

**Statutory Evolution of Property Owners  
Associations In Texas:  
Including An Overview of What They Are  
and Their Statutory Powers  
and Limitations**

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**South Texas College of Law  
18th Annual Real Estate Law Conference  
May 2002**

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**I. INTRODUCTION & OVERVIEW**

**A. Introduction.**

The purpose of this paper is to provide the real estate practitioner that is not familiar with representing residential property owners associations (POAs) an overview of what POAs are and the evolution of their statutory powers.

Until relatively recently Texas had very few statutes that dealt directly with POAs. While other states had statutes that governed POAs, the statutes that dealt with POAs in Texas were few and incomprehensive at best. The void in statutes directly dealing with POAs began to fill in 1993 when the 73<sup>rd</sup> Legislature added Chapter 82 to the Property Code (the Uniform Condominium Act).

The 74<sup>th</sup> and 75<sup>th</sup> Legislatures saw few bills dealing directly with POAs introduced; however the 76<sup>th</sup> Legislature was quite different. POAs were under siege in the 76<sup>th</sup> Legislature. Proposed bills ranged from attempts to prohibit mandatory membership in new POAs to prohibiting POAs from foreclosing on homesteads. In the 76<sup>th</sup> Legislature there was even a proposed bill that would have created a comprehensive statute for POAs (excluding condominiums that were already addressed by Chapter 82.) Regardless of what side of the debate one was on, the 76<sup>th</sup> Legislature was an exciting time for those interested in the future of POAs in Texas. Most of the legislation affecting POAs that was introduced in the 76<sup>th</sup> Legislature, however, did not become law.

In the 77<sup>th</sup> Legislature, POAs were again under siege. At the beginning of the 77th Legislature many of the same bills negative to POA's and their powers were again introduced, but the only proposed bill that seemed likely to pass was SB507 (now Chapter 209 of the Property Code) SB507 was touted to be (and it was) a POA consumer protection bill. Then it happened, the now infamous Winona Blevins case.

By way of background, Mrs. Blevins, an 84 year old widow with no mortgage on her homestead, was foreclosed on by her POA due to her failure to pay the maintenance fees. Many politicians jumped on the political bandwagon and introduced a plethora of bills and amendments to SB507 that would have, in effect, severely crippled POA's in Texas. Fortunately for POA's, the Blevins' foreclosure occurred late in the session. In the end, even though rules were suspended and several legislators made valiant efforts to push through legislation, the only bill that was passed was SB507 (virtually in its introduced form). SB507, which became Chapter 209 of the Texas Property Code will be discussed in detail in this paper.

The 78th Legislature promises to again be fertile ground for legislation attempting to curb the powers of POA's. One prominent legislator even prophesied soon after the end of the 77th Legislature that he was going to return and this time "cut the legs out from underneath them [POA's]". It does not take much political acumen to forecast that those interested in the future of POA's in Texas should pay close attention to the 78th Legislature.

The bottom line is that the representation of POAs is a rapidly evolving area of the law (both by case law and statutes) and the practitioner should always remember to update any reference materials, case law and statutes covering POAs.

Recently, the press has made quite a heyday out of the powers of POAs and the related perceived abuses created as a result of these powers. Newspapers (especially in Harris County) have been peppered with stories of owners that have been or have almost lost their homes due to POAs' foreclosure powers. SB507 was specifically aimed at placing safeguards in places to protect owners in POAs (excluding those in condominiums) from some of the perceived abuses that can occur due to the statutory powers of POAs. Due to Chapter 209 of the Texas Property Code, many of the statutory powers of POAs are now held in abeyance while certain statutory safeguards are implemented. This article will focus on the statutory powers and limitations of (non-condominium) POA's

## B. Jargon.

Every area of specialization is blessed and cursed by its own jargon, acronyms, and abbreviations. The POA field is no exception. The following terms were borrowed directly (with permission) from Sharon Reuler and Rosemary Jackson's article for the State Bar of Texas' 1998 Advanced Real Estate Drafting Course entitled "A Primer for Representing Condominium and Property Owners Associations", which the author highly recommends to any attorney venturing into the representation of POAs. While not all the terms below are used in this paper, the terms are very common in the practice of representing POAs and as espoused by Ms. Reuler and Ms. Jackson its authors: "Learning the following terms will make you sound like an expert."

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 ACC. The ACC is typically created by the declaration or CC&Rs.

2. **Bylaws** refers to the POA document that deals with governance and administration of the POA. Beware of people who use "Bylaws" to refer to any or all of the POA project documents. Also be aware that some documents titled "Bylaws" contain provisions that are customarily found in declarations.

3. **CA** (pronounced "see-ay") is the acronym for Community Association -- the term coined by CAI in the 1970s for all mandatory membership associations, including condominiums, cooperatives, and planned unit developments. CA is synonymous with POA and common interest communities as an all-inclusive term.

4. **CAI** is the acronym for the Community Associations Institute -- the national educational membership organization serving the POA

industry. CAI has local chapters in Houston, Dallas, San Antonio, and Austin.

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

6. **Common Interest Ownership** is sometimes 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.

8. **Council of Owners** is the term used by Chapter 81 of the Property Code for the condominium association.

9. **D&O** is the acronym and nickname for Directors and Officers Liability insurance, also known as errors and omissions coverage.

10. **Declaration** is the term used most often 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.

12. **Diminimis PUD** is a lender-coined term that was used widely in the 1980s to refer to a PUD with nominal common areas, thus requiring a less stringent review for underwriting purposes.

13. **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.

14. **Gated Community** usually refers to a POA with controlled vehicular access. The

existence of a gated entry suggests that the neighborhood served by the gate is subject to mandatory assessments.

**15. HOA** is the acronym for Homeowners Association, a term that is often used generically to refer to all residential POAs, but is sometimes used to distinguish PUDs from condominiums.

**16. Master or Umbrella Association** refers to a POA containing one or more subordinate POAs.

**17. PCAM** (pronounced "pee-cam") is the acronym for Professional Community Association Manager, a designation issued by CAI for managers who meet certain educational and proficiency requirements.

**18. POA** is the acronym for Property Owners Association, 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 this article, POA excludes the subcategory of condominium associations.

**19. 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.

**20. 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.

**21. Restrictions** refer to the document that creates the POA, although the document may be titled Condominium Declaration, or Master Deed, or Declaration of CC&Rs. Restrictions are sometimes used interchangeably with "Declaration."

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

**23. TLAC** (pronounced "tee-lak") is the acronym for the Texas Legislative Action Committee of CAI, which is involved in POA-related Texas legislation.

**24. Townhouse** 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, some people insist on using townhouse to describe the ownership of attached housing that is not condominium.

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

**26. 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.

### **C. Applicable Law.**

Representing POAs is an interesting and often challenging practice because it involves several different areas of the law. Those areas include traditional real estate law, corporate law and common law. Throw into this mix the overlay of federal law and the lawyer representing POAs has quite a list of possible applicable laws for any given question. On most days a lawyer representing POAs can find himself reviewing the Property Code, the Non-Profit Corporation Act, applicable case law and any applicable federal law on any given topic. Failure to remember the interaction of all these laws (plus many others) could land the practitioner in the very awkward and embarrassing position of having to explain to his client why opposing counsel has just made him aware of a statute (or case law) governing the issue at hand. It is precisely for this reason a lawyer representing POAs must know about this unique interaction of applicable laws, in addition to the hierarchy of the POA's dedicatory instrument.

