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Practical Tips for Dealing with Property Owners Associations

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TABLE OF CONTENTS

PAGE

I. SETTING THE STAGE

A. Prologue

Dealing with property owners associations ("POAs") can be challenging; this should not come as a great revelation to anyone. What may, however, come as a surprise to the novice practitioner in the POA arena is the level of emotions "neighborhood disputes" can generate. It is a known phenomenon to those that practice in this arena that emotions run higher and tempers shorter the closer an issue gets to a person's front door. There is, after all, a reason this area of law has earned the nickname the "family law of real estate." So, why all the hubbub? No doubt there are numerous theories regarding why "neighborhood disputes" in general and POAs in particular generate so much emotion, but the author offers the following possible theories:

1. A Man's Home Is His Castle Theory. The proverb upon which this theory is based has its roots in the English common law principle that one is the boss of one's own home and *nobody* should be able to tell one what one can do there. Many Texans of the redder neck variety have taken this proverb and put a "Don't mess with Texas" spin on it ending up with a belief that no one has the right to tell a Texan what he can do with his home, especially an un-American, fascist run POA. God bless Texas!

2. Not In My Backyard Theory. Actually an expansion of the "A Man's Home Is His Castle Theory" where the legal maxim is carried all the way to the four corners of the backyard and beyond. Interestingly, under this theory, the backyard eventually includes the entire neighborhood, which ultimately results in the war cry: "How dare you do that in my neighborhood; you have no right!" Juxtapose this theory against the previous one and you have the makings of a head on collision into a neighbor's castle. NIMBYism forever!

3. The Largest Financial Investment In Life Theory. The fact is, one's home is typically the largest financial investment most people will ever make in their lives. Of course, everyone wants to protect their investment, whether it is by making improvements to their castle or making sure the neighbor's castle does not bring down the value of their castle. This theory is bolstered by the belief that POAs exist to protect property values. This theory really does have a universal truth to it because we all know how emotional we get when someone gets into our back pockets. Enough said.

4. Home Is Where The Heart Is Theory. We are, after all, dealing with a person's "home" and all of the emotional baggage that concept carries with it … Mom, apple pie, Lassie … what red blooded American wouldn't fight for these things?! Man your battle stations!

Whether one's castle is 600 square feet or 6,000 square feet, all of the theories apply to some degree. The bottom line is neighborhood disputes in general and POAs in particular engender the extremes in people, a fact that should be remembered by the practitioner and dealt with accordingly.

In addition to the emotions, what may also come as a surprise to a novice practitioner in the POA world is the complexity of legal issues that typically surround confrontations with POAs. Local law, state law and federal law often come into play with any given POA dispute. Couple this fact with the oftentimes complex and conflicting POA project documents and the practitioner is often left with one fine emotional legal mess.

The purpose of this paper is to provide the practitioner a road map to successfully navigate both the legal and practical issues that are present when dealing with POAs. The author acknowledges, with gratitude, the contributions of Sharon Reuler and Rosemary B. Jackson, authors of the excellent article, *A Primer for Representing Condominium and Property Owners Associations (.V2)* prepared for the State Bar's 2001 Advanced Real Estate Law Course, without whom and the *Primer* this article would not have been possible or at least a lot shorter! Sections for this article were borrowed directly from the *Primer*, however, the focus of this article is geared toward enabling the attorney who is representing a client against a POA.

B. The Lingo.

Every area of specialization is blessed and cursed by its own jargon, acronyms, and abbreviations. The POA field is no exception. While not all of the terms below are used in this paper, the terms are common in the practice of representing POAs.

1. ACC, ARC, and MARC are the acronyms most often used for the function or entity of the POA that deals with matters of appearance and construction. The terms stand for Architectural Control Committee, Architectural Review Committee, and Master Architectural Review Committee. In some POAs this entity is independent of the board. In others, the board serves as or appoints the members. These entities are typically created by the declaration or CC&Rs.

2. Bylaws refer to the POA document that deals with governance and administration of the POA as an incorporated or unincorporated association. Some people mistakenly use "Bylaws" to refer to any or all of the POA project documents. Be aware that some documents entitled "Bylaws" contain provisions that are customarily found in declarations.

3. CA (pronounced "see-ay") is the acronym for Community Association, an industry termed coined in the 1970s for all mandatory membership associations, including condominiums, cooperatives, and PUDs. In the national literature, CA may be synonymous with POA and common interest communities as an all-inclusive term.

4. CAI is the acronym for the Community Associations Institute, a national educational membership organization of professionals serving the POA industry. CAI has local chapters in major Texas cities.

5. CC&Rs refers to the Declaration of Covenants, Conditions, and Restrictions, the name typically given to the document that creates a PUD rather than a condominium declaration, which creates a condominium.

6. Common Interest Ownership is used in professional literature to describe all POAs, which may be referred to as "Common Interest Communities."

7. Condominium is a type of real property ownership defined by and created according to Chapters 81 and 82 of the Property Code, and which combines fee simple ownership of a unit with tenancy in common ownership of common elements.

8. Council of Co-Owners is the term used by Chapter 81 of the Property Code for a condominium association created before January 1, 1994.

9. D&O is an acronym for Directors and officers Liability insurance coverage, also known as Errors and Omissions (E&O) insurance coverage.

10. Declaration is the term most often used to refer to the document that creates the POA, although the document may be titled Condominium Declaration, or Master Deed, or Declaration of CC&Rs. Declaration is sometimes used interchangeably with "Restrictions."

11. Dedicatory Instrument is the term used by Chapter 202 of the Property Code to refer to the project documents of a POA. The uncommon statutory definition of "dedicatory" is being repeated in other POA-related bills and statutes.

12. Design Guidelines refers to scheme and architectural standards, rules, and procedures of a POA.

13. Diminimus PUD is a lender-coined term that refers to a PUD with nominal common areas, thus requiring a less stringent review for underwriting purposes.

14. Dues are often used by POA directors, managers, and owners to refer to the regular assessments – monthly, quarterly, or annual assessments – as distinguished from special assessments.

15. Gated Community usually refers to a POA with controlled vehicular access and privately owned streets.

16. HOA is the acronym for Homeowner's Association, a term that is often used generically to refer to all residential POAs, but is sometimes used to distinguish PUDs from condominiums.

17. Master or Umbrella Association refers to an association containing one or more subordinate POAs.

18. Open Records refers to the records that a POA must maintain and make available to owners if required by the project documents or by statute, such as TUCA § 82.114 for condominiums, Texas Non-Profit Corporation Act Art. 1396-2.23 + 2.23A for incorporated POAs, Texas Uniformed Unincorporated Nonprofit Association Act

Art. 1396-70.01 § 11 for unincorporated POAs, and Texas Timeshare Act § 221.077 for timeshares.

19. OTARD (pronounced "oh-tard") is the acronym for Over the Air Reception Devices, and refers to the rules promulgated by the Federal Communications Commission at 47 CFR § 1.4000 to implement the Telecommunications Act of 1996, as amended in January 1999 and October 2000 for multi-family and POA settings.

20. POA is the acronym for Property Owners Association, used throughout this article, which is defined in § 202.001 of the Property Code. A POA is any type of mandatory membership real estate owners association. As used in the statute and in this article, POA includes the subcategory of condominium associations. In other words, condominium is a type of POA and is not distinguished from a POA.

21. Project Documents refers to the creation and governing documents of the POA, specifically including the Declaration or CC&Rs, the Bylaws, the POA Rules, and the Articles of Incorporation if the POA is incorporated.

22. PUD is the acronym for Planned Unit Development, which refers to POAs that are not condominiums or cooperatives. This term was coined by lenders in the 1970s to describe developments with individually owned lots and common areas owned by the corporate association. Although "PUD" was widely used in the 1980s, it is now used primarily by lenders to refer to POAs that are not condominiums.

23. Resale Certificate refers to the disclosures and related documents given by a POA in connection with unit or lot transfers, as required by TUCA § 82.116 for condominiums and by Chapter 207 of the Property Code (the one titled "Disclosure of Information by Property Owners' Associations").

