



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

March 13, 1997

The Honorable Rodney Ellis  
Chair, Senate Jurisprudence Committee  
Texas State Senate  
P.O. Box 12068  
Austin, Texas 78711-2068

Letter Opinion No. 97-019

Re: Whether Property Code section 204.010(a)(11), (12) authorizes a property owners' association to foreclose on a homestead in order to collect costs spent by the association to enforce deed restrictions (ID# 39292)

Dear Senator Ellis:

You ask whether Property Code section 204.010(a)(11), (12) authorizes a property owners' association to foreclose on a homestead in order to collect costs spent by the association to enforce deed restrictions. Section 204.010 -- a provision of chapter 204 added to the Property Code in 1995<sup>1</sup> that applies only to certain subdivisions in certain counties<sup>2</sup> -- provides, in pertinent part, as follows:

(a) Unless otherwise provided by the restrictions or the association's articles of incorporation or bylaws, the property owners' association, acting through its board of directors or trustees, may:

....

(11) if notice and an opportunity to be heard are given, collect reimbursement of actual attorney's fees and other reasonable costs incurred by the property owners' association relating to violations of the subdivision's restrictions or the property owners' association's bylaws and rules;

(12) charge costs to an owner's assessment account and collect the costs in any manner provided in the restrictions for the collection of assessments.

---

<sup>1</sup>See Act of May 27, 1995, 74th Leg., R.S., ch. 1040, § 2, 1995 Tex. Gen. Laws 5170, 5171.

<sup>2</sup>Chapter 204 applies only to certain subdivisions located in whole or in part in a county with a population of 2.8 million or more. Prop. Code § 204.002(a). In some cases, provisions of chapter 204 will apply to other counties. See *id.* ch. 205. Chapter 204 sets forth procedures to create a property owners' association in certain subdivisions with restrictions that do not provide for one. See *id.* § 204.006.

Prop. Code § 204.010.<sup>3</sup> The term “restrictions” is defined for purposes of chapter 204 as follows: “one or more restrictive covenants contained or incorporated by reference in a properly recorded map, plat, replat, declaration, or other instrument filed in the county real property records, map records, or deed records.” *Id.* §§ 201.003, 204.001(1). “Restrictive covenant” means “any covenant, condition, or restriction contained in a dedicatory instrument, whether mandatory, prohibitive, permissive, or administrative.” *Id.* §§ 202.001(4), 204.001(2).<sup>4</sup>

Attached to your request is an analysis of chapter 204 prepared by an attorney for property owners’ associations that states that section 204.010(a), subsections (11) and (12) “allow community associations to charge a homeowner for attorney’s fees and ‘other reasonable costs’ (including presumably management company charges for demand letters) spent to enforce the deed restrictions and *foreclose on the homeowner in order to collect them.*” (Emphasis added.) You express concern that section 204.010(a)(12) authorizes a property owners’ association “to foreclose [on a homestead] in order to collect charges outlined in section 204.010(a)(11), in cases where homestead rights do not precede a covenant with the association.”

Subsection (11) authorizes the board of a property owners’ association to “collect reimbursement of actual attorney’s fees and other reasonable costs incurred by the property owners’ association relating to violations of the subdivision’s restrictions or the property owners’ association’s bylaws and rules.” Subsection (12) provides that the board of the property owners’ association may “charge costs to an owner’s assessment account and collect the costs in any manner provided in the restrictions for the collection of assessments.” Presumably, the term “costs” in subsection (12) refers to the costs described in subsection (11), that is costs incurred by the property owners’ association relating to violations of the subdivision’s restrictions or the property owners’ association’s bylaws and rules.

---

<sup>3</sup>This office addressed subsection (9) of section 204.010(a) in Letter Opinion No. 96-123 (1996).

<sup>4</sup>The terms “regular assessment” and “special assessment” are defined in chapter 204 as follows:

(3) “Regular assessment” means an assessment, charge, fee, or dues that each owner of property within a subdivision is required to pay to the property owners’ association on a regular basis and that are to be used by the association for the benefit of the subdivision in accordance with the original, extended, added, or modified restrictions.

(4) “Special assessment” means an assessment, charge, fee, or dues that each owner of property within a subdivision is required to pay to the property owners’ association, after a vote of the membership, for the purpose of paying for the costs of capital improvements to the common areas that are incurred or will be incurred by the association during the fiscal year. A special assessment may be assessed before or after the association incurs the capital improvement costs.