### **D. Hierarchy of Authorities.**

## 1. Public Law.

a. Federal Law. Not surprisingly, federal law is the highest legal authority for the POA. For example, the Telecommunications Act of 1996 and the collateral FCC regulations supersede or modify the satellite and antenna restrictions in the POA Declaration.

b. State Law. Although there are still relatively few statutes targeted directly at POAs, there is a remarkably large body of case law affecting POA's. Additionally, there are a number of statutes that, while not specifically regulating POA's, do regulate many aspects of POA operations. Further, many federal laws -- such as the Telecommunications Act and the Fair Housing Act -- 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 also enact ordinances -- such as fair housing ordinances -- that have counterparts in state and/or federal law.

**2. POA Documents.** The next highest authority on the hierarchy ladder is the POA's project documents, which have a hierarchy of their own.

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.

c. Articles of Incorporation. On matters of POA governance, in case of conflict, the Articles of Incorporation (filed with the Secretary of State) generally control over 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. Board Resolutions. The lowest authority on the hierarchy ladder is the board-made policies, practices, procedures, and rules of the POA, typically enacted by virtue of resolutions or motions. 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.

## II. WHAT ARE POAS?

### 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.*

This definition, while widely accepted as the definition of POAs 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 Chapters 204 and 209 of the Property Code.

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 (Article 1369-1.01-11.01, Texas Revised Civil Statutes) and the Miscellaneous Corporation Laws Act (Article 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 the Property Code to be organized as a profit or nonprofit corporation.

## **III. OVERVIEW OF STATUTORY POWERS OF POAS**

### **A. Statutes Governing POAs versus Statutory Powers and Limitations of POAs.**

The distinction between the statutes governing POAs versus the statutory powers of POAs is significant. As mentioned previously, there are numerous federal and state statutes (as well as local ordinances) that govern the day-to-day operations of POAs. The primary focus of this paper, however, is the statutes that empower or limit a POA.

### **B. Statutory Powers and Limitations of a POA Distinguished from the Powers of a POA in its Project Documents.**

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. Conversely, the statutory limitations of POA's generally apply regardless of the terms of the project documents. Accordingly, a practitioner's first step should always be a review of the project documents to

ascertain whether there are any provisions that relate to any given situation and then the applicable statutes.

## **IV. POWERS OF AN INCORPORATED POA**

**A. Generally.** 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. Due to the fact that for profit POAs are virtually none existent, this paper will only focus on the powers of a POA that is a 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 board of directors of the POA 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 By-laws.

### **C. Powers of an Incorporated POA Contained in the Non-Profit Corporation Act.**

Art. 1396-2.02. General Powers of the Non-Profit Corporation Act provides the general

powers of a non-profit corporation are as follows:

*A. Subject to the provisions of Sections B and C of this Article, each corporation shall have power:*

*(1) To have perpetual succession by its corporate name, unless a limited period of duration is stated in its articles of incorporation. Notwithstanding the articles of incorporation, the period of duration for any corporation incorporated before August 10, 1959, is perpetual if all fees and franchise taxes have been paid as provided by law.*

*(2) To sue and be sued, complain and defend, in its corporate name.*

*(3) To have a corporate seal which may be altered at pleasure, and to use the same by causing it, or a facsimile thereof, to be impressed on, affixed to, or in any manner reproduced upon, instruments of any nature required to be executed by its proper officers.*

*(4) To purchase, receive, lease, or otherwise acquire, own, hold, improve, use, or otherwise deal in and with, real or personal property, or any interest therein, wherever situated, as the purposes of the corporation shall require, or as shall be donated to it.*

*(5) To sell, convey, mortgage, pledge, lease, exchange, transfer, and otherwise dispose of all or any part of its property and assets.*

*(6) To lend money to and otherwise assist its employees and officers, but not its directors, if the loan or assistance may reasonably be expected to benefit, directly or indirectly, the corporation providing the assistance. Loans made to officers must be:*

*(a) made for the purpose of financing the principal residence of the officer; or*

*(b) made during the first year of that officer's employment, in which case the original principal amount may not exceed 100 percent of the officer's annual salary; or*

*(c) made in any subsequent year, in which case the original principal amount may not exceed 50 percent of the officer's annual salary.*

*(7) To purchase, receive, subscribe for, or otherwise acquire, own, hold, vote, use, employ, mortgage, lend, pledge, sell or otherwise dispose of, and otherwise use and deal in and with, shares or other interests in, or obligations of, other domestic or foreign corporations, whether for profit or not for profit, associations, partnerships, or individuals, or direct or indirect obligations of the United States or of any other government, state, territory, government district, or municipality, or of any instrumentality thereof.*

*(8) To make contracts and incur liabilities, borrow money at such rates of interest as the corporation may determine, issue its notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge of all or any of its property, franchises, and income.*

*(9) To lend money for its corporate purposes, invest and reinvest its funds, and take and hold real and personal property as security for the payment of funds so loaned or invested.*

*(10) To conduct its affairs, carry on its operations, and have officers and exercise the powers granted by this Act in any state, territory, district, or possession of the United States, or any foreign country.*

*(11) To elect or appoint officers and agents of the corporation for such period of time as the corporation may determine and define their duties and fix their compensation.*

*(12) To make and alter by-laws, not inconsistent with its articles of incorporation or with the laws of this State, for the administration and regulation of the affairs of the corporation.*

*(13) To make donations for the public welfare or for charitable, scientific, or educational purposes and in time of war to make donations in aid of war activities.*

*(14) To cease its corporate activities and terminate its existence by voluntary dissolution.*

(15) Whether included in the foregoing or not, to have and exercise all powers necessary or appropriate to effect any or all of the purposes for which the corporation is organized.

(16) Any religious, charitable, educational, or eleemosynary institution organized under the laws of this State may acquire, own, hold, mortgage, and dispose of and invest its funds in real and personal property for the use and benefit and under the discretion of, and in trust for any convention, conference or association organized under the laws of this State or another state with which it is affiliated, or which elects its board of directors, or which controls it, in furtherance of the purposes of the member institution.

(17) To pay pensions and establish pension plans and pension trusts for all of, or class, or classes of its officer and employees, or its officers or its employees.

(18) To deliver money to a scholarship fund for rural students.

Sec. A amended by Acts 1997, 75th Leg., ch. 904, Sec. 5, eff. Sept. 1, 1997.

B. Nothing in this Article grants any authority to officers or directors of a corporation for the exercise of any of the foregoing powers, inconsistent with limitations on any of the same which may be expressly set forth in this Act or in the articles of incorporation or by-laws or in any other laws of this State. Authority of officers and directors to act beyond the scope of the purpose or purposes of a corporation is not granted by any provisions of this Article.

C. Nothing in this Article shall be deemed to authorize any action in violation of the Anti-Trust Laws of this State or of any of the provisions of Chapter 4 of Title 32 of Revised Civil Statutes of Texas, 1925, as now existing or hereafter amended.

#### **D. Case Law Interpreting the Corporate Powers of a POA.**

In *Candlelight Hills Civic Association v. Goodwin*, 763 S.W.2d 474 (Tex. App. - Houston [14th Dist.] 1988, writ denied) the court held

that the applicable Declaration's reference to the incorporation of the POA "implicitly integrated" the powers of a non-profit corporation found in the Texas Non-Profit Corporation Act into the intent of the Declaration.

#### **V. POWERS OF AN UNINCORPORATED POA.**

**A. Generally.** The powers of an unincorporated POA, as a rule, must be found in the project documents are in common law. The Uniform Unincorporated Association Act does not contain the same laundry list of powers found in §2.02 of the Non-Profit Corporation Act.