24. Reserve Study is a long range plan, prepared for the POA, to anticipate repair and replacement of common element improvements maintained by the POA and to guide the POA in funding its replacement reserves with regular assessments.

25. Restrictions refer to recorded restrictive covenants and can be the document that creates the POA, although it may be titled Condominium Declaration, Declaration of Protective Covenants, Master Deed, or Declaration of CC&Rs. The term "restrictions" is sometimes used interchangeably with "Declaration" and "CC&Rs."

26. Rules & Regs may refer broadly to the rules, regulations, restrictions, policies, guidelines, and/or practices of the POA, or more narrowly to the board-made rules as distinguished from the use restrictions in the declaration.

27. Sub-Association refers to a POA within a Master or Umbrella POA.

28. Townhouse or townhome has several definitions, but most often refers to row houses or dwellings that are attached side-by-side. Although townhouse is not a form of ownership that is recognized under Texas law, it is often used to describe the ownership of attached housing that is not condominium.

29. TUCA (pronounced "too-kah") is the acronym and nickname for the (Texas) Uniform Condominium Act, Chapter 82 of the Property Code.

30. UCIOA (pronounced "you-kiowa") is the acronym for the Uniform Common Interest Ownership Act, a model statute that encompasses all POAs, including cooperatives, condominiums, and PUDs.

PRACTICE TIP: As with most areas, sounding like you know what you are talking about is important. Learning and using the foregoing terms will make the practitioner sound like an expert.

II. WHAT ARE POAS ANYWAY?

A. Definition.

§ 202.001(2) of the Property Code defines POAs as:

an incorporated or unincorporated association owned by or whose members consist primarily of the owners of the property covered by the dedicatory instrument and thorough which the owners, or the board of directors or similar governing body, manage or regulate the residential subdivision, planned unit development, condominium or townhouse regime, or similar planned development.

While widely accepted as the definition of POAs, this definition only applies to Chapter 202 of the Property Code. As such, the practitioner must be cautious of the fine distinctions in the statutes when using the term POA. For example, there are certain state statutes that exclude condominiums from the definition of POAs, most notably Chapter 204 of the Property Code (which is bracketed only for Harris and Galveston Counties and as of the 2005 Legislative Session, Montgomery County).

In lay terms, a POA is distinguished from other neighborhood civic clubs or other associations by virtue of the fact that the declaration mandates that every owner in the development is obligated to pay mandatory dues or assessments to the POA. The obligation to pay mandatory dues is the primary distinction between POAs and voluntary neighborhood civic clubs and associations. The obligation for the owners (or in rare instances the residents) to pay mandatory dues must be included in the declaration for the obligation to be mandatory. In Texas when someone speaks of a POA, they are typically referring to those entities whose members are obligated by the declaration to pay mandatory dues.

B. Type of Entity.

POAs are either incorporated or unincorporated. As such, POAs are either governed by (i) the Non-Profit Corporation Act (Art. 1369-1.01-11.01, Texas Revised Civil Statutes) and the Miscellaneous Corporation Laws Act (Art. 1302, Texas Revised Civil Statutes), (ii) the Uniform Unincorporated Nonprofit Association Act (Article 1369-70.01, Texas Revised Civil Statutes) or (iii) in rare instances the POA may be for profit, in which case the for profit POA would be governed by the Business Corporation Act (as well as the Miscellaneous Corporation Laws Act). The POA for any condominium regime created from and after January 1, 1994 is required by § 82.01 of TUCA to be organized as a profit or non-profit corporation. (Note: the acts referenced above are effective until January 1, 2010 when they will be replaced by the Business Organizations Code.)

PRACTICE TIP: It is important for the practitioner to know what type of entity the POA in question is so that he knows which laws apply.

C. When Incorporation is Required.

A POA must be incorporated if:

1. It is a condominium created since January 1, 1994, which is therefore subject to § 82.101 of TUCA.

2. It is a condominium created before 1994 but which has amended its declaration to voluntarily adopt TUCA, in its entirety, as its governing law, in which case it is subject to § 82.101 of TUCA.

3. The project documents of the POA require the association to be incorporated, regardless of when the POA was created and regardless of whether it is a condominium or non-condominium.

III. KNOWING THE PLAYERS

As with most situations, it is important to be able to identify all of the players. This is particularly true when dealing with POAs. Being able to label the players and their authority is essential in identifying the source of power and their ability to act in any given set of circumstances. Likewise, the standard of care required of the parities can be invaluable information.

A. The Directors.

Directors of a POA are sometimes also referred to as managers or trustees in the project documents. Despite POA folklore and nomenclature, directors of a POA do not owe a fiduciary duty to its members, unless the non-profit corporation is a post TUCA condominium, as discussed in more detail below. Generally, the directors of a POA conduct all of the affairs of the POA, unless the powers are otherwise reserved to the members of the POA by the project documents or (if the POA is incorporated) the Non-profit Corporation Act. § 2.14A of the Non-profit Corporation Act provides the affairs of the corporation shall be managed by a board of directors, but § 2.14C provides the powers of the directors can be limited to whatever extent set forth in the articles of incorporation or bylaws. Similarly, § 82.103 of TUCA provides all of the acts of a post TUCA condominium must be by and through the board, unless otherwise prohibited by the declaration, bylaws or by law. In short, the Directors run the POA.

PRACTICE TIP: Directors run the POA and by extension many times the neighborhood. This power

sometimes has the tendency to put some directors on a power trip. While there is not much the practitioner can do about a director on a "power trip" (unless the director crosses the line or breaches a duty to the POA and its members), it does help to keep this phenomenon in mind when considering how to deal with a POA board. Also bear in mind the vast majority of directors are unpaid volunteers, which can sometimes result in a "holier than thou" attitude. All of these factors should be considered when attempting to understand the personalities of any given board of directors. Finally, there is no mandatory education for directors of Texas POAs. Couple this fact with the reality that the formal education of POA directors is not consistent and practitioners are often left with having to ascertain to what extent any given POA board comprehends the intricacies of the dispute in question.

B. The Officers.

§ 2.30 of the Non-profit Corporation Act requires there to be a president and a secretary of a non-profit corporation and makes allowances for one or more vice-presidents, a treasurer and such other officers or assistant officers as may be necessary. While all POAs have officers, typically all of the officers are also directors. Accordingly, in the POA setting, officers in and of themselves generally have very little authority aside from that afforded them by the project documents or by board resolution.

PRACTICE TIP: When dealing with a POA it is advisable to ensure the action taken by a POA officer has the approval of the POA board. Otherwise, with only the officer's approval, you may be left with having only an apparent authority argument. This tip also applies when dealing with POA committees.

C. The Members.

The members of a POA are almost always the owners of property in the project. In extremely rare instances, the residents (versus the owners) of the property in the project are the members of the POA. As allowed by § 2.08 of the Non-profit Corporation Act, if set forth in the articles of incorporation or bylaws, a POA may have more than one class of members. Typically, the developer of a POA is designated as a different class of membership from the other members of the POA and given a weighted vote (e.g. 3 to 1). This weighted vote is perfectly legal and commonplace.

PRACTICE TIP: It is important for the practitioner to remember POAs are made up of members and typically a board attempts to take actions that are in keeping with the collective consensus of the whole. Occasionally, a member of the Association is fueling a neighborhood dispute. Sometimes that person may even be a director. Such information can be helpful in sorting out all of the players to a particular situation and devising a strategy.

D. The Manager.

POAs are not required to hire managers, unless the POA project documents set forth the requirement, however many do hire managers. While not all POAs retain managers, those that do typically afford the manager a lot of authority to conduct the day-to-day affairs of the POA. As a general rule, the board looks to the manager for advice on most topics related to the operations of the POA. As such, a POA manager can play an instrumental role in assisting or hindering a resolution of a POA dispute. Despite the influence a manager typically has over the board, the manager actually has no real authority. Due to the influence, however, it is important for both the manager and the board to understand the facts and circumstances related to the issues. Texas currently has no laws regulating the professional POA management industry. CAI does have different levels of accreditation for managers, which includes AMS (Association Management Specialist), PCAM (Professional Community Association Manager) and CMCA (Certified Manager of Community Associations). Generally, POA managers that have earned an accreditation from CAI are more knowledgeable and professional than their unaccredited counterparts. Unfortunately, many POA managers are overworked, managing multiple POAs, leaving little time to fully understand the intricacies of a POA dispute. Despite this concern, getting a manager "on board" with a client's issue can open doors to an amicable resolution with the POA board.

