

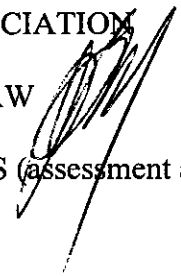
MEMORANDUM

TO: RODNEY ROBINSON  
MEADOWPARK HOMEOWNERS ASSOCIATION

FROM: J. BRIAN MARTIN, ATTORNEY AT LAW

RE: COMMON AREA MAINTENANCE FEES (assessment and collection)

DATE: May 7, 2002



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Paragraph I.  
Maintenance Assessments

The original declaration of covenants and restrictions filed in Volume 666, Page 55, Deed Records, Midland County, Texas, and as thereafter amended, establish the right of the homeowners association (that was created by the restrictive covenants) to assess the properties within the subdivision for common area maintenance and support. Since the restrictive covenants were filed for record when the subdivision was initially created, the priority of its assessment lien was established at that time (September, 1981). Therefore, all subsequent liens that are filed against the properties within the subdivision (that is, the individual lots) are subsequent and subordinate to the homeowner's assessment lien. The exception to that rule is found in Article 9, Section 8, wherein the developer specifically subordinated the assessment lien to purchase money liens or mortgages that are placed on the properties that are subject to the assessment. Subordination as described in Section 8 "only applies to the assessments which have become due and payable prior to a sale or transfer of such property pursuant to a decree of foreclosure or any other proceeding in lieu of foreclosure". The effect of this is that if there is a purchase money mortgage in place that is foreclosed upon, then the assessment lien is cut off and cannot be imposed or enforced against the property that generated the assessment lien because it has no longer priority in relation to the purchase money lien. The homeowners association can still pursue the debt against the defaulting homeowner. The new owner is subject to assessments that become due after that new owner acquires title.

Paragraph II.  
Right of Foreclosure

The restrictive covenants filed of record for Meadowpark subdivision give the homeowners association or property owners' association the right to foreclose for non-payment of assessment fees. The authority for and the method by which foreclosures are accomplished are provided for in the dedicatory instruments (that is the restrictive covenants). Whenever a person accepts a deed in the subdivision, then, as a matter of law, he accepts it subject to the restrictive covenants and the right that the homeowners

association has to place assessments fees and subsequently foreclose on those that are delinquent.

Paragraph III.  
Judicial versus Non-Judicial Foreclosure

Sub-Paragraph A.  
Property Owner Association (POA) Liens

The Courts have examined the language of restrictive covenants as those rights pertain to foreclosure in great detail. Since a property right is being taken, consequently, due process of law is extremely important. Since the restrictive covenants are a contractual lien, the Courts have held that homeowners associations are entitled to foreclose on the contractual lien it has on houses of delinquent owners. It is a harsh remedy (foreclosure), particularly when such a small sum is compared with the immeasurable value of a homestead. Under the laws of the State of Texas however, homeowners associations and restrictive covenants are enforced.

Sub-Paragraph B.  
Judicial Foreclosure

Judicial foreclosure is accomplished by the filing of a petition for foreclosure in District Court in the County where the property is located. If the owner fails to respond within thirty (30) days of being served, the association can seek the entry of a default judgment. If the owner files an answer, then discovery will be necessary prior to trial and then trial will occur. Once a judgment is obtained, the association may proceed with the foreclosure of the property utilizing a sheriff or constable to notice and conduct its sale.

Sub-Paragraph C.  
Non-Judicial Foreclosure

Non-judicial foreclosure is the quickest method of foreclosure in the State of Texas, if the homeowners association's dedicatory instruments adequately provide for this method. Public opinion and as a consequence of that recent Court decisions have made home owners associations carefully review the individual facts surrounding each potential foreclosure and closely evaluating the adequacy of their dedicatory instruments prior to exacting this method of foreclosure. In order to employ this method of foreclosure, the dedicatory instrument should specifically include each necessary element.

Sub-Paragraph D.  
Non-Judicial Foreclosure Procedure

In order to non-judicially foreclose, an assessment lien on property used as the homeowner's principal residence, the homeowners association's attorney must accomplish the following (which should be viewed as a minimum standard):

- a. Provide the owner with thirty (30) days written notice to cure the default sent via certified mail, postage pre-paid, to the owners' last known address as shown by the records of the association. This step is only potentially required if the property being foreclosed is occupied as a residence;
- b. Properly establish the trustee or proper appointment of a substitute trustee to post and perform the foreclosure sale; be sure the association document appoints or gives power of appointment;
- c. Upon the expiration of the initial thirty (30) day notice and the non-payment of arrears, provide the owner with a notice of the sale, including a statement of the earliest time the sale will begin, at least twenty-one (21) days before the date of sale;
- d. File the Notice of Foreclosure Sale in the Office of the County Clerk in each county that the property is located;
- e. Post the Notice at the Courthouse Door of each county that the property is located;
- f. Perform a title search on the property to be foreclosed to verify title, check on other liens effecting the property, possibility of owner being in bankruptcy or subject of a proceeding (while such a search is not required, it is highly recommended by this author);
- g. Assure the sale is begun at the time stated in the notice and concluded not later than three (3) hours after that time;
- h. Prepare complete and file a Trustee's Deed; and
- i. After January 1, 2002, perform all required notices pursuant to Section 209.001 of the Texas Property Code (Section 209, Texas Property Code - this act became effective January 1, 2002 and applies to all residential subdivisions with restrictions that authorize a property owners association, "POA" to collect assessments; however, it does not apply to condominium projects. (1) WHAT IS A POA REQUIRED TO DO? (a) RECORD A MANAGEMENT CERTIFICATE. If the POA has not already done so, you are now required to record a management certificate in each county where the subdivision is located. You MUST also amend and record any changes to this information within thirty (30) days of any change. The management certificate must be signed by an officer or the managing agent, be notarized and contain the following information: 1) name of the subdivision, 2) name of the association, 3) recording data for subdivision, 4) recording data for declaration, 5) mailing address of the association or the managing agent of the association; and 6) any other information the association considers appropriate. (b) GIVE OWNERS NOTICE UNDER THE FOLLOWING CIRCUMSTANCES: 1) When charging an owner for property damage, 2) when levying a fine for violation of the restrictions, by-laws or rules; 3) when filing a lawsuit, except for: a) lawsuits to collect regular or special assessments; b) lawsuits where one of the causes of action is foreclosure under an association lien; c) lawsuits for temporary restraining order or temporary injunctions; 4) when suspending an owner's right to use the common area, except for a) a