**B. No Presumption.** Unlike the Non-profit Corporation Act, there is also no presumption of authority in favor of the leaders of an unincorporated association contained in the Uniform Unincorporated Association Act.

#### **C. Powers of an Unincorporated POA Contained in the Uniform Unincorporated Association Act.**

While there is no laundry list of powers of an unincorporated association in the Uniform Unincorporated Association Act like that found in §2.02 of the Non-profit Corporation Act, there are a few stated powers. §5(a) provides: "A nonprofit association in its name may acquire, hold, encumber, or transfer an estate or interest in real or personal property." §8(a) provides: "A nonprofit association, in its name, may institute, defend, intervene, or participate in a judicial, administrative, or other governmental proceeding or in an arbitration, mediation, or any other form of alternative dispute resolution." Likewise §8(b) provides:

*A nonprofit association may assert a claim in its name on behalf of its members if one or more members of the nonprofit association have standing to assert a claim in their own right, the interests the nonprofit association seeks to protect are germane to its purposes, and neither the claim asserted nor the relief requested requires the participation of a member.*

#### **D. Case Law Interpreting the Powers of an Unincorporated Association.**



There are no cases specifically stating that an unincorporated POA is governed by the general laws governing unincorporated associations, however, the author believes that this would be the case. As a general rule, courts will not interfere with the internal management of voluntary associations so long as the governing bodies do not substitute legislation for interpretation and do not act totally unreasonably contravene public policy in such interpretation. Indeed, several cases have applied general rules of law governing associations to POA's. See *Holleman v. Mission Trace Homeowners Ass'n*, 556 S.W.2d 632 (Tex. Civ. App.–San Antonio 1977, no writ); *Frey v. DeCordova Bend Estates Owners Ass'n*, 632 S.W.2d 877 (Tex. App.–Fort Worth), *aff'd*, 647 S.W.2d 246 (Tex. 1983); *Musgrage v. Brookhaven Lake Property Owners Ass'n*, 990 S.W.2d 386 (Tex. App. –Texarkana 1999, pet. Denied).

## VI. STATUTORY POWERS OF POAS

### A. Generally.

Generally speaking a POA has few statutory powers other than those set forth in the Non-Profit Corporation Act (assuming the POA in question is a non-profit corporation). The exceptions to this general rule are contained in the Property Code and are discussed below.

The most notable exception to this general rule is Chapter 204 of the Property Code, which is bracketed to Harris County. Due to the bracketing, Chapter 204 is very limited in its application, however, it is imperative that those practitioners representing POA's located in Harris County have a basic understanding of its provisions. (The recent case of *Geneva Brooks, et al v. Northglen Association* upheld the constitutionality of Chapter 209). The actual text of the statutes quoted below has been italicized by the author and the author's comments following the text (which comments are not italicized).

### B. Statutory Powers of (non-condominium) POAs in the Property Code.

**1. §5.006(a)** – *In an action based on breach of a restrictive covenant pertaining to real property, the court shall allow to a prevailing party who asserted the action reasonable attorney's fees in addition to the party's costs and claim.*

While this “right” is not technically a “power” the benefit of this section cannot be underestimated. This section only allows the “prevailing party who asserted the action” to recover “reasonable attorney’s fees.” Accordingly, if a defendant in an action to enforce a restrictive covenant prevails, there is not corresponding right for the defendant to recover reasonable attorney’s fees. This is not a revolutionary concept in Texas law, as there have been attempts in past Legislatures to provide that any prevailing party in a lawsuit (not just the one bringing the lawsuit) will recover attorney’s fees. Likewise, many critics of POAs are of the opinion this section should be amended to provide any “prevailing party” in an action regarding a breach of a restrictive covenant should be statutorily allowed to recover reasonable attorney’s fees.

**2. §202.003(a)** – *A restrictive covenant shall be liberally construed to give effect to its purposes and intent.*

Again, while this rule of construction is also not technically a “power” of a POA, it is an important tool. The practitioner is, however, cautioned to carefully review the case law interpreting this section. For example the 1<sup>st</sup> and 14<sup>th</sup> Courts of Appeals have issued conflicting opinions on this “tool,” i.e., the 1st Court of Appeals has historically held that this presumption does not change the prior law of strict construction of restrictive covenants, while the 14th Court of Appeals has held §202.002(a) liberal construction has created a new rule of construction.

**3. §202.004(a)** – *An exercise of discretionary authority by a property owner's association or other representative designated by an owner of real property concerning a restrictive covenant is presume reasonable unless the court determines by a preponderance of the evidence that the exercise of discretionary*

*authority was arbitrary, capricious, or discriminatory.*

Again, while this presumption is not technically a “power” of a POA, it is an important tool. Note, however, the limitation on this “tool”, which provides the discretionary action of the POA must not be “arbitrary, capricious or discriminatory”.

**4. §202.004(b)** - *A property owners' association or other representative designated by an owner of real property may initiate, defend, or intervene in litigation or an administrative proceeding affecting the enforcement of a restrictive covenant or the protection, preservation, or operation of the property covered by the dedicatory instrument.*

This section made it clear that a POA could file a lawsuit to enforce restrictive covenants, whether or not this right is given in the Declaration.

**5. § 202.004(c)** - *A court may assess civil damages for the violation of a restrictive covenant in an amount not to exceed \$200 for each day of the violation.*

This is not technically a “power,” but again, it is a very important enforcement and negotiating tool of a POA when dealing with a violation of the Declaration.

**6. § 204.003** *An express designation in a document creating restrictions applicable to a residential real estate subdivision that provides for the extension of, addition to, or modification of existing restrictions by a designated number of owners of real property in the subdivision prevails over the provisions of this chapter.*

The practitioner reviewing the various provisions of Chapter 204 must always remember the limitation established in this section.

**7. §204.005 (a)** - *A property owners' association has authority to approve and circulate a petition relating to the extension of, addition to, or modification of existing restrictions. A property owners' association is*

*not required to comply with Sections 201.009–201.012.*

*(b) A petition to extend, add to, or modify existing restrictions approved and circulated by a property owners' association is effective if:*

*(1) the petition is approved by the owners, excluding lienholders, contract purchasers, and the owners of mineral interests, of at least 75 percent of the real property in the subdivision or a smaller percentage required by the original dedicatory instrument; and*

*(2) the petition is filed as a dedicatory instrument with the county clerk of the county in which the subdivision is located.*

*(c) If a subdivision consisting of multiple sections, each with its own restrictions, is represented by a single property owners' association, the approval requirement may be satisfied by obtaining approval of at least 75 percent of the owners on a section-by-section basis or of the total number of properties in the property owners' association's jurisdiction.*

Texas case law provides that the percentage required for the amendment of restrictions contained in separate Declarations must be satisfied in order to amend the Declarations in each section (as stated in the separate Declarations). This section allows for the “pooling” of votes in all sections represented by a POA to accomplish the amendment of each Declaration by 75 percent of the total number of properties in the POA. The author believes this section only applies if the various sets of restrictive covenants of the sections under the jurisdiction of the POA provide the terms thereof can be amended with the approval of the owners of 75 percent of the properties or less (reference § 204.003 above).

*(d) If approved, the petition is binding on all properties in the subdivision or section, as applicable.*

*(e) A property owners' association that circulates a petition must notify all record owners of property in the subdivision in writing of the proposed extension, addition to, or*

*modification of the existing restrictions. Notice may be hand-delivered to residences within the subdivision or sent by regular mail to the owner's last known mailing address as reflected in the ownership records maintained by the property owners' association. The approval of multiple owners of a property may be reflected by the signature of a single co-owner.*

The right to have the proposed amendment approved by only one of the owners of a property is a significant tool in amending restrictive covenants. Without this tool, most practitioners recommend that the signatures of all the owners of the property should be obtained. Even with this section, the conservative practitioner should continue to make the same recommendation, until there is case law specifically interpreting this section.