PRACTICE TIP: Just as some directors can get on a power trip, so can some managers. Getting on the "bad side" of a manager can make dealings with a POA difficult, at best. The problem is, one may not know when one has gotten on the bad side of a manager. For

this reason among others, communications with the POA, through the manager, should be in writing to maintain a paper trail; even telephone conversations should be confirmed in writing. It is also important for the practitioner and his client to obtain a meeting with the board of a POA to ensure all of the facts and circumstances are being properly relayed to the board by the manager. Requesting a meeting with the board also conveys the message that your client is serious about the issues and the situation is not going to "just go away." § 209.007 of the Property Code specifically affords a member of a POA a statutory opportunity to meet with the board prior to the Board taking certain enforcement actions, discussed in more detail below.

E. The Attorney.

The POA attorney represents the interests of the POA as an entity and not its individual members, directors, developer of the project or the manager of the POA (if any). The POA attorney's advice should be in the best interests of the POA. *Gamboa v. Shaw* 956 S.W.2d 662 (Tex. App.—San Antonio 1997, no pet.). It is customary in the POA industry for the POA to retain the services of an attorney, especially when a member of the POA has retained an attorney for a particular situation. This should not be regarded as the harbinger of a stalemate. Rather, it typically heralds the fact that the board grasps the gravity of the situation and wants to protect the best interests of the POA. Conversely, if a POA member has retained the services of an attorney, but the POA board does not, then the practitioner can be fairly certain the POA board has yet to consider the situation serious (with the exception of "209 hearings" discussed below).

PRACTICE TIP: As with some POA directors and managers, the POA attorney may not be well educated in all the legal aspects of a POA and the dispute in question. It is, therefore, advisable for the practitioner to determine the competency of the POA attorney in the applicable law; a determination that may be helpful in formatting a game plan. Identification of all of the clients of a POA attorney in any given POA dispute can also be helpful in sorting out the meanderings of the debate. For example, the interests of the developer of the project and the POA may not always be similarly aligned, which information can be useful, especially if the POA's attorney also represents the developer.

IV. THE PROJECT DOCUMENTS AND THE LAW

Practitioners must always remember the interplay of the different areas of the law when dealing with POAs, which areas include traditional real estate, corporate, and common law. Throw into this mix the overlay of federal law and there is quite a list of possibly applicable laws for any given POA question. Failure to remember the interaction of all the possible laws could land the practitioner in the awkward and embarrassing position of having to explain to his client why opposing counsel has just made him aware of a statue or case governing the issue at hand. In addition to the unique interaction of applicable laws, practitioners must also be aware of the hierarchy of the POA's project documents.

A. The Project Documents and Hierarchy of Authorities.

Comprehending the hierarchy of applicable law and POAs project documents is essential when grappling with POAs. Indeed, it is not uncommon for the POA project documents to conflict with both the law and one another. It is for this reason, an understanding of the hierarchy is mandatory.

1. Public Law. The highest – most powerful – category affecting POAs is public law. As public laws change, certain provisions of the POA project documents may become unenforceable.

Although it should seem obvious that POAs are subject to public law, many POA leaders, managers, and members are slow to grasp the effect of public law on their private operations and project documents. Some POA leaders even believe that the publicly recorded CC&Rs are exempt from public laws, or that a private entity can make internal decisions without regard to public law. The categories of public law have their own hierarchy, ranging from federal law (highest authority) to local ordinance (lowest authority).

a. Federal Law. Highest legal authority for the POA is federal law. For example, the Telecommunications Act of 1996 and OTARD supersedes or modifies the satellite and antenna restrictions in the POA project documents and the Fair Housing Act Amendments of 1989 supersede occupancy restrictions that affect families.

b. State Law. A large number of state laws regulate many aspects of POA operations. Further, many federal laws – such as the debt collection and fair housing acts – have counterparts in state law.

c. Local Ordinances. POAs are also subject to the ordinances, codes, and regulations of the cities and counties in which they are located. Some cities enact ordinances – such as fair housing ordinances – that have counterparts in state and/or federal law.

PRACTICE TIP: For a general overview of statutory laws affecting POAs, the practitioner should review Appendix A to this paper. For an overview of Texas case law affecting POAs, the practitioner is directed to "Survey of Texas Case Law Affecting Property Owners Associations," prepared by the author in conjunction with this paper, which may be found at http://conferences.utcle.org.

2. Project Documents. The next highest authority on the hierarchy ladder is the POA project documents, which have a hierarchy of their own. As a general rule, the greater the document's inherent authority, the greater the prospect that the provision is enforceable. For example, a fining provision in the declaration is probably more enforceable than a fining policy in a board-made rule. In descending order, from most authoritative to least, a POA's project documents include the following:

a. Recorded Plats & Easements. Of the POA project documents, publicly recorded subdivision plats and easements are generally supreme. In a condominium, the subdivision plat is usually an exhibit to the declaration.

b. Recorded Condominium Declaration or CC&Rs. Of the text instruments, the one that creates the development is supreme. Although this document is usually titled "Condominium Declaration," "Master Deed," or "Declaration of Covenants, Conditions & Restrictions," the layperson often refers to it, mistakenly, as the "bylaws."

c. Articles of Incorporation. On matters of POA governance, in case of conflict, the articles of incorporation are considered a higher authority than the bylaws.

d. Bylaws. Bylaws typically deal with the administrative and governance aspects of the POA. In case of a conflict between the Bylaws and the declaration, the declaration generally controls.

e. Policies & Practices. The lowest authority on the hierarchy ladder is the board-made policies, practices, procedures, and rules of the POA. The POA leadership has inherent general authority to act in ways that are reasonable and necessary to fulfill its duties – provided the acts are not prohibited by law or the project documents.

PRACTICE TIP: Obtain and review all of the POA's documents prior to confronting a POA on an issue. Failure to take this small first step can tip your hand and reveal that you are a novice; never a wise move in any arena. If your client does not have all of the POA project documents, they should be available upon request (and payment of copying charges) from the POA. For a quick list of a POAs documents that are recorded in the county records, obtain a Schedule B from a title policy of a lot or unit recently purchased in the project.

B. Interpreting Project Documents.

There are several useful tools the practitioner should be aware of when interpreting project documents. Those tools are discussed below.

1. Conflicting Provisions. When conflicting provisions in different documents, generally defer to the document with the higher authority. If conflicting provisions are found within the same document, apply rules of internal construction to the conflict.

2. Rules of Construction. Restrictive covenants are subject to general rules of contract construction. In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument. To achieve this objective, courts should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument. Words and phrases in restrictive covenants must be given their commonly accepted meaning. *Pilarcik v.*

Emmons, 966 S.W.2d 474 (Tex. 1998); *Coker v. Coker*, 650 S.W.2d 391 (Tex. 1983).

