THE TEXAS POA PRIMER
~ Tips for Working with Condo & Homeowner Associations ~

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PRACTICING LAWYER

Sharon Reuler is a Dallas-based attorney with a statewide practice representing real estate developers in the creation, marketing, and operation of planned communities and condominiums. Prior to focusing her practice on the development and declarant-control side of common interest projects, Sharon represented established property owners associations. The experience representing owner-controlled associations greatly influences her approach to preparing documents to create new common interest developments.

EDUCATOR

On the topic of condominiums and planned communities, Sharon has contributed to state and national continuing legal education programs since 1994. She has authored articles for the State Bar's Advanced Real Estate Law and Drafting Courses, for The University of Texas School of Law's Mortgage Lending Institute, and for ALI-ABA's course on Drafting Documents for Condominiums, Planned Communities, and New Urbanism Developments.

LEGISLATION GADFLY

Sharon has been involved with legislation pertaining to condominiums and planned communities since 1981 - always in a volunteer capacity. She was the spokesperson for the Texas Uniform Condominium Act in the 1991 and 1993 legislative sessions (enacted in 1993 as Chapter 82 Texas Property Code). In the early 2000s, she was the spokesperson for an ill-fated initiative known as the Texas Uniform Planned Community Act, sponsored by the Texas College of Real Estate Attorneys, which never became a bill. In the mid-2000s, she participated with the National Conference of Commissioners on Uniform State Laws in updating the Common Interest Ownership Act as an observer to the Drafting Committee.

YET MORE VOLUNTEERISM

Among her professional volunteer activities, Sharon has served continuously on the Government Relations Committee of the Home Builders Association of Greater Dallas since 1995, and also serves on the POA Task Force appointed by the Texas Association of Builders. She is a member of the American College of Real Estate Lawyers, the College of the State Bar of Texas, and the American, Texas, and Dallas Bar Associations.

RECOGNITIONS

She is a proud recipient of the 2004 Weatherbie Workhorse Award, presented by the Texas Bar CLE to honor years of contribution to real property law CLE. Sharon was also recognized as a Texas SuperLawyer in real estate for 2008, 2009, and 2010, and in 2010 was named one of the top women lawyers in North Texas by D Magazine.

PERSONAL

Sharon has three degrees from The University of Texas, the last being a law degree earned in 1987 at the ripe age of 40. Practicing what she preaches, Sharon has been a member and resident of common interest communities since 1977. For more information, please visit www.txlandlaw.com.

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BIOGRAPHICAL INFORMATION

Roy D. Hailey is a principal with the law firm of Butler | Hailey and focuses his practice on the representation of property owners associations and the preparation of project documents for real estate developers. He and his firm represent over 600 property owners associations. Mr. Hailey earned his law degree from the South Texas College of Law in 1981 after receiving a B.S.E. degree from the University of Texas at Austin. He is board certified in commercial and residential real estate law by the Texas Board of Legal Specialization. Mr. Hailey is a member of the Houston Bar Association and a fellow of the Houston Bar Foundation. He is also a member of the State Bar of Texas and is a member of its Real Estate Section and its Committee on Property Owners Associations. Mr. Hailey has spoken at numerous seminars on behalf of the State Bar of Texas and the Houston Bar Association regarding property owners' associations. The Texas Bar CLE presented Mr. Hailey the Jerry Charles Saegert Award for "Best CLE Paper" for the paper he prepared for the 2002 Advanced Real Estate Law Course: "Survey of Recent Case Law Affecting Property Owners Associations."

PUBLICATIONS AND PRESENTATIONS:

- *7th Annual Advanced Real Estate Drafting Course "Drafting Documents Associated with Judicial Foreclosures, Assessment Lien Foreclosures and Mechanics Lien Foreclosures" sponsored by the State Bar of Texas and the Houston Bar Associations, February, 1996*
- *9th Annual Advanced Real Estate Drafting Course "Amendments to Restrictive Covenants and Condominium Declarations" sponsored by the State Bar of Texas, February, 1998*
- *20th Annual Advanced Real Estate Law Course "Survey of Recent Texas Case Law Affecting Property Owner's Associations" sponsored by the State Bar of Texas, June, 1998*
- *"New HOA Laws" sponsored by the 9th Annual Texas Land Title Institute, December, 1999*
- *11th Annual Advanced Real Estate Drafting Course "Recent Legislation Affecting Property Owners' Associations" sponsored by the State Bar of Texas, February, 2000*
- *17th Annual Real Estate Law Conference: "Property Owners Associations: An Overview, Including What They Are, How They Are Created, and Their Statutory Powers" sponsored by South Texas College of Law, May 2001*
- *18th Annual Real Estate Law Conference, "Statutory Evolution Property Owners Associations In Texas: Including An Overview of What They Are and Their Statutory Powers and Limitations" sponsored by South Texas College of Law, May 2002*
- *24th Annual Advanced Real Estate Law Course "Survey of Recent Case Law Affecting Property Owners Associations" sponsored by the State Bar of Texas, July 2002*
- *Mortgage Lending Institute, September, 2002, "Statutory Evolution of Condominiums and Property Owners Associations in Texas" co-authored with Sharon Reuler and sponsored by The University of Texas Law School*
- *27th Annual Advanced Real Estate Law Course 2005 "Practical Tips for Dealing with Property Owners Association" sponsored by the State Bar of Texas, July, 2005*
- *Mortgage Lending Institute, October, 2005 "Practical Tips for Dealing with Property Owners Associations" sponsored by The University of Texas School of Law*
- *New POA Laws for 2009 "Legislative Update for Real Estate Lawyers: Condos and Owners Associations – More "Band-Aid" Laws" Webcast co-presented with Sharon Reuler and sponsored by State Bar of Texas, June 19, 2009*

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DISCLAIMER

Do not – repeat - DO NOT rely on this Primer to resolve legal questions. This Primer does not provide the level of specificity needed for the proper legal analysis of any issue or situation. It is no substitute for a competent attorney's thorough review of the relevant statutes and court opinions of a particular jurisdiction, in light of the facts of a specific case.

Once upon a time, nobody looked at CLE articles except (maybe) *some* of the lawyers who attended the course at which an article was presented. Because the internet makes CLE articles available to audiences for which it was not written, CLE authors are wisely cautious to not venture too far from the statutes and reported opinions in their subject area. We are not wise.

This Primer is written for lawyers who are dealing with POAs for the first time – lawyers who want a "feel" for the subject matter, in addition to substantive knowledge. It is designed to be a simplified, generalized, superficial, dumbed-down overview of a complicated topic in which confusing fact patterns abound. It is chock full of unsubstantiated statements that are meant to be provocative rather than authoritative. We intentionally use a style that is informal, practical, conversational, approachable, and even a bit irreverent.

Although writing for lawyers, we did not design this Primer to withstand "legal scrutiny." Here's hoping we don't live to regret that decision.

BLOOD OATH

Being lawyers, we can't help but worry that someone may take something in our Primer out of context and try to shove our printed words down our proverbial throats. So, we have taken a blood oath that we each will take credit for being the sole author of the words being shoved down the other's throat, to enable the other when challenged to say "That? I didn't write ***that***. Not ***my*** idea. ***That*** belongs to my co author."

EVOLUTIONARY NOTICE

This Primer reflects our ideas, the laws, and standards of practice in effect in early 2010. Because POAs exist in an evolving environment of rapidly changing laws, values, practices, and technologies, we expect parts of the Primer to become outdated or modified … sooner (more likely) or later. Heck, we are still students, ourselves. Our values and counsel are continually being revised and shaped by new experiences. To paraphrase Maya Angelou, "When we know better, we do better."

July 2010
Sharon Reuler and Roy D. Hailey

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I. INTRODUCTION & OVERVIEW

prim·er [1] (pri-mər) *n. A book that covers the basic elements of a subject.*

The Texas POA Primer is a guidebook covering the basic elements of a Texas law practice that works with common interest developments (**CIDs**) and property owners associations (**POAs**) - in the residential context - both condominiums and planned communities.

A. Primer Preliminaries

1. Title of Primer

POA is the term used by the authors to refer to every type of automatic mandatory real property association – if you buy an interest in real estate, you automatically become a member of an association of owners with mandatory assessments. In this Primer, the term includes condominiums, cooperatives, townhomes, planned unit developments, and master planned communities. We added "condo" and "homeowner associations" to the title as a research aid to find this article.

2. Origins

This article is the third version of the Primer, which was previously published by the State Bar in 1998 and 2001. Each version has its own unique features. For example, the one presented at the 1998 Adv. Real Estate Drafting Course contains 100+ pages of forms that have not been published since. The one presented at the 2001 Adv. Real Estate Law Course lacked forms but contained case law citations throughout. The previous versions were co-authored by Sharon Reuler and Rosemary Jackson, and are still available in the State Bar's On-Line Library.