**8. §204.006(a)** – *If existing restrictions applicable to a subdivision do not provide for a property owners' association and require approval of more than 60 percent of the owners to add to or modify the original dedicating instrument, a petition to add to or modify the existing restrictions for the sole purpose of creating and operating a property owners' association with mandatory membership, mandatory regular or special assessments, and equivalent voting rights for each of the owners in the subdivision is effective if:*

*(1) a petition committee has been formed as prescribed by §201.005;*

*(2) the petition is approved by the owners, excluding lienholders, contract purchasers, and the owners of mineral interests, of at least 60 percent of the real property in the subdivision; and*

*(3) the procedure employed in the circulation and approval of the petition to add to or amend the existing restrictions for the specified purpose complies with the requirements of this chapter.*

*(b) If the circulated petition is not approved by the required percentage of owners within one year of the creation of the petition committee, the petition is void and another petition committee may be formed.*

*(c) If the petition is approved, the petition is binding on all properties in the subdivision or section, as applicable.*

While this section does not technically create a power of a POA (inasmuch as a POA is not yet in existence) this is an extremely effective tool. This section should be used by subdivisions that do not have a POA, but desire one and the existing restrictive covenants require a percentage higher than 60 percent for an amendment.

**9. §204.008** - *An extension, addition to, or modification of restrictions proposed by a property owners' association may be adopted:*

*(1) by a written ballot that states the substance of the amendment and specifies the date by which a ballot must be received to be counted;*

*(2) at a meeting of the members represented by the property owners' association if written notice of the meeting stating the purpose of the meeting is delivered to each owner of property in the subdivision;*

*(3) by door-to-door circulation of a petition by the property owners' association or a person authorized by the property owners' association;*

*(4) by a method permitted by the existing restrictions; or*

*(5) by a combination of the methods described by this section.*

This section provides several methods for the amendment of restrictive covenants, some of which methods would not otherwise be available unless provided for in the Declaration.

**10. §204.009(a)** - *If the property owners' association is referenced in the existing, extended, added to, or modified restrictions as a Texas nonprofit corporation, the instrument contemplates the interaction of a nonprofit corporation, its articles of incorporation, and its bylaws.*

This section codifies the holding *Candlelight Hills*.

**11. §204.009(b)** - *The property owners' association has the powers and shall promote the purposes enumerated in the articles of incorporation and bylaws. These powers and purposes necessarily modify the express provisions of the restrictions to include the referenced powers and purposes.*

Again, this section codifies the holding *Candlelight Hills*.

**12. §204.010(a)(1) – (21) & (b) –**

*(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:*

*(1) adopt and amend bylaws;*

*(2) adopt and amend budgets for revenues, expenditures, and reserves and collect regular assessments or special assessments for common expenses from property owners;*

*(3) hire and terminate managing agents and other employees, agents, and independent contractors;*

*(4) institute, defend, intervene in, settle, or compromise litigation or administrative proceedings on matters affecting the subdivision;*

*(5) make contracts and incur liabilities relating to the operation of the subdivision and the property owners' association;*

*(6) regulate the use, maintenance, repair, replacement, modification, and appearance of the subdivision;*

*(7) make additional improvements to be included as a part of the common area;*

*(8) grant easements, leases, licenses, and concessions through or over the common area;*

*(9) impose and receive payments, fees, or charges for the use, rental, or operation of the common area and for services provided to property owners;*

*(10) impose interest, late charges, and, if applicable, returned check charges for late payments of regular assessments or special assessments;*

*(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;*

*(13) adopt and amend rules regulating the collection of delinquent assessments and the application of payments;*

*(14) impose reasonable charges for preparing, recording, or copying amendments to the restrictions, resale certificates, or statements of unpaid assessments;*

*(15) purchase insurance and fidelity bonds, including directors' and officers' liability insurance, that the board considers appropriate or necessary;*

*(16) if the restrictions allow for an annual increase in the maximum regular assessment without a vote of the membership, assess the increase annually or accumulate and assess the increase after a number of years;*

*(17) subject to the requirements of the Texas Non-Profit Corporation Act (Article 1396–1.01 et seq., Vernon's Texas Civil Statutes) and by majority vote of its board of directors, indemnify a director or officer of the property owners' association who was, is, or may be made a named defendant or respondent in a proceeding because the person is or was a director;*

*(18) if the restrictions vest the architectural control authority in the property owners' association or if the authority is vested in the property owners' association under §204.011:*

*(A) implement written architectural control guidelines for its own use or record the guidelines in the real property records of the applicable county; and*

*(B) modify the guidelines as the needs of the subdivision change*

*(19) exercise other powers conferred by the restrictions, its articles of incorporation, or its bylaws;*

*(20) exercise other powers that may be exercised in this state by a corporation of the same type as the property owners' association; and*

*(21) exercise other powers necessary and proper for the governance and operation of the property owners' association.*

*(b) Powers enumerated by this section are in addition to any other powers granted to a property owners' association by this chapter or other law.*

Section §204.010(a)(1) – (21) & (b) has been at the root of the controversy and the genesis of most of the perceived abuses by POAs in Harris County. Most of the powers listed are self-explanatory. There are, however, some subsections that merit discussion; those subsections are (6), (9), (10), (11), (12), (13), (16) and (21).

§204.010(a)(6) – This subsection has been utilized by some practitioners as a “catch-all” section to allow a residential subdivision to promulgate rules and regulations that were not previously in place. The author does not recommend using this subsection as the sole authority for a POA's actions.

§204.010(a)(9) – This subsection has been interpreted by some practitioners to allow a POA to charge for services provided by a POA over any cap on dues in the Declaration. For example, many of the older generation declarations

provide a cap for dues. Utilizing this subsection some practitioners in Harris County are of the opinion a POA can charge the maximum dues established in the Declaration, plus an owner's pro-rata share of any given service that is provided for and paid for above the cap. There is an Attorney General's opinion that arguably lends some credibility to this interpretation. 1996 WL 667447 (Tex. A.G.). While this issue was generally mentioned in the *Northglen* case, the right of a POA to levy a community service charge under this section is still open to debate.

§204.010(a)(10) – This subsection very clearly allows for the imposition of interest and late fees for the late payment of dues. (The authority to charge late fees was upheld in the *Nottingham* case.)

§204.010(a)(11) & (12) – It is the interaction between subsection (11) and subsection (12) that has been utilized by POAs in Harris County to “charge-back” attorney's fees and costs incurred by the POA in the enforcement of a Declaration to an owner's dues account (which account is typically secured by a lien in favor of the POA retained in the Declaration). Assuming this interpretation is correct, then a POA can seek (in its' petition filed to enforce the terms of the Declaration) foreclosure of its lien for the attorneys fees it incurs to enforce the Declaration. Although there are no cases interpreting this interaction of subsections (11) and (12) to date, several judges in Harris County have agreed with this interpretation. There is, however, a movement afoot to introduce a bill in the 78th Legislation that would eliminate or severely limit this power.

§204.010(a)(13) – This is another power that should not be overlooked or underestimated. Utilizing this subsection, a POA can adopt a rule regarding the application of dues to amounts owed the POA. Typically, the application of payments in the rule will first be made to attorney's fees, interest, late charges, costs, etc. prior to the payment being applied to the dues. Theoretically, then, even though a payment of the dues has been made by the owner, the owner could still be sued or foreclosed upon for the non-payment of dues, because the dues were applied as set forth in the rule.