3. Liberal Construction. When reviewing the POA project documents the practitioner should be mindful of § 202.003 of the Property Code, which requires that dedicatory instruments be construed liberally to give effect to the intent of the document. Most real estate attorneys believed this provision changed (and the better reasoned view is that it did) the rules of construction of restrictive covenants in Texas from the historical holding of *Baker v. Henderson*, 137 Tex. 266, 153 S.W.2d 465 (1941), which held restrictive covenants must be construed with all doubts in favor of the free and unrestricted use of the land. Unfortunately, to confuse matters, in 1987 – as the Texas legislature was adopting § 202.003 of the Property Code – the Texas Supreme Court held that covenants restricting the free use of property are to be strictly construed. *Wilmoth v. Wilcox*, 734 S.W.2d 656 (Tex. 1987). Perceiving a change because of § 202.003, the Fourteenth Court of Appeals in *Candlelight Hills Civic Ass'n, Inc. v. Goodwin*, 763 S.W.2d 474 (Tex. App.—Houston [14th District] 1988, writ denied) held that a restrictive covenant should not be hedged about with strict construction, but given liberal construction in order to carry out its evident purpose. Thereafter, setting the stage for conflicting decisions, the First Court of Appeals in *Ashcreek Homeowner's Ass'n, Inc. v. Smith*, (Tex. App.—Houston [1st District] 1995, n.w.h.) held that there was no meaningful distinction between § 202.003 and the old rule of construction set forth in *Baker*. In *Herbert v. Polly Ranch Homeowners Ass'n*, 943 S.W.2d 906 (Tex. App.—Houston [1st Dist] 1996, no writ] the First Court of Appeals acknowledged that even though *Wilmoth* was decided after the effective date of § 202.003, copies of the briefs filed before the supreme court in *Wilmoth* show that the effect of § 202.003 was not an issue. In *City of Pasadena v. Gennedy*, 125 S.W.3d 687 (Tex. App.—Houston [1st Dist.] 2003, pet. denied), the First Court of Appeals specifically acknowledged the conflict of authorities and "respectfully urge[d] the Supreme Court to resolve the differences among the courts of appeals on this issue."

The Beaumont Court of Appeals in *Bernard v. Humble*, 990 S.W.2d 929 (Tex. App.—Beaumont 1999, pet. denied) made an interesting attempt to reconcile the divergent rulings by stating: "Though statutorily we are to liberally construe the questioned language, liberality must be toned to the given facts." The *Bernard* court referred to this process as "judicial toning." The author would suggest the process of "judicial toning" is the reason so many cases interpreting restrictive covenants appear to be in hopeless conflict!

The bottom line is that the cases involving liberal construction are in hopeless conflict and ripe for interpretation by the Supreme Court of Texas.

4. Ambiguous Provisions. Whether restrictive covenants are ambiguous is a question of law. *Pilarcik v. Emmons*, supra. In determining whether restrictive covenants are ambiguous, courts must examine the covenants as a whole in light of the circumstances present when the parties entered the agreement. Covenants are unambiguous as a matter of law if they can be given a definite or certain legal meaning; on the other hand, if the covenants are susceptible to more than one reasonable interpretation, they are ambiguous. *Id*. Mere disagreement over a restrictive covenant's interpretation does not necessarily render the covenant ambiguous. *Air Park-Dallas Zoning Comm. v. Crow Billingsley Airpark, Ltd.*,109 S.W.3d 900, 909 (Tex. App.—Dallas 2003, no pet.). If restrictive covenants are ambiguous, parole evidence of the intent of the party drafting the restrictive covenants is appropriate and admissible. *Herbert v. Polly Ranch Homeowners Ass'n*, supra.

V. THE POWER SOURCE

A. Generally.

It has been said: "Power tends to corrupt, and absolute power corrupts absolutely." There are those who believe POAs have unlimited powers and that their boards wield this power unmercifully. Frankly, that is not true in either case. The powers of both POAs and their board do have limits. Generally speaking, unless the authority to take any action can be identified, the POA and/or its board probably does not have the power to take the action in question. Despite this general rule, the project documents and the applicable statutes typically give a POA and its board far-reaching powers when it comes to dealing with the project. Assuming the POA is a corporation, the Business Act and the Non-Profit Corporation Act both contain various powers that are inherent in a profit or non-profit corporation. § 2.02 of the Non-profit Corporation Act contains a laundry list of

the powers of a non-profit corporation in Texas. This list can be very useful in determining whether a POA has the power to take certain actions. The key is determining whether the powers can be exercised by the POA board without a vote of the membership.

B. Presumption.

As a rule, the powers of an incorporated POA can be exercised by its board of directors, unless the project documents limit the powers of the board of directors. The presumption is that the board of a non-profit corporation can exercise *all* the powers of the corporation. In this regard, § 2.14 of the Non-Profit Corporation Act provides: "The affairs of a corporation shall be managed by a board of directors." Note, however, § 2.14C of the Non-profit Corporation Act provides, in pertinent part: "… If the corporation has a board of directors, it may limit the authority of the board of directors to whatever extent as may be set forth in the articles of incorporation or by-laws. …" Practically speaking, most project documents also provide that the board of directors of a POA shall manage all the affairs of the POA, except for those matters reserved to the membership by the terms of the Declaration, Articles of Incorporation or the Bylaws.

The boards of condominiums governed by § 82.103(a) of TUCA are empowered to act for the POA in all instances if in the good faith judgment of the board the action is reasonable or not otherwise prohibited by the declaration, bylaws or TUCA. § 82.102(a) of TUCA provides a laundry list of powers of the board, unless otherwise limited by the declaration. The practitioner should note that only certain sections ((1) through (7), inclusive, and (12) through (22), inclusive) automatically apply to pre-TUCA condominiums.

PRACTICE TIP: The practitioner should always review the project documents to ascertain the powers and any limitations on those powers contained in these documents. The powers of a POA can be greatly enhanced or severely limited by the terms of the project documents. Generally speaking a POA will be held to the terms of any limitations or grants of power contained in the project documents, unless overruled by case law or statute.

C. Authority and Methodology.

Actions taken by a POA and/or board without authority are typically voidable. *Swain v. Wiley College*, 74 S.W.3d 143 (Tex. App.—Texarkana 2002, no pet.). Similarly, the manner within which an action was approved should be reviewed to ensure the methodology used to approve or adopt an action was appropriate. For example, there are only two acknowledged ways for a board of a POA that is a non-profit corporation to approve an action, i.e., either by unanimous written consent or at a properly noticed meeting at which a quorum is present. Additionally, actions by the members must be taken in accordance with the terms of the applicable power giving the authority, whether by the project documents or a statute and the requisite number of approvals of members must be obtained.

PRACTICE TIP: Once the authority of the POA or its board to take a certain action has been identified, the practitioner should ensure the proper methodology was used to approve the action and that the requisite number of votes to approve the action was obtained.

D. Director Limitations and Protections.

In addition to limitations on the power of POAs and their directors imposed by the project documents, there are also certain statutory standards and protections pertaining to POAs and their boards.

1. Non-profit Corporation Act's General Standards for Directors. This section pertains to incorporated POAs. Directors are required to discharge their duties in (i) good faith; (ii) with ordinary care; and (iii) in a manner the director reasonably believes to be in the best interests of the corporation. This duty applies to members of committees as well. Directors may in good faith rely on information, reports, opinions, or statements, including financial statements and data that were prepared or presented by officers or employees of the corporation, legal counsel, public accountants, or others reasonably believed by the director to be a competent expert, and committees of the board of directors of which the director is not a member. § 2.28 Non-profit Corporation Act.

A director is not liable to the corporation, any member, or any other person for any action taken if the director acted in compliance with the standard set forth in the Non-profit Corporation Act. A person seeking to establish liability of a director must prove the director

did not act with the care of an ordinary prudent person in a like position under the circumstances.

For the purposes of the Non-profit Corporation Act, a director is not acting in good faith if he has knowledge concerning a matter in question that makes reliance otherwise permitted unwarranted. The comments state that good faith is subjective, however, the court will look to objective facts and circumstances to determine whether the good faith requirement is met, and look to the director's state of mind to see if it evidenced honesty and faithfulness to the director's duties and obligations, or whether there was an intent to take advantage of the corporation.

As a point of information, due to the increasing reluctance of volunteers to serve on the boards of non-profit corporations, in 1993 the Legislature amended § 2.28 of the Non-profit Corporation Act to provide the directors of a non-profit corporation do not have the duty of a trustee of a trust to the corporation or its property. This is not true for the boards of condominiums created after 1993 and pre-TUCA condominiums that amended their declarations to be governed by TUCA as discussed below.

2. TUCA's Standards for Directors. Condominiums created after 1993 and pre-TUCA condominiums that amended their declarations to be governed by TUCA are subject to TUCA § 82.103(a), which provides the officers and directors are liable as a fiduciary to its members.

