with ligament statistical data to prove a state-wide issue.

Therefore, it is the committee’s opinion, the legislative amendments set forth by 82<sup>nd</sup> Legislature was steered in the right direction.

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**RECOMMENDATIONS:**

1. Lower the amount of votes necessary for homeowners to seek recourse through their existing voting rights.
2. Extend benefits of the amendments to Condo Association Members.
3. Education verse Regulation; We feel homeowners do have the power available to them to address their concerns at the local community level.

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## **APPENDIX A**

Statements:

Rep. Rob Orr, Vice Chair  
Rep. Dwayne Bohac

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**ROB ORR**  
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The Honorable Joe Deshotel  
Chairman, House Committee on Business & Industry  
P.O. Box 2910  
Austin, TX 78768

Dear Chairman Deshotel,

I wish to thank you for your hard work and due diligence in compiling the House Committee on Business and Industry's interim report. The report contains numerous excellent and beneficial recommendations. However, I have reservations in regard to the report's treatment of Charge No. 1 which instructs the Committee to "Review existing lien laws in Texas and make recommendations for improvements"

On the recommendations for changes to the state's mechanics lien laws, my concern is specifically with the third, fourth, and fifth bullet points. Creating an almost entirely new regulatory framework for such liens is a change that I do not believe can be justified by the testimony and evidence presented to the committee. In fact my take away from the discussions on this question were how much disagreement existed among various parties to exactly how much of a problem existed and especially the best approach to take to resolve any such problems. For that reason, I cannot at this time endorse the specific recommendations mentioned above.

My concern with recommendations 1 and 3 in the property tax lien section of the report is similar to above. I do not believe the evidence and testimony heard by the committee justifies making a recommendation on what is a contested matter between various parts of the lending industry, and therefore I cannot at this time support the recommendation to make explicit what lending costs can and cannot be covered by a transferred tax lien. The recommendation relating to foreclosure of mortgage liens when a property tax payment scheme is in effect is also in my opinion not supported by the evidence presented to the committee; it seems more like a solution in search of a problem and far too hypothetical to justify inclusion as a recommended course of action for the legislature.

It is for these reasons that I respectfully dissent from some of the recommendations related to Charge 1 though overall am satisfied with the other parts of the report.

Again, thank you for you and your staff's hard work and for the opportunity to participate in the process. I look forward to working with you on these and other important issues in the 83rd Legislature.

Sincerely,

A handwritten signature in black ink that reads "Rob Orr".

Representative Rob Orr

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**DWAYNE BOHAC**  
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## TEXAS HOUSE OF REPRESENTATIVES

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December 7, 2012

The Honorable Joe Deshotel  
Chairman, House Committee on Business & Industry  
P.O. Box 2910  
Austin, TX 78768

Dear Chairman Deshotel:

I want to commend you and your staff for the detailed and diligent work in drafting the interim report for the House Committee on Business & Industry. The report is very thorough and offers a number of exceptional recommendations. I am, however, apprehensive with the report's view concerning Charge 1, "Review existing lien laws in Texas and make recommendations for improvement."

I have reservations regarding the recommendations that have been made for Charge 1, pertaining to changes to the state's mechanic lien and property tax lien laws. Based on the testimony and evidence provided at the August 27, 2012 public hearing, I do not feel that some the recommended changes are justified and should be implemented. I cannot support some recommendations for Charge 1.

I respectfully submit my signature for the interim report with the request that my objection to the recommendations of Charge 1 be noted and included.

Thank you and your staff for your hard work and support during the 82nd Legislature and throughout the interim. I look forward to being your colleague during the 83rd Legislature.