§204.010(a)(16) – It is common for Declarations to contain a cap on the amount the dues can be increased each year by its board of directors without a vote of the membership, e.g., no more than 10% over the prior year’s dues. Typically, although the board of directors of a POA can increase the dues by a stated percentage (up to the cap), the maximum allowed increase it not needed that year so the board of directors will set the dues beneath the allowed cap. This subsection allows POAs to accumulate the allowed increase in the dues and then assess the “increase” later all at one time. (The constitutionality of this section was also upheld by the *Northglen* case.)

§204.010(a)(18) – This subsection very clearly empowers a POA to adopt architectural guidelines (where architectural control power is vested in the POA), which are most often used to supplement the provisions of the Declaration.

§204.010(a)(21) – As with §204.010(a)(6), this subsection has been utilized by some practitioners as a “catch-all” section to empower a POA to take actions the POA does not otherwise have under the project documents, e.g., the power to fine. The author would not use this section as the sole source of authority for any given action and cautions practitioners to exercise discretion in using this section.

**14. §204.011** (a) *This section applies to restrictions providing for the creation and operation of an architectural control committee with the power to approve or deny applications for proposed original construction or modification of a building, structure, or improvement.*

(b) *Unless the restrictions applicable to a residential real estate subdivision vest the architectural control committee authority in the property owners' association before either of the following events, the architectural control committee authority automatically vests in the property owners' association when:*

(1) *the term of the architectural control committee authority expires as prescribed by the restrictions;*

(2) *a residence on the last available building site is completed and sold;*

(3) *the person or entity designated as the architectural control committee in the restrictions assigns, in writing, authority to the property owners' association; or*

(4) *an assignee of the original holder abandons its authority for more than one year.*

(c) *If the architectural control committee authority is transferred to the property owners' association, the authority is vested in the property owners' association until:*

(1) *the restrictions are modified to reflect otherwise;*

(2) *the restrictions are terminated; or*

(3) *the property owners' association ceases to exist.*

This subsection of Chapter 204 is a useful tool for the practitioner to remember where the powers of the architectural control committee may otherwise have lapsed.

**15. §205.004(a)** – *The governing body of a property owners' association may amend the restrictions for the limited purpose of complying with United States Department of Housing and Urban Development or United States Department of Veterans Affairs requirements for subdivision property to qualify for insured or guaranteed mortgage loans. (Note: this section only applies to a county with a population of 65,000 or more.)*

This section empowers the board of directors of a POA to amend the Declaration to bring it into compliance with HUD or VA requirements for insured or guaranteed mortgage loans.

**25. Chapter 208** - *Amendment and termination of restrictive covenants in historic neighborhoods.* (Text not quoted in this article, but references added for those practitioners representing historic neighborhoods, as defined by Chapter 208).

## VI. STATUTORY LIMITATION OF POWERS OF POAS IN THE PROPERTY CODE

### A. Generally.

Other than the few limitations set forth in the empowerment sections of the Property Code quoted above, prior to the passage of Chapter 209 of the Property Code, there were few statutory limitations on the powers of POA's. Section 202.006 and Chapter 207 of the Property Code (while not necessarily a limitation on POA's powers) did, however, require a POA to take certain actions that POA's were not otherwise required to take prior to their passage. POA's now have a statute (Chapter 209 of the Property Code) that puts in place certain statutory safeguards prior to a residential POA's enforcement of its power. As above, the text of the various statutes is quoted below in italics and the author's comments follow (which comments are not italicized).

### B. POA'S Enforcement of its Powers.

Section 202.006 of the Property Code provides: *A property owners' association shall file the dedicatory instrument in the real property records of each county in which the property to which the dedicatory instrument relates is located.*

This statute basically requires a POA to file all its project documents (including articles of incorporation, rules and regulations, policies and procedures, etc.) of record.

### B. Chapter 207 of the Code.

#### § 207.001. Definitions

(1) *"Restrictions" has the meaning assigned by Section 201.003.*

(2) *"Dedicatory instrument," "property owners' association," and "restrictive covenant" have the meanings assigned by Section 202.001.*

(3) *"Owner" means a person who owns record title to property in a subdivision or the*

*personal representative of an individual who owns record title to property in a subdivision.*

(4) *"Regular assessment" and "special assessment" have the meanings assigned by Section 204.001.*

(5) *"Resale certificate" means a written statement issued, signed, and dated by an officer or authorized agent of a property owners' association that contains the information specified by Section 207.003(b).*

(6) *"Subdivision" means all land that has been divided into two or more parts and that is or was burdened by restrictions limiting at least the majority of the land area burdened by restrictions, excluding streets and public areas, to residential use only, if the instrument or instruments creating the restrictions are recorded in the deed or real property records of a county.*

#### § 207.002. Applicability

*This chapter applies to a subdivision with a property owners' association that is entitled to levy regular or special assessments.*

#### § 207.003. Delivery of Subdivision Information to Owner

(a) *Not later than the 10th day after the date a written request for subdivision information is received from an owner, owner's agent, or title insurance company or its agent acting on behalf of the owner, the property owners' association shall deliver to the owner, owner's agent, or title insurance company or its agent:*

(1) *a current copy of the restrictions applying to the subdivision;*

(2) *a current copy of the bylaws and rules of the property owners' association; and*

(3) *a resale certificate that complies with Subsection (b).*

(b) *A resale certificate under Subsection (a) must contain:*

(1) a statement of any right of first refusal or other restraint contained in the restrictions or restrictive covenants that restricts the owner's right to transfer the owner's property;

(2) the frequency and amount of any regular assessments;

(3) the amount of any special assessment that is due after the date the resale certificate is prepared;

(4) the total of all amounts due and unpaid to the property owners' association that are attributable to the owner's property;

(5) capital expenditures, if any, approved by the property owners' association for the property owners' association's current fiscal year;

(6) the amount of reserves, if any, for capital expenditures;

(7) the property owners' association's current operating budget and balance sheet;

(8) the total of any unsatisfied judgments against the property owners' association;

(9) the style and cause number of any pending lawsuit in which the property owners' association is a defendant;

(10) a copy of a certificate of insurance showing the property owners' association's property and liability insurance relating to the common areas and common facilities;

(11) a description of any conditions on the owner's property that the property owners' association board has actual knowledge are in violation of the restrictions applying to the subdivision or the bylaws or rules of the property owners' association;

(12) a summary or copy of notices received by the property owners' association from any governmental authority regarding health or housing code violations existing on the preparation date of the certificate relating to the

owner's property or any common areas or common facilities owned or leased by the property owners' association;

(13) the amount of any administrative transfer fee charged by the property owners' association for a change of ownership of property in the subdivision;

(14) the name, mailing address, and telephone number of the property owners' association's managing agent, if any; and

(15) a statement indicating whether the restrictions allow foreclosure of a property owners' association's lien on the owner's property for failure to pay assessments.

(c) A property owners' association may charge a reasonable fee to assemble, copy, and deliver the information required by this section and may charge a reasonable fee to prepare and deliver an update of a resale certificate.

(d) The property owners' association shall deliver the information required by Subsection (a) to the person specified in the written request. A written request that does not specify the name and location to which the information is to be sent is not effective. The property owners' association may deliver the information required by Subsection (a) and any update to the resale certificate by mail, hand delivery, or alternative delivery means specified in the written request.

(e) Unless required by a dedicatory instrument, neither a property owners' association or its agent is required to inspect a property before issuing a resale certificate or an update to a resale certificate.