PRACTICE TIP: The practitioner should identify the proper standard for directors of the POA in question then analyze the facts to ascertain whether a director has arguably breached his duty to the POA.

3. Charitable Immunity and Liability Act. Chapter 84 of the Texas Civil Practices and Remedies Code (Charitable Immunity and Liability Act of 1987) was passed because the legislature recognized a need for "robust, active, bona fide, and well supported charitable organizations" in Texas. The concern was for the willingness of volunteers to offer their services if there was a perception of personal liability arising out of their services to these organizations and problems in obtaining affordable liability insurance for the organizations, their employees, and volunteers.

Fortunately for POAs, the statute defines "charitable organization" more broadly than the IRS. In addition to income tax exempt organizations, the Act includes "a homeowners association as defined by § 528(c) of the Internal Revenue Code of 1986" within the definition, although POAs are not "charitable" organizations for income tax or other purposes.

A volunteer who is serving as an officer or director of a POA is immune from civil liability for any act or omission resulting in death, damage, or injury if he was acting in the course and scope of his duties or functions within the organization.

The exemption is only afforded to volunteers and not to the POA. In any civil action brought against a POA for damages based on an act or omission by its employees or volunteers, liability is limited to monetary damages in a maximum amount of $500,000.00 for each injured person, $1,000,000.00 for each single occurrence of bodily injury or death, and $100,000.00 for each single occurrence for injury or destruction of property. It does not apply to an act or omission that is intentionally, willfully, or wantonly negligent, or done with conscience indifference or reckless disregard for the safety of others or a POA which does not have liability insurance coverage. The insurance requirements are set forth in the statute.

E. Other Limitations

In addition to the limitations on directors actions discussed above, there is also a statutory limitation the practitioner should be aware. § 202.004(a) of the Property Code provides an exercise of discretionary authority by a POA or other representative designated by an owner of real property concerning a restrictive covenant is presumed reasonable unless the court determines by a preponderance of the evidence that the exercise of discretionary authority was arbitrary, capricious or discriminatory. *Anderson v. New Prop. Owners' Ass'n of Newport, Inc.*, 122 S.W.3d 378 (Tex. App.—Texarkana 2003, pet denied).

There are also several cases involving condominiums and town homes in which courts have recognized a "reasonableness" standard. When reviewing an action of a board of directors of a condominium association courts apply a "reasonableness" standard "recognizing that they may not enforce arbitrary, capricious, or discriminatory

rules." *Gulf Shores Council of Co-Owners, Inc. v. Raul Cantu No. 3 Family Ltd. P'ship*, 985 S.W.2d 667 (Tex. App.—Corpus Christi 1999, pet. denied). The reasonableness standard in cases concerning condominiums and town homes must be "measured in the context of the uniqueness of condominium living". *Id*; *see also San Antonio Villa Del Sol Homeowners Ass'n v. Miller*, 761 S.W.2d 460 (Tex. App.—San Antonio 1988, no writ); *Pooser v. Lovett Square Townhomes Owners' Ass'n*, 702 S.W.2d 226 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

PRACTICE TIP: A practitioner should analyze the actions of a POA in question related to the enforcement action in question to ascertain if the action in question is reasonable or if there are any examples of arbitrary, capricious or discriminatory actions taken by the POA. If the answer is yes, those examples should be highlighted to prove the enforcement action in question may not be reasonable and, therefore, unenforceable.

VI. THE HEARING

Most boards will meet with a POA member upon request. Unfortunately, this is not always the case. Recognizing the importance of obtaining a face-to-face meeting with a POA board especially in certain situations, the Legislature in 2001 adopted § 209.006 and § 209.007 of the Property Code. § 209.006 statutorily mandates the right of an owner to meet with his POA prior to certain enforcement actions being taken by the POA. To date, there are no cases interpreting § 209.006 and § 209.007, but one can surmise the failure of a POA to hold the required hearing would make their enforcement action voidable.

A. § 209.006, Property Code – Notice Required To an Owner Before Enforcement Action

1. Notice Required. Notice to an owner is required before the following actions are taken by the POA:

a. suspension of right to use common areas (unless the result of a violation that occurred in the common area and involved a "significant and immediate risk of harm to others in the subdivision." [§ 209.007(d)]);

b. filing a suit, other than a suit:

i. to collect a regular or special assessment;

ii. to foreclose the POA's lien; or

iii. for a TRO or temporary injunction

c. charging an owner for property damage; and

d. levying a fine for a violation of the restrictions, bylaws or rules.

2. Notice Requirements. The notice must adhere to the following criteria:

a. must be in writing;

b. sent by certified mail, return receipt requested;

c. describe the violation or property damage;

d. state any amount due the association; and

e. inform the owner that he is entitled to a reasonable period to cure the violation and avoid the fine or suspension (unless the owner was given notice and an opportunity to cure a similar violation within the preceding six (6) months) and may request a hearing on or before the 30th day after the date the owner *receives* the notice.

B. § 209.007, Property Code – Hearing Before Board; Alternative Dispute Resolution

The owner must submit a written request for a hearing (within 30 days of the owner's *receipt* of the notice of the violation or property damage. [§ 209.006(b)(2)(B)]). The hearing must be before the board or a committee appointed by the board. If before a committee, the owner has the right to appeal the decision of the committee to the board, by written notice to the board. The hearing must be held within 30 days of the date the board *receives* the owner's request for a hearing. The association must notify the owner of the date, time and place of the hearing not later than the 10th day before the date of the hearing. The board or the owner may request a postponement and, if requested, a postponement *shall* be granted for not more than 10 days. Additional postponements may be granted by agreement of the parties. The owner may make an audio recording of the

meeting. The owner's presence is not required to hold a hearing [§ 209.008(b)]. The owner is not liable for attorney's fees incurred by the association before the conclusion of the hearing [§ 209.008(b)]. (Also, the practitioner should be mindful of § 209.008(a) that provides a POA may collect reimbursement of reasonable attorney's fees and other costs only if owner was provided written notice that attorney's fees and costs will be charged to the owner if the delinquency violation continues after a date certain**.)**

C. Practical Tips for Hearing (or any other meeting) with POA

1. Be Prepared. Know the facts and the law applicable to the dispute (especially if the POA's attorney will be present). Bring any documentation available to support the client's position. For example, if your client is arguing waiver of a restrictive covenant, bring to the hearing pictures of the other violations.

2. Be professional. Keep cool and unemotional. Remember that POA directors are volunteers and while some POA directors may not be professionals, all directors expect *you* to act as a professional. This includes dressing appropriately. Failure to act as a professional will discredit your client's position.

3. Do not be surprised. Many POA boards opt not to have an attorney at the hearing. This should not be a concern, unless the dispute is not resolved after the "209 hearing." POA boards will typically retain an attorney to represent the interests of the POA if a matter continues after a 209 hearing. Remember, most POAs are non-profit corporations on tight budgets. Attorney fees for 209 hearings cannot be charged back to an owner; therefore, POA attorneys are typically not asked to attend 209 hearings. If the POA has retained an attorney for a dispute in question of which the practitioner is aware, but the attorney will not be present for the 209 hearing, permission to speak to the POA board should be obtained from the POA attorney. Typically, if a POA attorney is not present at the 209 hearing or a meeting with the POA board, the board will only listen and not otherwise comment on the presentation (typical advice from a POA attorney to a POA board).

4. Know what you want. Know what action your client wants the POA board to take and why you (the practitioner) believes they should take the action. Articulate your client's position.

VII. OTHER PRACTICAL TIPS

A. Review the Law.

There is a large body of law (both Texas and other jurisdictions) dealing with restrictive covenants and POAs, commonly referred to as community association law. For an overview of Texas law applicable to POAs, as mentioned above, the practitioner is directed to (i) Appendix A to the outline for a quick review of statutes, and (ii) the author's outline entitled "A Survey of Texas Case Law Affecting Property Owners Associations" for an overview of Texas cases.