3. Purpose and Style

This Primer is intended to be a springboard for the practitioner who wants to get his feet wet in the pool of POA law. We intentionally use a conversational style of prose that is not traditional for CLE articles. Hence, the lack of annotations throughout. We hope the practical aspects of the Primer more than make up for the lack of cited authorities.

To stay focused on our goals of readability and practicality, we imagined ourselves mentoring a newbie lawyer who expresses interest in this practice area. Although this Primer is not *"everything"* a Texas attorney needs to get started with POAs, it's dang close.

4. Lingo

The beginning of wisdom is the definition of terms. ~ Socrates

We urge you to start your reading with Exhibit 1 of this Primer - *POA Jargon ~ Fifty Nifty Words & Phrases for Common Interest Developments in Texas*. The POA field is fraught with imprecise and confusing terminology at every level. Any 3 Texans will have 5 definitions of "townhome," and all of them will be right . . . or wrong. The terms we use in this Primer and the terms used in Texas statutes are also capable of multiple meanings.

5. Exhibits

We encourage you visit the exhibits portion of this Primer before you sit down to read. We purposefully included many lists of practical tips as "pull-out" exhibits. The final exhibit is a 25-page supplement to the Survey of Texas Case Law Affecting Property Owners Associations that was published by the State Bar in 2002.

B. Overview

Working with POAs is a relatively new area of concentration. POA law is an interesting and challenging field because it contains components of traditional real property law, corporate law, and public law - combined in a new way that is still taking shape. Judges, lawmakers, public officials, and every type of professional that deals with POAs quickly discover that these are unique - even peculiar - entities for which we are now pioneering laws, forms, procedures, and practices.

C. Theories for Emotionalism in POA Issues

For many years, POAs and their practices have attracted the unfavorable attention of State lawmakers and the media. The general public is discovering what POA lawyers already know - emotions run high and tempers are short the closer an issue gets to a person's front door, which is why we nickname it "the family law of real estate."

Not being social scientists, we can offer only our personal "theories" - based on experience and observation - about why people seem to get particularly incensed about POA issues.

1. A Man's Home is His Castle

The essence of this theory is that a man - even a commoner - is "king" of his own home. It is based on a proverb rooted in two English common law concepts - one that allows a man to do as he pleases in his own house, the other that anyone who enters a home except by the owner's invitation is a trespasser. Bottom line, an

owner is justified in protecting his home.

2. You are Not the Boss of Me

Americans in general, and Texans in particular, have a profound sense of personal autonomy. POAs are inherently egalitarian with grass roots leadership - homeowners are expected to take turns volunteering to serve on committees and on the board. At the same time, POAs are hierarchical - one neighbor is elected to rule over other neighbors. It's only natural for a homeowner to think "Who are you to tell me what to do?" when confronted with a decision by a neighbor who just happens to be wearing the director's hat.

3. Doesn't Play Well With Others

Some people do not "belong" in POAs - either as leaders or as members. They lack the temperament. Life in a POA requires patience, tolerance, flexibility, civility, and a bit of "live-and-let-live." A person has to accept that his views - no matter how "right" - may not be championed by the majority of members or directors, and should not be forced on people. Sadly, power-trippers and self-righteous folk cannot see how this might possibly apply to them. Mirrors, please!

4. Not in My Back Yard

POAs are lauded as a way to promote a sense of community and neighborhood pride. The flip side of that coin is that a homeowner feels possessive about more than his home and his private fenced yard. The greenbelt and community pool are also "mine". Indeed, the entire planned community becomes an extension of his "back yard," entitling him to take a personal interest in what happens on any lot or common area anywhere in the subdivision. NIMBYism is alive and well in POAs. Neighborhoodism is a sword that cuts both ways.

5. Largest Financial Investment

A home is typically the largest financial investment a person will make in his lifetime. And who doesn't want to protect his investment? A homeowner who wants to make what he perceives as an "improvement" to his investment is understandably frustrated if the POA says "No, not that." On the other hand, a homeowner depends on the POA to maintain and enhance property values in the subdivision by maintaining common areas and making sure other homes and yards don't fall into disrepair. Talk about a love/hate relationship!

6. Home is Where the Heart Is

"Home" is all about f-e-e-l-i-n-g-s (the orchestra swells). . . Mom, apple pie, Lassie. The closer an issue is to a person's home - to his heart - the more likely a person will feel affected by the actions and decisions of a POA, the more likely he will take it "personally," the more likely he will fight to defend what is precious. Semper Fi!