Your inquiry raises two issues: (i) whether a cost is authorized by section 204.010(11), and (ii) whether a lien for subsection (11) costs may be enforced by foreclosure of a homestead. To be authorized by subsection (11), a cost must relate to violations of the subdivision's restrictions or the property owners' association's bylaws and rules and must be reasonable. The determination whether any particular cost is reasonable and relates to violations of the subdivision's restrictions or the property owners' association's bylaws and rules will depend upon the facts of the particular case. The second issue raises more complex legal and factual issues. Although we cannot ultimately resolve it, we can provide the following guidance.

The Texas Supreme Court addressed homestead rights and foreclosure to collect subdivision assessment liens in *Inwood North Homeowners' Association, Inc. v. Harris*, 736 S.W.2d 632 (Tex. 1987). As that case makes clear, homestead rights, although constitutionally created, may not be construed to avoid or destroy preexisting rights. 736 S.W.2d at 635. When the property has not become a homestead at the execution of the mortgage, deed of trust, or other lien, the homestead protections have no application even if the property later becomes a homestead. *Id.* With respect to the relationship between a homestead right and a subdivision assessment lien, the court determined that the critical issue is when the lien attaches on the property and whether the lien is the result of a covenant that runs with the land:

If [the lien] occurred simultaneously to or after the homeowners took title, there is authority which would deem the homestead right superior. See *Freiberg v. Walzem*, 85 Tex. 264, 20 S.W. 60, 61 (1892). On the other hand, if the lien attached prior to the claimed homestead right and the lien is an obligation that would run with the land, there would be a right to foreclose.

In Texas, a covenant runs with the land when it touches and concerns the land; relates to a thing in existence or specifically binds the parties and their assigns; is intended by the original parties to run with the land; and when the successor to the burden has notice.

*Id.*

In *Harris*, the developer had filed a declaration of covenants and restrictions in 1980 that stated that each person receiving a deed for a lot in the subdivision is deemed to agree to pay to the association annual assessments and special assessments for capital improvements. *Id.* at 633. Homeowners purchased lots in subsequent years. The deeds made specific reference to the maintenance charges or to the property records where the declaration was filed. *Id.* at 634. On the basis of these facts, the court concluded that the restrictions were placed on the land before it became the homestead of the homeowners. *Id.* at 635. The court also concluded that the restrictions contained valid contractual liens that ran with the land. *Id.* As a result, "an order of foreclosure would have been proper." *Id.* at 635-36.

Whether a property owners' association may foreclose on a homestead to collect the costs outlined in section 204.010(a)(11) will depend upon whether the lien for those costs (i) attached to the property prior to the homestead right and (ii) is the result of a restriction that runs with the land. The answers to both these questions will ultimately depend upon the facts of the particular case and are beyond the purview of an attorney general opinion. With respect to the first issue, however, we note that the determination whether a lien for costs incurred by a property owners' association relating to violations of the subdivision's restrictions or the property owners' association's bylaws and rules preexisted a homestead right will depend upon the terms of the applicable restrictions and whether the assessment of these costs is contemplated by an existing lien under the restrictions or creates a new lien. *Cf. Boudreaux Civic Ass'n v. Cox*, 882 S.W.2d 543, 547 (Tex. App.—Houston [1st Dist.] 1994) (suggesting in dicta that if amendment to restrictions creates a new lien made subsequent to homestead declaration, it is not enforceable; if it is a modification of the maintenance fee lien, it is a lien preexisting the homestead right and is enforceable).<sup>5</sup> We do not believe that a claim for costs arising merely by virtue of an action taken by a board of a property owners' association under section 204.010(a) would create a lien that would precede a homestead right dating from before the board's action.

### S U M M A R Y

To be authorized by Property Code section 204.010(11), a cost must relate to violations of the subdivision's restrictions or the property owners' association's bylaws and rules and must be reasonable. Whether a property owners' association may foreclose on a homestead to collect the costs outlined in section 204.010(a)(11) will depend upon whether a lien for those costs (i) attached to the property prior to the homestead right and (ii) is the result of a restriction that runs with the land. A claim for costs arising merely by virtue of an action taken by a board of a property owners' association under section 204.010(a) does not create a lien that would precede a homestead right dating from before the board's action.

Yours very truly,



Mary R. Crouter  
Assistant Attorney General  
Opinion Committee

---

<sup>5</sup>Chapter 204 sets forth procedures for amending existing deed restrictions. *See* Prop. Code § 204.005. Express designation in a document creating restrictions providing for amendments to restrictions by a designated number of owners of real property in the subdivision prevails over these provisions. *Id.* § 204.003.