B. Act Reasonable.

Always counsel your client to act reasonably. Likewise, practitioners should be courteous when dealing with POA boards and POA attorneys. Ill-tempered *pro se* homeowners contact POA attorneys routinely after receiving a demand letter. A reasonable, even-tempered attorney speaking on behalf of a client is a welcomed relief and is likely to lead to a more productive conversation and/or solution.

C. Scour the Neighborhood.

Encourage your client to inspect his neighborhood for situations similar to the POA issue you are dealing with and take pictures of his discoveries. While a true waiver defense is not easy to prove, proving that the POA board has approved other similar situations goes a long way in bolstering your client's argument that the POA board may be acting in an arbitrary, capricious or discriminating manner, i.e., not reasonable in violation of § 202.004(a) of, Property Code.

D. Do Not Make Veiled Threats.

Do not threaten actions you are not ready to take on behalf of your client. Veiled threats and bluffs are not appreciated, usually seen through, and can actually draw the battle lines. On the other hand, if your client has valid legal defenses or a cause of action with the financial means to follow through, these facts should be made known.

E. Be Aware Of the Importance of Insurance.

A paper discussing practical tips for dealing with POAs would not be complete without mentioning the importance of insurance. There are several types of insurance policies a typical POA will likely carry, including D&O, liability, casualty, etc. The types of available insurance a POA may carry is not pertinent for the purposes of this paper. What is pertinent is the fact that the presence or lack of insurance coverage for a lawsuit brought against a POA is powerful influence and will often dictate the willingness of the POA board to resolve a POA conflict. The practitioner should ascertain what POA insurance policies may apply to a given POA dispute and then artfully determine how to plead the lawsuit so that it does or does not have coverage, depending on the desired result.

F. Remember the Bias Against POAs.

Most POA attorneys will readily acknowledge there is a built-in prejudice against POAs. This bias seems to be shared not only by the media, but judges and juries. As one district court judge once told a partner of the author: "Take your neighborhood dispute and get out of my court." This bias can work to the advantage of an attorney representing a client against a POA.

VIII. EPILOGUE

When a client's castle collides with his POA, the practitioner called to the wreck should remember there are preferred ways to deal with the aftermath. The information and practical tips in this paper are the product of the author's twenty plus years of dealing with neighborhood disputes and the author hopes they are helpful, however, this paper is intended to provide general information about certain law. It is not intended to be nor is it exhaustive. As always, there is no substitute for an attorney's thorough review of the facts and relevant statutes and case law on any particular matter.

The author acknowledges with gratitude the contributions of Cliff Davis and Eric Tonsul, both associates with Butler & Hailey, P.C. for their contributions to this article.

Good luck with your neighborhood dispute!

APPENDIX A

LIST OF STATUTES USEFUL IN WORKING WITH TEXAS PROPERTY OWNERS ASSOCIATIONS

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The following list of federal and state statutes does not purport to be complete or exhaustive. It is offered as a handy reference to many of the laws that property owners associations in Texas—and their attorneys—use from time to time. It identifies but does not detail statutes bracketed for the specific areas.

SOME PERTINENT FEDERAL LAW

1. Bankruptcy Code, Rules, and Forms, Title 11 of United States Code

2. Fair Housing Act, 42 U.S.C.A. § 3600, *et seq.*

3. Federal Fair Debt Collection Practices Act, 15 U.S.C.A. § 1692

4. Income Tax Code, 26 U.S.C.A. § 528, Certain Homeowners Associations

5. Telecommunications Act of 1996, 47 U.S.C.A. §§ 151, 154, 207, 303 & 309(j)

SOME PERTINENT TEXAS STATUTES & RULES

(alphabetical by topic)

1. **ASSOCIATIONS** - Incorporated or Not

   a. Associations - Incorporated. *Texas Non-Profit Corporation Act*, Art. 1396, Texas Revised Civil Statutes.

   b. Associations - Incorporated. All corporations - business and nonprofit - are subject to *Texas Miscellaneous Corporation Act*, Art. 1302, Texas Revised Civil Statutes.

   c. Associations - Unincorporated. *Texas Uniform Unincorporated Nonprofit Association Act*, Art. 1396-70.01, Texas Revised Civil Statutes. Enacted 1995.

   (Note: All three of the statutes are effective until July 1, 2010, when they will be replaced by the new Texas Business Organizations Code.)

2. **ATTORNEYS FEES**

   a. *Attorney's Fees in Breach of Restrictive Covenant Action*. § 5.006, Texas Property Code.

   b. *Recovery of Attorney's Fees*. § 38.001 *et seq*, Texas Civil Practice & Remedies Code (for use in breach of contract case).

   c. *Attorney's Fees with Declaratory Judgment*. Uniform Declaratory Judgments Act, § 37.009, *et seq*, Texas Civil Practice & Remedies Code.

   d. *Non-Condo POAs*. § 209.008, Texas Property Code, applicable to all mandatory POAs except condos. Enacted 2001.

3. **BAD CHECKS**. You may not charge more than $30 as a processing fee for a bounced check, according to *Processing Fee by Holder of Dishonored Check*, § 3.506 V.T.C.A., Bus. & Com. Code. See also: *Issuance of Bad Check*, Texas Penal Code § 32.41; *Fee for Collecting and Processing Sight Order*, Texas Criminal Procedures Code § 102.007; *Justice Court Dishonored Check*, Texas Criminal Procedures Code § 102.0071.

4. **COMMUNITY HOMES**. *Community Homes for Disabled Persons Location Act*, Chapter 123, Texas Human Resources Code. Restrictions may not prohibit qualified community homes. Enacted 1991. Amended 1999.

5. **CONDOMINIUMS**

   a. Condominiums created after 1993 are subject to the *Texas Uniform Condominium Act* (**TUCA**), Chapter 82, Texas Property Code. Enacted 1993, Effective 1/1/94. Amended 1997.

   b. Pre-TUCA Condominiums—created before 1994—are subject to the *Texas Condominium Act*, Chapter 81, Texas Property Code, which was enacted in 1963. Since January 1, 1994, pre-TUCA condominiums are *ALSO* subject to 14 sections of the Texas Uniform Condominium Act (**TUCA**), Chapter 82, Texas Property Code.

      - *Which 14 sections of TUCA? The ones listed in § 82.002(c), which are:*

        §§ 82.005, 82.006, 82.007, 82.053, 82.054, 82.102(a)(1)-(7) and (12)-(22), 82.108, 82.111, 82.113, 82.114, 82.116, 82.157, and 82.161. The definitions prescribed by § 82.003 apply to a condominium in this state for which the declaration was recorded before January 1, 1994, to the extent the definitions do not conflict with the declaration. The sections listed above apply only with respect to events and circumstances occurring on or after January 1, 1994, and do not invalidate existing provisions of the declaration, bylaws, or plats or plans of a condominium for which the declaration was recorded before January 1, 1994.

        - *But, § 82.108, which requires open board meetings, became applicable to pre-TUCA condos on January 1, 1998.*

- EXCEPTION: *Pre-TUCA condominiums may amend their declarations to be governed exclusively by TUCA, in its entirety. Consult legal counsel to determine if such amendment is advisable for your condominium.*

6. **CONSTRUCTION & CONTRACTORS**

   a. *Residential Construction Liability Act*. (aka RECLA), Chapter 27, Texas Property Code. Enacted 1989. Amended 1993, 1999 & 2003.

   b. *Prompt Payment to Contractors and Subcontractors*. Chapter 28, Texas Property Code. Enacted 1993. Amended 1999.

   c. *Mechanics & Materialman's Liens*. There are 2 authorities for M&M liens in Texas. The constitutional lien is found in Art. XVI, Sec. 37 of the Texas Constitution. The statutory lien is found in Chapter 53 of the Texas Property Code, which is titled *Mechanic's, Contractor's, or Materialman's Lien*. The M&M statute was enacted in 1983, substantially amended in 1997, and amended again in 1999.

7. **COOPERATIVES**. *Cooperative Association Act*, Art. 1396-50.01, Texas Revised Civil Statutes. Enacted 1975. Amended 1977-1997.