7. Home is a Safe Haven

In many POA issues, each side claims to speak for "everyone" - for good reason. Many homeowners abhor controversy on the doorstep to their safe haven. They either keep their heads low to keep from getting hit in the crossfire of warring factions, or they sign every petition and proxy presented to them to keep from offending anyone, even if one signature cancels out another. The silent majority who could have a moderating influence on the combatants, often refuse to participate. As a result, the energized complainers have a disproportionate influence.

8. With Me or Against Me?

The belief that if you are not my supporter, you are my enemy is at least as old as Matthew 12:30. *(We had to invoke the Bible for at least one theory.)* Unfortunately, factionalism often finds fertile ground in POAs, and neutrality is too often disparaged - both by leaders and by members. Some POA boards feel besieged by packs of disgruntled homeowners. Some homeowners feel that the POA leaders are "out to get me" because of a difference of opinion. Lines are drawn in the sand.

D. Topics Not Covered

This Primer is drafted for what we consider to be the most typical type of POA - an established association governing a completely residential development in which all of the units or lots are owned by different persons. Accordingly, we have not addressed a large number of POA-related topics, such as creating the POA, declarant-controlled POAs, terminating the POA, POAs controlled by one owner, mixed-use and non-residential developments, large-scale POAs, timeshare developments, MUDs, PIDs, covenant enforcement in subdivisions without POAs, and voluntary neighborhood associations.

II. PEOPLE

As entities, POAs are more complex (and interesting!) than many other types of organizations. That is also true of the people who play roles in the real life drama of daily life in a POA. Being able to label the players and their authority is necessary to identify sources of power and decision-making in any set of circumstances. Likewise, knowing which standard of care (if any) applies to each player can be invaluable information. What the labeling does not reveal is the history - possibly the "bad blood"- that may underlay the relationships between people. Sound dramatic? It is!

A. POA Power Tripping

Something about POAs seems to encourage power-tripping at all levels, and to create a perception of power-tripping even when it does not exist. Every one of the players described in this part of the article is capable of *being* a power-tripper, or being *perceived* as one. *("Power trip" is an action undertaken chiefly for the gratification associated with the exercise of power over others. Some people seem to use "power trip" when they want to call someone "arrogant.")*

Where do we see it? The homeowner who barks orders to the POA's gardener because "my dues pay your wages." Or, the POA manager who filters what he presents to the POA board because he "knows what's best" for the POA. Or, the POA president who demands that the board ratify the waiver he granted because he "knows what's best" for the POA. Or, the POA directors who hold a homeowner's feet to the fire over a technical violation of the restrictions, even though no real harm resulted. Or, the POA attorney who unilaterally decides which payment plans to accept without conferring with the board because he "knows" what the board would have said if he had asked. Or, the State lawmaker who proposes a bill to constrain every POA - regardless of the consequences - because of the bad acts of a single POA.

Bottom line - watch for this phenomenon and try to figure out how to work around it without aggravating the situation or energizing the power-tripper. No one said it would be easy. Good luck!

B. Developer/Declarant

The risk-taking visionary who creates the common interest development signs a document in which he "DECLARES" that the land described in the document will forever be subject to the covenants, conditions, and restrictions contained in the document. The act of declaring makes the developer a "Declarant," and the document is typically called a "Declaration." In most CIDs, the initial Declarant is the only Declarant, and once the project is completely built and sold-out, the active role of the Declarant is over.

During the years in which the developer is actively involved with the CID, he typically controls governance of the POA by putting his people on the board, controls architectural approvals and denials for the subdivision, and has unilateral rights - such as the right to expand the project through annexation - that are not available to other owners. The rights reserved by the developer are considered necessary to ensure the successful completion of the development.

Most Declarations provide a process by which the rights of a Declarant can be voluntarily transferred from the original Declarant to a successor Declarant, who may also have the right to further assign the Declarant rights. One trap for the unwary is to assume that whomever owns vacant lots or markets new homes is the "Declarant." In fact, the developer may sell lots to builders (or units to remarketers) while retaining the Declarant controls over the project. Absent a formal assignment or transfer of Declarant rights, the person or entity named as "Declarant" in the Declaration is the only Declarant the CID will ever have. In bad economic times, when developers lose their unfinished projects to foreclosure, a question may arise as to whether the foreclosing lender becomes or can designate the successor Declarant.