**§ 207.004. Owner's Remedies for Failure by Property Owners' Association to Timely Deliver Information**

(a) If a property owners' association does not timely deliver information in accordance with Section 207.003, the owner, owner's agent, or title insurance company or its agent acting on behalf of the owner may submit a second request for the information.



*(b) If a property owners' association fails to deliver the information required under Section 207.003 before the seventh day after the second request for the information was mailed by certified mail, return receipt requested, or hand delivered, evidenced by receipt, the owner:*

*(1) may seek one or any combination of the following:*

*(A) a court order directing the property owners' association to furnish the required information;*

*(B) a judgment against the property owners' association for not more than \$500;*

*(C) a judgment against the property owners' association for court costs and attorney's fees; or*

*(D) a judgment authorizing the owner or the owner's assignee to deduct the amounts awarded under Paragraphs (B) and (C) from any future regular or special assessments payable to the property owners' association; and*

*(2) may provide a buyer under contract to purchase the owner's property an affidavit that states that the owner, owner's agent, or title insurance company or its agent acting on behalf of the owner made, in accordance with this chapter, two written requests to the property owners' association for the information described in Section 207.003 and that the association did not timely provide the information.*

*(c) If the owner provides a buyer under contract to purchase the owner's property an affidavit in accordance with Subsection (b)(2):*

*(1) the buyer, lender, or title insurance company or its agent is not liable to the property owners' association for:*

*(A) any money that is due and unpaid to the property owners' association on the date the affidavit was prepared; and*

*(B) any debt to the property owners' association or claim by the property owners' association that accrued before the date the affidavit was prepared; and*

*(2) the property owners' association's lien to secure the amounts due the property owners' association on the owner's property on the date the affidavit was prepared shall automatically terminate.*

#### **§ 207.005. Effect of Resale Certificate; Liability**

*(a) A property owners' association may not deny the validity of any statement in the resale certificate. The property owners' association's lien to secure undisclosed amounts due the property owners' association on the date the resale certificate is prepared shall automatically terminate as a lien securing the undisclosed amount. A buyer, buyer's agent, owner, owner's agent, lender, and title insurance company and its agent are not liable for any debt or claim existing on the preparation date of the resale certificate that is not disclosed in the resale certificate.*

*(b) A resale certificate does not affect:*

*(1) the right of a property owners' association to recover debts or claims that arise or become due after the date the resale certificate is prepared; or*

*(2) a lien on a property securing payment of future assessments held by the property owners' association.*

*(c) The owner's agent and the title insurance company and its agent are not liable to a buyer for any delay or failure by the property owners' association in delivering the information required by Section 207.003.*

*(d) Except as provided by Section 207.004, the property owners' association is not liable to an owner selling property in the subdivision for delay or failure to deliver the information required by Section 207.003. An officer or agent of the property owners' association is not liable*

for a delay or failure to furnish a resale certificate.

While Chapter 207 could be viewed as an empowering statute, in reality Chapter 207 statutorily mandates POA's to disclose certain information to those designated, which disclosure were not previously required.

C. Chapter 209 of the Code.

Chapter 209 of the Texas Property Code (SB507) as previously stated, was touted from its introduction as a consumer protection statute. While Chapter 209 is, in fact, a consumer protection statute, many believe Chapter 209 is not as thorough as it should be in limiting powers of POA's. Nonetheless, it is the first piece of legislation in Texas that effectively places safeguards in place prior to a POA exercising its powers.

**1. §209.001** - *This chapter may be cited as the Texas Residential Property Owners Protection Act.*

**2. 209.002.** - (1) *"Assessment" means a regular assessment, special assessment, or other amount a property owner is required to pay a property owners' association under the dedicatory instrument or by law.*

(2) *"Board" means the governing body of a property owners' association.*

(3) *"Declaration" means an instrument filed in the real property records of a county that includes restrictive covenants governing a residential subdivision.*

(4) *"Dedicatory instrument" means each governing instrument covering the establishment, maintenance, and operation of a residential subdivision. The term includes restrictions or similar instruments subjecting property to restrictive covenants, bylaws, or similar instruments governing the administration or operation of a property owners' association, to properly adopted rules and regulations of the property owners' association, and to all lawful amendments to the covenants, bylaws, rules, or regulations.*

(5) *"Lot" means any designated parcel of land located in a residential subdivision,*

*including any improvements on the designated parcel.*

(6) *"Owner" means a person who holds record title to property in a residential subdivision and includes the personal representative of a person who holds record title to property in a residential subdivision.*

(7) *"Property owners' association" or "association" means an incorporated or unincorporated association that:*

(A) *is designated as the representative of the owners of property in a residential subdivision;*

(B) *has a membership primarily consisting of the owners of the property covered by the dedicatory instrument for the residential subdivision; and*

(C) *manages or regulates the residential subdivision for the benefit of the owners of property in the residential subdivision.*

(8) *"Regular assessment" means an assessment, a charge, a fee, or dues that each owner of property within a residential subdivision is required to pay to the property owners' association on a regular basis and that is designated for use by the property owners' association for the benefit of the residential subdivision as provided by the restrictions.*

(9) *"Residential subdivision" or "subdivision" means a subdivision, planned unit development, townhouse regime, or similar planned development in which all land has been divided into two or more parts and is subject to restrictions that:*

(A) *limit a majority of the land subject to the dedicatory instruments, excluding streets, common areas, and public areas, to residential use for single-family homes, townhomes, or duplexes only;*

(B) *are recorded in the real property records of the county in which the residential subdivision is located; and*

(C) *require membership in a property owners' association that has authority to impose regular or special assessments on the property in the subdivision.*

(10) *"Restrictions" means one or more restrictive covenants contained or incorporated by reference in a properly recorded map, plat, replat, declaration, or other instrument filed in the real property records or map or plat records. The term includes any amendment or extension of the restrictions.*

(11) "Restrictive covenant" means any covenant, condition, or restriction contained in a dedicatory instrument, whether mandatory, prohibitive, permissive, or administrative.

(12) "Special assessment" means an assessment, a charge, a fee, or dues, other than a regular assessment, that each owner of property located in a residential subdivision is required to pay to the property owners' association, according to procedures required by the dedicatory instruments, for:

(A) defraying, in whole or in part, the cost, whether incurred before or after the assessment, of any construction or reconstruction, unexpected repair, or replacement of a capital improvement in common areas owned by the property owners' association, including the necessary fixtures and personal property related to the common areas;

(B) maintenance and improvement of common areas owned by the property owners' association; or

(C) other purposes of the property owners' association as stated in its articles of incorporation or the dedicatory instrument for the residential subdivision.

**3. §209.003(a)** - This chapter applies only to a residential subdivision that is subject to restrictions or provisions in a declaration that authorize the property owners' association to collect regular or special assessments on all or a majority of the property in the subdivision.

(b) This chapter applies only to a property owners' association that requires mandatory membership in the association for all or a majority of the owners of residential property within the subdivision subject to the association's dedicatory instruments.

(c) This chapter applies to a residential property owners' association regardless of whether the entity is designated as a "homeowners' association," "community association," or similar designation in the restrictions or dedicatory instrument.

(d) This chapter does not apply to a condominium development governed by Chapter 82.

**4. §209.004** - (a) A property owners' association shall record in each county in which any portion of the residential subdivision is located a management certificate, signed and

acknowledged by an officer or the managing agent of the association, stating:

- (1) the name of the subdivision;
- (2) the name of the association;
- (3) the recording data for the subdivision;
- (4) the recording data for the declaration;
- (5) the mailing address of the association

or the name and mailing address of the person managing the association; and

(6) other information the association considers appropriate.