8. **DEBT COLLECTION ACT**, Chapter 392, Texas Finance Code.

9. **DECLARATORY JUDGMENTS**. *Uniform Declaratory Judgments Act*, § 37.001, *et seq*, Texas Civil Practice & Remedies Code.

10. **DIRECTORS & OFFICERS** - Liability

   a. *Limitation of Liability*, Art. 1302-7.06, Texas Miscellaneous Corporation Laws Act, Texas Revised Civil Statutes. Enacted 1987. Amended 1989-1999.

   b. *Charitable Immunity & Liability Act of 1987*, Chapter 84, Texas Civil Practice & Remedies Code. Covers "a homeowners association as defined by Section 528(c) of the Internal Revenue Code of 1986." Enacted 1987. Amended 1997, 1999, 2001 & 2003.

11. **DOCUMENTS** - Project Documents, Governing Documents, Restrictions

   a. Recording. *Public Records*, § 202.006, Texas Property Code, requires every mandatory property owners association (condo & non-condo) to file each of its governing documents in the county's real property records. Enacted 1999.

   b. Amendment of Restrictions. 1. *Restrictive Covenants Applicable to Certain Subdivisions*, Chapter 201, Texas Property Code. Provides a petition process for amending otherwise-impossible-to-amend restrictions. For subdivisions in cities of 100,000+ or in unincorporated areas in and around Harris County. Enacted 1985. Amended 1987, 1989, 1991, 1997 & 1999 - statewide applicability, amended again in 2005.

c. Amend for FHA or VA. § 205.004, Texas Property Code, allows a majority of owners to amend the declaration to comply with HUD/FHA or VA requirements. Owners must sign the amendment. Applies to counties with at least 65,000 people. Enacted 1997.

d. Interpretation. Requires "liberal" construction of restrictive covenants, thus reversing common law of "strict" or "narrow" construction. § 202.003, Texas Property Code. Enacted 1987.

e. Preparation of Documents Affecting Title to Real Property. Only Texas attorneys and brokers may be compensated for preparing documents affecting title to real property (such as lien notices). *Certain Unauthorized Practice of Law, Chapter 83, Texas Government Code*. Enacted 1989.

f. Recording Requirements. Chapters 11, 12, and 13, Texas Property Code, particularly:
§ 11.001 - *Place of Recording* (record in county where property located)
§ 12.001 - *Instruments Concerning Property* (signature & acknowledgment)
§ 13.002 - *Effect of Recorded Instrument* (notice to the world)

12. **DTPA**. *Deceptive Trade Practices - Consumer Protection Act*, § 17.41 *et seq.*, Texas Business & Commerce Code.

13. **EMPLOYEES**. This list does not address the body of state and federal law dealing with employees and labor relations. If a POA has employees, be mindful of those bodies of laws.

14. **ENFORCEMENT OF RESTRICTIONS**

a. Enforcement by Owners Association. *Construction and Enforcement of Restrictive Covenants*, Chapter 202, Texas Property Code. Authorizes court-awarded civil damages up to $200 per day of violation. Enacted 1987.

b. Enforcement by Justice Court. *Deed Restriction Jurisdiction*, § 27.034, Texas Government Code. Adopted 1995 (bracketed for Houston area). Amended 1997 (expanded statewide) & 1999 (prohibits injunctive relief).

c. Enforcement by County Attorney. *Enforcement of Land Use Restrictions in Certain Counties* (population 200,000+), Chapter 203, Texas Property Code. Enacted 1987. Amended 1997.

15. **EXEMPT PROPERTY**. Title 5, Chapters 41 (Homestead) and 42 (Personal Property), Texas Property Code.

16. **FAIR HOUSING**. *Texas Fair Housing Act*, Title 15, Chapter 301, Texas Property Code.

17. **FORECLOSURE OF REAL PROPERTY**

a. Nonjudicial. *Provisions Generally Applicable to Liens*, Chapter 51, particularly § 51.002, Texas Property Code.

b. Condominiums. § 82.113 of TUCA, Chapter 82, Texas Property Code, applicable to condominiums only. Applies to all condominiums (pre-TUCA & post-TUCA). Enacted 1993.

c. Non-Condo POAs. § 209.009-011, Texas Property Code, applicable to all mandatory POAs except condos. Enacted 2001.

18. **GATED** *Multi-Unit Housing Projects*, § 352.111 et. seq., Subchapter E, Chapter 352, Local Government Code. Enacted 2001. Amended 2005.

19. **HARRIS AND OTHER COUNTY SPECIFIC STATUTES**

a. Chapter 204, Texas Property Code, *Powers of Property Owners Association Relating to Restrictive Covenants in Certain Subdivisions.* Enacted 1995. Amended 2003 to apply to Galveston County, amended 2005 to apply to Montgomery County.

b. Chapter 206, Texas Property Code, *Extension of Restrictions Imposing Regular Assessments in Certain Subdivisions.* (Narrowly bracketed to apply only to a specific neighborhood in Harris County, Texas.) Enacted 1997. Amended 2001.

c. Chapter 208, Texas Property Code, *Amendment and Termination of Restrictive Covenants in Historic Neighborhoods*. For historic neighborhoods (as defined) that are located in whole or in part in a municipality with a population of 1.6 million or more located in a county with a population of 2.8 million or more. Enacted 1999 as Chapter 207, renumbered in 2001 by H.B. 2812.

d. Chapter 210, Texas Property Code, *Extension or Modification of Residential Covenants.* Applies to subdivisions in counties with a population of more than 170,000 and less than 175,000 and counties with a population of more than 45,000 and less than 75,000, which counties are located adjacent to a county within a population of more than 170,000 and less than 175,000. Enacted 2005. Chapter 211 of Texas Property Code applicable subdivisions in the unincorporated area of a county with a population of 65,000 or less. Enacted 2005.

e. Chapter 211, Texas Property Code, *Amendment and Enforcement Restrictions in Certain Subdivisions*. Applies to subdivisions located in whole or in part within an unincorporated area of a county within a population of less than 65,000. Enacted 2005.

20. **HOMESTEAD**. See Exempt Property.

21. **INTEREST**, Title 4, Subtitle A, § 301 *et seq*, Texas Finance Code.

22. **JURISDICTION** of Justice Court and Small Claims Court, Texas Government Code: § 27.031 (Justice Court) and § 28.003 (Small Claims Court).

23. **MANAGEMENT CERTIFICATE**

a. Condominiums. § 82.116 of TUCA, Chapter 82, Texas Property Code, applicable to condominiums only. Applies to all condominiums (pre-TUCA & post-TUCA). Enacted 1993.

b. Non-Condo POAs. § 209.004, Texas Property Code, applicable to all mandatory POAs except condos. Enacted 2001.

24. **MEETINGS**

a. Condominiums. Board meetings and association meetings must be open to members. However, the board may go into closed executive session for certain limited purposes. § 82.108 of TUCA, Chapter 82, Texas Property Code. Enacted 1993. Amended 1997. The 1997 amendment became effective January 1, 1998, and applies to all condominiums (pre-TUCA & post-TUCA).

b. Select POAs. A limited category of mandatory property owners association are subject to government open meeting laws and open records laws. Bracketed to Harris County and surrounding counties, and limited to POAs with assessments based on tax values. §§ 551.0015 & 552.0035, Texas Government Code. Enacted 1999.

25. **NON-CONDOMINIUMS - POAs, PDs, PUDS, MUDs, PIDs**

a. *Powers of Property Owners Association Relating to Restrictive Covenants in Certain Subdivisions*, Chapter 204, Texas Property Code. Bracketed for Harris County. Enacted 1995. Amended 2003 to be applicable to Galveston County. Amended 2005 to be applicable to Montgomery County.

b. PUD District. *Designation of a Planned Unit Development District in Extraterritorial Jurisdiction*, § 42.046, Texas Local Government Code.

c. MUDs. *Municipal Utility Districts*, Chapter 54, Texas Water Code. Enacted 1971.

d. PIDs. *Public Improvement Districts*, Subchapter A, Chapter 372, Texas Local Government Code. Enacted 1987.