C. Owner/Member

Membership in a POA has facets that are different from membership in other types of organizations, such as the following:

1. Mandatory

The hallmarks of POA membership are that it is mandatory - not optional or voluntary - and that it emanates from a relationship with real property. POA members are typically the owners of all the real property in the common interest development.

2. Co-Owners Share Membership

Although every owner may be a member of the POA, the governing documents customarily provide that each lot or unit has only one membership. So, if a unit or lot is co-owned by three brothers, it is customary for all three brothers to be POA members, but for the unit or lot to have only one membership for purposes of assessment and voting. The co-owners may attend the POA's meetings, but they must decide among themselves how to cast the one vote for their unit or lot.

3. Classes

The governing documents may establish different types or classes of membership - such as commercial members and residential members in a mixed-use development. The governing documents for a new development may create distinct membership categories for the developer and builders. Texas corporation law allows the governing documents to create multiple classes of membership. It is not uncommon for each type of membership to have different allocated interests, such as the amount of the assessment obligation.

4. Good Standing

Some POAs have governing documents that authorize the board to limit certain membership benefits to only those members who are "in good standing," however that concept is defined by the documents. For example, an owner who is delinquent in paying assessments to the POA may not be allowed to vote in the POA's elections or serve on the POA board. Such

disenfranchisement is not universal.

5. Investors v. Occupants

Another way of distinguishing between members is owner-occupants v. investor owners. Some POAs emphasize the distinction by having different standards for the two classifications, such as using occupancy as a qualification for serving as a POA director.

6. Allocations

POA membership is typically tied to appurtenant allocated interests that are specified in the governing documents. One allocated interest is the vote for each unit or lot, which may be uniform and universal, or may be weighted and/or tied to certain types of decisions. Another is an assessment obligation, which - like the vote - may or may not be uniform for all units or lots. And, in condominiums, an ownership interest in the common elements of the condominium regime is a third type of allocated interest. Do not assume that every unit or lot in a CID is subject to the same rate of assessment, or that it has the same voting rights as every other unit or lot.

7. Master/Sub Members

In a tiered POA, ownership of property may be tied to mandatory membership in more than one POA. The owner of a unit or lot governed by a neighborhood or sub-POA may also be a member of the master POA - two memberships, two assessments. In some tiered developments, the sub-POA, as an entity, is the member of the master POA.

8. People

A POA is an association of real people with varied lifestyles, finances, feelings, opinions, and experiences. Unlike the shareholders of a business corporation, the POA members are likely to be neighbors, some of whom may have been scarred by long-ago run-ins with the POA leaders or manager, some of whom may bear grudges unrelated to the affairs of the POA, and some of whom may belong to factions within the CID. It is rare for POAs members to be of "one mind" on any issue, or to sing Kumbaya at annual meetings. The attorney who interacts primarily with the POA manager and POA leaders may need to work at being mindful of "the people."

D. Director/Officer

The typical governance structure for a POA (after the period of Declarant control) is that the members elect directors (who may be called "managers" or "trustees" in the governing documents), and the directors elect the officers. The directors "run" the POA. The proverbial buck stops with the POA directors. The board of directors is the highest authority in the POA. When dealing with a POA, make sure the action of a POA officer - or a POA committee - has the approval of the POA board. Otherwise, you may be left with only an apparent authority argument.

The number and qualifications for directors and officers is determined by the governing documents. The number of directors must be no less than three for a Texas nonprofit, and is typically five, sometimes more. Experience teaches us that smaller boards are more efficient and effective. Large boards may result in factions that make consensus-building difficult. A POA with a large pool of potential leaders may channel some of that energy into committees and task forces.

Texas law does not provide qualifying criteria for directors and officers, except that the president and secretary of a corporation may not be the same person. Unless the governing documents provide otherwise, directors are not required to be members of the POA or residents of the CID, and officers are not required to be directors or members of the POA. But, as a practical matter, directors are usually members, and officers are usually directors. Accordingly, the officers in and of themselves generally have very little authority aside from what is specified by the governing documents or by board resolution.

Texas law does not mandate education for POA directors (or POA mangers). Attorneys who work with POAs must ascertain whether a POA board comprehends the intricacies of the dispute in question, and the applicable laws and documents.