Best regards,

Dwayne Bohac

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## ENDNOTES

- <sup>1</sup> Interim Report to the 77th Legislature, House Committee on Business & Industry, p. 20
  - <sup>2</sup> <http://www.statutes.legis.state.tx.us/Docs/CN/htm/CN.16.htm>
  - <sup>3</sup> Testimony given by Richard Thomas at the Business & Industry Committee hearing on August 27, 2012
  - <sup>4</sup> <http://www.statutes.legis.state.tx.us/Docs/CN/htm/CN.16.htm#16.37>
  - <sup>5</sup> Testimony given by Richard Thomas at the Business & Industry Committee hearing on August 27, 2012
  - <sup>6</sup> Testimony given by Richard Thomas at the Business & Industry Committee hearing on August 27, 2012
  - <sup>7</sup> Property Tax Lending Study Report by The Finance Commission's, August 2012, p. 10
  - <sup>8</sup> Property Tax Lending Study Report by The Finance Commission's, August 2012, Table 3, p. 4
  - <sup>9</sup> Testimony given by Commissioner Leslie Pettijohn with the Finance Commission at the Business & Industry Committee on August 27, 2012
  - <sup>10</sup> Texas Property Code 33.06(d)
  - <sup>11</sup> Texas Tax Code §33.01 & 33.08
  - <sup>12</sup> Texas Tax Code §31.031-.032
  - <sup>13</sup> Texas Tax Code §33.05
  - <sup>14</sup> Texas Tax Code §31.07,33.01,33.07
  - <sup>15</sup> Texas Tax Code §31.072
  - <sup>16</sup> Texas Tax Code Ann. §31.06 (c)
  - <sup>17</sup> Property Tax Lending Study Report by The Finance Commission's, August 2012, p. 8
  - <sup>18</sup> Industry Overview by Property Tax Lend Holders Association, March 2012
  - <sup>19</sup> Testimony given by Charlie Brown at the Business & Industry Committee Hearing on August 27, 2012
  - <sup>20</sup> Property Tax Lending Study Report by The Finance Commission's, August 2012, p. 16-17
  - <sup>21</sup> Texas Tax Code, 32.06
  - <sup>22</sup> Property Tax Lending Study Report by The Finance Commission's, August 2012, p. 17
  - <sup>23</sup> Property Tax Lending Study Report by The Finance Commission's, August 2012, p. 17
  - <sup>24</sup> Property Tax Lending Study Report by The Finance Commission's, August 2012, p. 10
  - <sup>25</sup> Property Tax Lending Study Report by The Finance Commission's, August 2012, p. 10-11
  - <sup>26</sup> Testimony from John Flemings on behalf of the Mortgage Bankers to the Business & Industry Committee Hearing on August 27, 2012
  - <sup>27</sup> Property Tax Lending Study Report by The Finance Commission's, August 2012, Table 7-9, p. 15-13
  - <sup>28</sup> Property Tax Lending Study Report by The Finance Commission's, August 2012, p. 35
  - <sup>29</sup> Testimony from John Flemings on behalf of the Mortgage Bankers to the Business & Industry Committee Hearing on August 27, 2012
  - <sup>30</sup> Testimony from John Flemings on behalf of the Mortgage Bankers to the Business & Industry Committee Hearing on August 27, 2012
  - <sup>31</sup> Tax Code 32.06(k)
  - <sup>32</sup> Testimony from John Flemings on behalf of the Mortgage Bankers to the Business & Industry Committee Hearing on August 27, 2012
  - <sup>33</sup> Testimony from John Flemings on behalf of the Mortgage Bankers to the Business & Industry Committee Hearing on August 27, 2012
  - <sup>34</sup> Texas Civil Practices & Remedies Code, Section 16.022
  - <sup>35</sup> Texas Civil Practices & Remedies Code, Section 16.022
  - <sup>36</sup> Texas Civil Practices & Remedies Code, Section 16.023
  - <sup>37</sup> Texas Civil Practices & Remedies Code, Section 16.024
  - <sup>38</sup> Texas Civil Practices & Remedies Code, Section 16.025
  - <sup>39</sup> Texas Civil Practices & Remedies Code, Section 16.026
  - <sup>40</sup> <http://www.wfaa.com/news/crime/Jury-deliberates-penalty-for-Arlington--179497611.html>  
<http://www.khou.com/news/Squatter-132590428.html>  
<http://www.foxnews.com/politics/2011/07/21/texas-mans-16-property-seizure-throws-obscure-law-into-spotlight/>
  - <sup>41</sup> Wilson, Reid C. "Public and Private Land Use Regulation: Zoning and Deed Restrictions" University of Houston, p.2, June 1993.
  - <sup>42</sup> House Research Organization, "Interim News: Foreclosure by Homeowner Associations: Striking a Balance", p. 2, July 23, 2002
  - <sup>43</sup> House Research Organization, "Interim News: Authority of HOAs in Texas examined" pg 2, August 12, 2010.
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- <sup>44</sup> Written Testimony from Irene "Beanie" Adolph of the HOA Reform Coalition to Business and Industry Committee
- <sup>45</sup> Written testimony from Harvella Jones, President of The National Homeowners Advocate Group, LLC.
- <sup>46</sup> Written testimony from Brenda Johnson with the San Antonio Satellite Office of National Homeowners Advocacy Group provided to the Business & Industry committee.
- <sup>47</sup> House Research Organization, "Interim News: Foreclosure by Homeowner Associations: Striking a Balance", p. 3, July 23, 2002.
- <sup>48</sup> Written testimony from Brenda Johnson with the San Antonio Satellite Office of National Homeowners Advocacy Group provided to the Business & Industry committee.
- <sup>49</sup> Written testimony from Harvella Jones, President of The National Homeowners Advocate Group, LLC.
- <sup>50</sup> Written testimony from Harvella Jones, President of The National Homeowners Advocate Group, LLC.
- <sup>51</sup> NCPlus Brochure "Healing Texas' HOA Collection Cost Crisis"
- <sup>52</sup> House Research Organization, "Interim News: Authority of HOAs in Texas examined" pg 1-2, August 12, 2010.
- <sup>53</sup> <http://www.legis.state.tx.us/BillLookup/Text.aspx?LegSess=82R&Bill=HB1228>
- <sup>54</sup> House Research Organization, "Interim News: Authority of HOAs in Texas examined" pg 7, August 12, 2010.
- <sup>55</sup> House Committee of Business & Industry, Interim Report to 80<sup>th</sup> Legislature, p. 51
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