26. **NUISANCES**. *Common and Public Nuisances*, Chapter 125, Civil Practice and Remedies Code. Enacted 2003. Amended 2005.

27. **RECORDS - OPEN**

a. Corporations. §§ 1396-2.23 & 2.23A, Texas Non-Profit Corporation Act.

b. Unincorporated POAs. § 1396-70.01, Sec. 11, Texas Uniform Unincorporated Nonprofit Association Act.

c. Condominiums. § 82.114(b) of TUCA, Chapter 82, Texas Property Code, applicable to condominiums only. Enacted 1993. Applies to all condominiums (pre-TUCA & post-TUCA).

d. Non-Condo POAs. § 209.005, Texas Property Code, applicable to all mandatory POAs except condos. Enacted 2001 as S.B. 507, to be effective January 1, 2002.

28. **ROOFS**. *Wood Shingle Roof*, § 5.025, Texas Property Code. Restrictions requiring use of wood shingle roofs are void. Enacted 1983.

29. **SALES OF UNITS OR LOTS**

a. Condominium - Resale Certificate. Resales of units (residential and non-residential) in pre-TUCA and post-TUCA condominiums are subject to § 82.157 of TUCA, which requires a condominium resale certificate executed by the condominium association if a written request received from seller. Enacted 1993.

b. Unit (Condo) and Lot (Non-Condo) - Resale Certificate. Resales of units and lots in developments with mandatory property owners associations are subject to Chapter 207, Texas Property Code, which requires a resale certificate executed by the owners association if a written request received from (1) seller, (2) seller's agent, or (3) seller's title insurance company. Does not apply to nonresidential developments. Does not expressly exempt condominiums. Enacted 1999. NOTE: In 1999 Texas enacted 3 bills adding Chapter A207 to Property Code. This refers to the one titled A Disclosure of Information by Property Owners Association.

c. Lots (Non-Condo) - Notice of POA. Sales of residential lots in developments with mandatory property owners associations (non-condo only) are subject to § 5.012, Texas Property Code, which requires sellers to give purchasers A Notice of Obligations Related to Membership in Property Owners Association. The POA has no responsibility for this notice. Enacted 1999.

30. **SEX OFFENDER**. *Registration Program*, Chapter 62, Texas Code of Criminal Procedure (formerly Art. 6252-13c.1 VACS). Enacted 1991. Amended 1993-1999.

31. **POLITICAL SIGNS**. § 202.009, Texas Property Code, Relating to Regulation by a Property Owners' Association of Certain Displays on Property in a Residential Subdivision. Enacted 2005.

32. **STREETS - Public & Private**

a. *Overnight Parking of Commercial Motor Vehicles in Residential Subdivision*, § 545.307, Texas Transportation Code. Applies to deed restricted residential subdivisions in counties with 220,000+ population. Enacted 1997. Amended 1999.

b. Private Roads. *Rules on Private Property* - § 542.005 and *Speed Restrictions on Private Roads* - § 542.006, Texas Transportation Code. Enacted 1995.

c. *Private Subdivision in Certain Counties* (under 500,000 population) - roads can be regulated by the county if petitioned by property owners. § 542.007, Texas Transportation Code. Enacted 1999. Amended 2001 and 2003.

d. *Traffic Regulation in Private Subdivision* located in municipality with population of 300 or more. § 542.008, Texas Property Code. Enacted 2001.

33. **SUBDIVISION REGULATION**. Texas Local Government Code: Chapter 212 - *Municipal Regulation of Subdivision and Property Development*; Chapter 232 - *County Regulation of Subdivisions*.

34. **SWIMMING POOL**. A. *Pool Yard Enclosures*, Chapter 757, Texas Health & Safety Code. Enacted 1993. B. *Specific Safety Features for Pools & Spas*, Chapter 265 (Subchapter L), Texas Administrative Code. Enacted 2004.

35. **TAXES**

    a. Appraisal for Property Taxes. *Condominium and Planned Unit Developments*, § 25.09, Texas Tax Code. Enacted 1979. Amended 1981.

    b. Nominal Property Tax. *Property Owned by a Nonprofit Homeowners' Organization for the Benefit of Its Members*, § 23.18, Texas Tax Code. Enacted 1981.

    c. Franchise Tax. Incorporated associations are liable for the annual State franchise tax - unless granted an *Exemption - Certain Homeowners' Associations*, § 171.082, Texas Tax Code. Enacted 1981. Amended 1995.

    d. Priority of Tax Liens Over Other Property Interests. § 32.05, Texas Tax Code. Amended 1999.

    e. Obligation for POA Assessments. When owner redeems after property tax foreclosure. § 34.21, Texas Tax Code. Enacted 1979. Amended 1989-1999, 2001 & 2003.

36. **TENANT/LANDLORD LAW**. This list does not address the body of State law dealing with tenant/landlord, which applies to POAs that own and lease units or homes. TAA's Redbook has a good compilation of tenant/landlord laws.

37. **TIMESHARING**. *Texas Timeshare Act*, Chapter 221, Texas Property Code. Enacted 1987. Amended 1989, 1993, 1995 & 1999.

38. **TOWING**

    a. *Abandoned Motor Vehicles*, Chapter 683, Texas Transportation Code. Enacted 1995. Amended 1999.

    b. *Removal of Unauthorized Vehicle from Parking Facility or Public Roadway*, Title 7, Chapter 684, Texas Transportation Code. Enacted 1995. Amended 1997.

39. **UTILITIES**

    a. Cutoff (Any Utility). *Landlord Liability to Tenant for Utility Cutoff*, § 92.301, Texas Property Code. Enacted 1989. Amended 1995.

    b. Cutoff (Any Utility). *Interruption of Utilities*, § 92.008, Texas Property Code. Enacted 1983. Amended 1985-1995.

c. Cutoff (Condominium). § 82.102(a)(14) gives condominiums the authority to adopt rules regulating the termination of utility service to a unit of delinquent owners where the assessment is used in whole or in part to pay the cost of a utility.

d. Electric Cutoff. *Central System or Nonsubmetered Master Metered Utilities*, § 25.141, Texas Administrative Code (Title 16, Part 2 [PUC], Chapter 25).

e. Electric Submetering. *Submetering for Apartments, Condominiums, and Mobile Home Parks*, § 25.142, Texas Administrative Code (Title 16, Part 2 [PUC], Chapter 25).

f. Water Cutoff. *Discontinuance of Service*, § 291.126, Texas Administrative Code (Title 30, Part 1 [TCEQ], Chapter 291).

g. Water Submetering. *Submetering and Plumbing Fixtures*, §§ 13.502 & 13.506, Chapter 13, Texas Water Code. Amended 2001 by H.B. 2404 to require individual or submetering of water for condominium units built after January 1, 2003.

h. Gas Submetering. *Gas Distribution in Mobile Home Parks, Apartment Houses, and Apartment Units*, § 7.46, Texas Administrative Code (Title 16, Part 1 [RR Comm.], Chapter 7).

40. **VIOLATIONS**

a. Condominiums. §§ 82.102(a)(12), (c) & (d) of TUCA, Chapter 82, Texas Property Code, applicable to condominiums only. Enacted 1993. Applies to all condominiums (pre-TUCA & post-TUCA).

b. Non-Condo POAs. § 209.006-008, Texas Property Code, applicable to all mandatory POAs except condos. Enacted 2001.

c. Specific Counties. § 204.010(a)(11), Texas Property Code. Applies only to non-condo POAs in Harris, Galveston or Montgomery Counties.

41. **WATER CONSERVATION AND COMPOST**. A property owners association may not include or enforce a dedicatory instrument that prohibits or restricts various water conservations and composting measures. § 202.007, Texas Property Code. Enacted 2003.

42. **WHITE-TAILED DEER**. Property owners associations may trap and transport white-tailed deer under certain circumstances with a permit issued by the Texas Parks and Wildlife Department. § 43.0612, Texas Parks and Wildlife Code. Enacted 2003.