temporary suspension of a person's right to use common areas if the violation involved a significant and immediate risk of harm to others in the subdivision.

Sub-Paragraph E  
**Notice Requirements**

1. A description of the violation, property damage, fine or charges;
2. State any amount due the POA;
3. Include a statement which informs the owner: a) they are entitled to a reasonable time to cure the violation and avoid the fine or suspension (unless owner has already been given notice and an opportunity to cure a similar violation within the preceding six months); and b) they may request in writing a hearing before the board or designated committee on or before the thirtieth (30th) day after the date the owner receives the notice; and c) if the hearing is before a designated committee, the owner has a right to appeal the decision to the board by written notice to the board.

Sub-Paragraph F  
**Hearing Requirements**

If a hearing is requested from an owner as described above, then the POA must:

- 1) hold a hearing within thirty (30) days from the date of receipt of the owner's request for a hearing,
- 2) notify the owner of the date, time and place of the hearing not later than the tenth (10th) day before the hearing,
- 3) if a postponement of the hearing is requested by either the board or the owner, it must be granted for a period not more than ten (10) days and additional postponements may be granted by agreement of the parties,
- 4) an owner or POA may make an audio recording of the hearing,
- 5) an owner need not be present in order to hold a hearing

Sub-Paragraph G  
**Are Reimbursement of Fees and Costs Allowed?**

**Reimbursements Allowed.** Under the Act, POA may collect reimbursement of its reasonable attorneys fees and costs related to collection and damages for enforcement of its declaration of covenants, conditions and restrictions ("dedicatory instruments"), but only if it first gives the owner written notice stating that attorney's fees and costs be charged to the owner if the delinquency or violation continues after a date certain. This is why notice before a lawsuit is given.

Sub-Paragraph H  
When is a Foreclosure Prohibited Under this Act?

A POA may not foreclose an assessment lien if the debt consists solely of fines or attorneys fees associated with the fines.

Sub-Paragraph I  
Right of Redemption - What Notices Must Be Provided After a POA Foreclosure?

1. **Notice after the Foreclosure Sale.** If a POA conducts a foreclosure sale, they must send written notice to the owner by certified mail, return receipt requested, to the last known address as reflected on the records of the POA. This notice must be sent regardless of whether the foreclosure is non-judicial or judicial. The Notice must be sent no more than thirty (30) days after the foreclosure sale date informing the owner of the following:

- a) The date and time of the sale and a statement informing them that they have 180 days from the date of the notice to redeem the property.
- b) Not later than the 30th day after the date this Notice is sent, the POA must record an Affidavit in the real property records in the county where the property is located stating: 1) the date the Notice was sent to owner; and 2) contain a legal description of the property sold.

Paragraph IV.  
Do the Dedicatory Instruments of Meadowpark Provide for or Allow a Non-Judicial Foreclosure?

Sub-Paragraph A

The Key Issue in Question is "If challenged, will the Court uphold Meadowparks' right to foreclose non-judicially? In that regard, the Court will look at the language and determine whether or not the dedicatory instrument (the restrictive covenants) are sufficient and particular enough to allow the homeowners association to enforce the lien through non-judicial foreclosure methods as authorized under Section 51.002 of the Texas Property Code.

The optimal situation will allow for the lien for assessments to be foreclosed pursuant to Section 51.002 of the Texas Property Code. This allows the POA to foreclose by giving the requisite notice, appoint a trustee to conduct the sale, or gives a power of appointment, vests the association with a power of sale, gives the association the power to bid and provides for retention of the lien. It should be noted that the power of sale language is critical. If a POA's dedicatory instruments only provide for a foreclosure in a like manner as a mortgage and does not reference the Texas Property Code or provide for the appointment of a trustee to post and sell the property at foreclosure, some have questioned the authority of a POA to foreclose under these circumstances. However, it is important to note that foreclosures have been

accomplished under these exact circumstances and some maintain that there is a necessary assumption of the law that a POA may appoint a trustee for purposes of foreclosure. Recently, however, some authorities have questioned this assumption. Therefore, if the dedicatory instruments for a POA do not specifically contain all the necessary elements, a judicial foreclosure may be warranted.

Paragraph V.  
SUMMARY

In general, the homeowners association restrictive covenants (for Meadowpark) do provide for the ability of a homeowners association to foreclose. The restrictive covenants do not, it appears, specifically cite the Texas Property Code regarding foreclosure. It would be my recommendation in that case than to commence a judicial foreclosure procedure in the aggregious circumstances where homeowners are abusing the good nature of their neighbors by non-payment of the assessment lien.