(b) The property owners' association shall record an amended management certificate not later than the 30th day after the date the association has notice of a change in any information in the recorded certificate required by Subsection (a).

(c) The property owners' association and its officers, directors, employees, and agents are not subject to liability to any person for a delay in recording or failure to record a management certificate, unless the delay or failure is wilful or caused by gross negligence.

This section requires a POA to file a document of record (and keep it updated) that identifies all the pertinent information governing and/or relating to a POA, including where the POA can be contacted.

This section requires a statutory notice prior to the enumerated enforcement actions. Generally, the notice requirements apply to the filing of a lawsuit to enforce the restrictions (except for collection of assessments, foreclosures, temporary restraining orders and temporary injunctions). Note, however, this section also applies to the suspension of the right to use the common area. The author is of the opinion that this section applies to a suspension of an owner's rights of the common area due to an owner's failure to timely pay an assessment in addition to suspensions for the violation of Rules. Note the wording of §209.006(b)(2)(b) is problematic; unless the owner signs the return receipt there is no way to ensure when the owner received the notice as required. The author recommends sending the notice by regular mail, in addition to the certified mail and relying on the presumption at law regarding the delivery of mail.

**5. §209.005** - (a) A property owners' association shall make the books and records of the association, including financial records,

reasonably available to an owner in accordance with Section B, Article 2.23, Texas Non-Profit Corporation Act (Article 1396-2.23, Vernon's Texas Civil Statutes).

(b) An attorney's files and records relating to the association, excluding invoices requested by an owner under Section 209.008(d), are not:

- (1) records of the association;
- (2) subject to inspection by the owner; or
- (3) subject to production in a legal proceeding.

This section specifically provides the provisions of Section 2.23 of the Texas Non-Profit Act are applicable to incorporated POA's and statutorily preserves the attorney client privilege of a POA and its attorney.

**6. §209.006** - (a) Before a property owners' association may suspend an owner's right to use a common area, file a suit against an owner other than a suit to collect a regular or special assessment or foreclose under an association's lien, charge an owner for property damage, or levy a fine for a violation of the restrictions or bylaws or rules of the association, the association or its agent must give written notice to the owner by certified mail, return receipt requested.

(b) The notice must:

- (1) describe the violation or property damage that is the basis for the suspension action, charge, or fine and state any amount due the association from the owner; and
- (2) inform the owner that the owner:
  - (A) is entitled to a reasonable period to cure the violation and avoid the fine or suspension unless the owner was given notice and a reasonable opportunity to cure a similar violation within the preceding six months; and
  - (B) may request a hearing under Section 209.007 on or before the 30th day after the date the owner receives the notice.

**7. §209.007** - (a) If the owner is entitled to an opportunity to cure the violation, the owner has the right to submit a written request for a hearing to discuss and verify facts and resolve the matter in issue before a committee appointed by the board of the property owners' association or before the board if the board does not appoint a committee.

(b) If a hearing is to be held before a committee, the notice prescribed by Section 209.006 must state that the owner has the right to appeal the committee's decision to the board by written notice to the board.

(c) The association shall hold a hearing under this section not later than the 30th day after the date the board receives the owner's request for a hearing and shall 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 a period of not more than 10 days. Additional postponements may be granted by agreement of the parties. The owner or the association may make an audio recording of the meeting.

(d) The notice and hearing provisions of Section 209.006 and this section do not apply if the association files a suit seeking a temporary restraining order or temporary injunctive relief or files a suit that includes foreclosure as a cause of action. If a suit is filed relating to a matter to which those sections apply, a party to the suit may file a motion to compel mediation. The notice and hearing provisions of Section 209.006 and this section do not apply to a temporary suspension of a person's right to use common areas if the temporary suspension is the result of a violation that occurred in a common area and involved a significant and immediate risk of harm to others in the subdivision. The temporary suspension is effective until the board makes a final determination on the suspension action after following the procedures prescribed by this section.

(e) An owner or property owners' association may use alternative dispute resolution services.

This section affords the hearing of which notice is required in §209.006, and sets forth very specific requirements as to: who is to conduct the hearing; rights of appeal; time frames for the hearing and postponements; the right to record the hearing; and matters for which the right to a hearing are not applicable. This section affords a right (power) to owners that did not previously exist at law.

**8. §209.008(a)** - A property owners' association may collect reimbursement of reasonable attorney's fees and other reasonable

costs incurred by the association relating to collecting amounts, including damages, due the association for enforcing restrictions or the bylaws or rules of the association only if the owner is provided a written notice that attorney's fees and costs will be charged to the owner if the delinquency or violation continues after a date certain.

(b) An owner is not liable for attorney's fees incurred by the association relating to a matter described by the notice under Section 209.006 if the attorney's fees are incurred before the conclusion of the hearing under Section 209.007 or, if the owner does not request a hearing under that section, before the date by which the owner must request a hearing. The owner's presence is not required to hold a hearing under Section 209.007.

(c) All attorney's fees, costs, and other amounts collected from an owner shall be deposited into an account maintained at a financial institution in the name of the association or its managing agent. Only members of the association's board or its managing agent or employees of its managing agent may be signatories on the account.

(d) On written request from the owner, the association shall provide copies of invoices for attorney's fees and other costs relating only to the matter for which the association seeks reimbursement of fees and costs.

(e) The notice provisions of Subsection (a) do not apply to a counterclaim of an association in a lawsuit brought against the association by a property owner.

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

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

(2) \$2,500.

(g) Subsection (f) does not prevent a property owners' association from recovering or

collecting attorney's fees in excess of the amounts prescribed by Subsection (f) by other means provided by law.

§209.008. Again, this section places a safeguard in place that did not previously exist. POA's (by virtue of Section 5.006(a) of the Property Code) have had the right to collect attorney's fees in litigation over restrictive covenants for many years, even if the right was not present in the project documents. This section precludes the POA from recovery of attorney's fees, unless the POA gives written notice as required by §209.008. This section also reflects the Legislature's first attempt to place a cap on the attorney's fees a POA may collect from an owner. Although this cap at one point is in the legislation process of SB507, applied to both non-judicial and judicial foreclosure, the judicial portion of the cap was ultimately removed prior to the passage of SB507. There has been some talk among legislators of extending this cap to other POA litigation.

**9. §209.009** - A property owners' association may not foreclose a property owners' association's assessment lien if the debt securing the lien consists solely of:

(1) fines assessed by the association; or

(2) attorney's fees incurred by the association solely associated with fines assessed by the association.

As with the previous sections, this section limits the powers of POA's by placing a safeguard in place that protects owners from foreclosure in certain circumstances.

**10. §209.010(a)** - A property owners' association that conducts a foreclosure sale of an owner's lot must send to the lot owner not later than the 30th day after the date of the foreclosure sale a written notice stating the date and time the sale occurred and informing the lot owner of the owner's right to redeem the property under Section 209.011.

(b) The notice must be sent by certified mail, return receipt requested, to the lot owner's last known mailing address, as reflected in the records of the property owners' association.

(c) *Not later than the 30th day after the date the association sends the notice required by Subsection (a), the association must record an affidavit in the real property records of the county in which the lot is located, stating the date on which the notice was sent and containing a legal description of the lot. Any person is entitled to rely conclusively on the information contained in the recorded affidavit.*

(d) *The notice requirements of this section also apply to the sale of an owner's lot by a sheriff or constable conducted as provided by a judgment obtained by the property owners' association.*

This section sets up the right of redemption after foreclosure (as detailed in the next section) by requiring notice of a POA's foreclosure (non-judicial or judicial). Again, this is a new safeguard for the owner.

**11. §209.011(a)** - *A property owners' association or other person who purchases occupied property at a sale foreclosing a property owners' association's assessment lien must commence and prosecute a forcible entry and detainer action under Chapter 24 to recover possession of the property.*

(b) *The owner of property in a residential subdivision may redeem the property from any purchaser at a sale foreclosing a property owners' association's assessment lien not later than the 180th day after the date the association mails written notice of the sale to the owner under Section 209.010.*

(c) *A person who purchases property at a sale foreclosing a property owners' association's assessment lien may not transfer ownership of the property to a person other than a redeeming lot owner during the redemption period.*

(d) *To redeem property purchased by the property owners' association at the foreclosure sale, the lot owner must pay to the association:*

(1) *all amounts due the association at the time of the foreclosure sale;*

(2) *interest from the date of the foreclosure sale to the date of redemption on all amounts owed the association at the rate stated in the dedicatory instruments for delinquent assessments or, if no rate is stated, at an annual interest rate of 10 percent;*

(3) *costs incurred by the association in foreclosing the lien and conveying the property to*

*the redeeming lot owner, including reasonable attorney's fees;*

(4) *any assessment levied against the property by the association after the date of the foreclosure sale;*

(5) *any reasonable cost incurred by the association, including mortgage payments and costs of repair, maintenance, and leasing of the property; and*

(6) *the purchase price paid by the association at the foreclosure sale less any amounts due the association under Subdivision (1) that were satisfied out of foreclosure sale proceeds.*

(e) *To redeem property purchased at the foreclosure sale by a person other than the property owners' association, the lot owner:*

(1) *must pay to the association:*

(A) *all amounts due the association at the time of the foreclosure sale less the foreclosure sales price received by the association from the purchaser;*

(B) *interest from the date of the foreclosure sale through the date of redemption on all amounts owed the association at the rate stated in the dedicatory instruments for delinquent assessments or, if no rate is stated, at an annual interest rate of 10 percent;*

(C) *costs incurred by the association in foreclosing the lien and conveying the property to the redeeming lot owner, including reasonable attorney's fees;*

(D) *any unpaid assessments levied against the property by the association after the date of the foreclosure sale; and*

(E) *taxable costs incurred in a proceeding brought under Subsection (a); and*

(2) *must pay to the person who purchased the property at the foreclosure sale:*

(A) *any assessments levied against the property by the association after the date of the foreclosure sale and paid by the purchaser;*

(B) *the purchase price paid by the purchaser at the foreclosure sale;*

(C) *the amount of the deed recording fee;*

(D) *the amount paid by the purchaser as ad valorem taxes, penalties, and interest on the property after the date of the foreclosure sale; and*

(E) *taxable costs incurred in a proceeding brought under Subsection (a).*

(f) *If a lot owner redeems the property under this section, the purchaser of the property at foreclosure shall immediately execute and*

*deliver to the owner a deed transferring the property to the redeeming lot owner. If a purchaser fails to comply with this section, the lot owner may file a cause of action against the purchaser and may recover reasonable attorney's fees from the purchaser if the lot owner is the prevailing party in the action.*

*(g) If, before the expiration of the redemption period, the redeeming lot owner fails to record the deed from the foreclosing purchaser or fails to record an affidavit stating that the lot owner has redeemed the property, the lot owner's right of redemption as against a bona fide purchaser or lender for value expires after the redemption period.*

*(h) The purchaser of the property at the foreclosure sale or a person to whom the person who purchased the property at the foreclosure sale transferred the property may presume conclusively that the lot owner did not redeem the property unless the lot owner files in the real property records of the county in which the property is located:*

*(1) a deed from the purchaser of the property at the foreclosure sale; or*

*(2) an affidavit that:*

*(A) states that the lot owner has redeemed the property; and*

*(B) contains a legal description of the property.*

*(i) If the property owners' association purchases the property at foreclosure, all rent and other income collected by the association from the date of the foreclosure sale to the date of redemption shall be credited toward the amount owed the association under Subsection (d), and if there are excess proceeds, they shall be refunded to the lot owner. If a person other than the association purchases the property at foreclosure, all rent and other income collected by the purchaser from the date of the foreclosure sale to the date of redemption shall be credited toward the amount owed the purchaser under Subsection (e), and if there are excess proceeds, those proceeds shall be refunded to the lot owner.*

*(j) If a person other than the property owners' association is the purchaser at the foreclosure sale, before executing a deed transferring the property to the redeeming lot owner, the purchaser shall obtain an affidavit from the association or its authorized agent stating that all amounts owed the association under Subsection (e) have been paid. The*

*association shall provide the purchaser with the affidavit not later than the 10th day after the date the association receives all amounts owed to the association under Subsection (e). Failure of a purchaser to comply with this subsection does not affect the validity of a redemption by a redeeming lot owner.*

*(k) Property that is redeemed remains subject to all liens and encumbrances on the property before foreclosure. Any lease entered into by the purchaser of property at a sale foreclosing an assessment lien of a property owners' association is subject to the right of redemption provided by this section and the lot owner's right to reoccupy the property immediately after the redemption.*

*(l) If a lot owner makes partial payment of amounts due the association at any time before the redemption period expires but fails to pay all amounts necessary to redeem the property before the redemption period expires, the association shall refund any partial payments to the lot owner by mailing payment to the owner's last known address as shown in the association's records not later than the 30th day after the expiration date of the redemption period.*

*(m) If a lot owner sends by certified mail, return receipt requested, a written request to redeem the property on or before the last day of the redemption period, the lot owner's right of redemption is extended until the 10th day after the date the association and any third party foreclosure purchaser provides written notice to the lot owner of the amounts that must be paid to redeem the property.*

*(n) After the redemption period and any extended redemption period provided by Subsection (m) expires, the association or third party foreclosure purchaser shall record an affidavit in the real property records of the county in which the property is located stating that the lot owner did not redeem the property during the redemption period or any extended redemption period.*

*(o) The association or the person who purchased the property at the foreclosure sale may file an affidavit in the real property records of the county in which the property is located that states the date the citation was served in a suit under Subsection (a) and contains a legal description of the property. Any person may rely conclusively on the information contained in the affidavit.*

*(p) The rights of a lot owner under this section also apply if the sale of the lot owner's property is conducted by a constable or sheriff as provided by a judgment obtained by the property owners' association.*

This section provides the owner ultimate remedy when a POA forecloses, i.e., the right to redeem the foreclosed property, provided the statutory criteria are met. There are numerous requirements for notices and safeguards that must be followed by both the owner and the POA in this subsection, in order for the foreclosed property to be redeemed.

## **XII. CONCLUSION**

The attorney representing a POA has to be cognizant of the many areas of the law that potentially affect POAs. Familiarization with the POA's project documents is the first step in analyzing a particular POA's power; however, a review of the project documents is only the first step. A review of the applicable federal and state law is also mandatory. The interaction between a POA's project documents and the Non-Profit Corporation Act and the Property Code cannot be underestimated, especially if the POA is located in Harris County. More importantly, to adequately represent a POA, the attorney must be aware of all the statutes that empower or limit the power of a POA. Until relatively recently, there were no statutes dealing with POA's. Today, however, there are numerous statutes empowering and limiting the powers of POA's. Texas legislators' fascination with POA's has not waned. The 78th Legislature will undoubtedly see many bills filed attempting to limit the powers of POA's. Accordingly, those practitioners interested in the future of POA's in Texas must get involved and closely monitor the legislative process as it impacts POA's in Texas.