Contrary to entrenched popular belief, directors are not "fiduciaries" or "trustees" of the POA, except for certain circumstances discussed below. The standard of care issue warrants more attention than provided in this nutshell. The general standard of care for POA directors, using the corporation model, is to discharge their duties in good faith, with ordinary care, and in a manner the director reasonably believes to be in the best interests of the corporation. The Texas Nonprofit Corporation Law has several sections dealing with the liability of "governing persons" - such as Tex. Bus. Orgs. Code §§7.001, 22.221, 22.226 and 22.235, among others. In the absence of the exceptions mentioned below, the director of an incorporated POA is not liable to the POA or to any member for an action taken in compliance with the "ordinary care" statutory standard.

There are at least three exceptions to the "ordinary care" standard of duty for POA officers and directors. First, the governing documents of the POA may impose a higher duty on the POA's officers and directors. Second, condominiums governed by TUCA §82.103(a) - includes all condos created since 1994 - are subject to a statutory fiduciary duty for officers and directors. Third, officers or directors of a POA may have the duties of a trustee in the limited instance of being designated to conduct a

foreclosure sale of the POA's assessment lien.

E. Renter

"Renters" is a casual label for residents of the CID who are not owners. Although every owner has probably been a renter at some time in his life, the popular perception is that renters are inherently "bad" because renters and investor-owners do not take care of property the way an owner-occupant does. This belief is institutionalized by mortgage lenders who require certification that a condominium is populated primarily by owner-occupants. Some POAs have rules or restrictions to discourage, limit, or prohibit rentals. When working with a POA, be aware of how renters and investor-owners are perceived and treated.

F. Management

In the long life of a POA, different forms of management may be used. The POA that is managed by a credentialed professional in one era, may be self-managed by lay volunteers in another era. Although our laws do not dictate how a POA will be managed, the governing documents of some POAs do address the issue and should be consulted when changes of management are contemplated. As of 2010, Texas law does not require education or licensing of POA managers.

1. Types of Management

The type of management, as well as the company or individuals who perform the work, may change from time to time in any POA. When you are dealing with a representative of the POA, it helps to know by what authority the person speaks and the length of his tenure with the POA.

a. No "Management"

Usually found in super small projects - 2 to 5 units or lots - where owners get together to hash out every decision.

b. Self Management

The board is "hands on" in doing the work, delegating, and hiring and firing contractors. Usually found in CIDs with few if any common areas, small projects, financially-strapped POAs, and POAs with a do-it-yourself attitude. Typically, one volunteer owner is "in charge."

c. Hired or On-Site Management

The board hires and supervises a full or part-time person (or team of people) who work only for that POA. Usually found in CIDs of any size with an on-site office.

d. Third-Party or "Professional" Management

The board hires an off-site company that manages multiple POAs. These companies range from mom-and-pops, through regional companies, to national operations. The degree of professionalism varies by individual and company.

e. Third-Party with On-Site Management

The board hires an off-site company who, in turn, hires and supervises a person to work on-site full or part-time. Usually found in larger CIDs with extensive common areas and an on-site office.

2. Types of Relationships with Managers

No matter who has what title, the real seat of power and decision-making in a POA may not be apparent. The types of relationships that boards have with managers are arranged along a continuum. At one extreme is the "Strong Board, Weak Manager." At the other extreme is the "Strong Manager, Weak Board." A "Balanced" relationship is the mid-point between the two extremes. The type that "works" best for a community often depends on the personalities, experiences, and expectations of individual directors and managers.

a. Strong Board, Weak Manager

The board "manages" the manager, rarely allowing the manager to exercise his professional judgment. The manager may need to solicit the board's approval for every action he takes in the name of the POA.

b. Strong Manager, Weak Board

The board looks to the manager for direction on every decision and may act as a "rubber stamp" for what the manager does in the name of the POA.

c. Balanced

A respectful and trusting working partnership between the board and the manager, in which the board makes informed decisions that are executed by the manager, who is allowed to exercise his professional judgment, knowing he has the board's support. The board trusts the manager to bring to its attention those matters that require the board's attention.

3. What do those letters mean?

After their names, some managers have letters denoting something, but what? Below are some of the professional designations you may encounter, each of which requires prescribed course work, experience, and testing by the awarding organization:

- CPM® - Certified Property Manager® is a real estate professional designation awarded by the Institute of Real Estate Management (IREM) and recognized by the National Association of Realtors (NAR).

- PCAM® - Professional Community Association Manager® is the highest professional recognition available to managers with at least 5 years' experience in POA management, offered through the Community Associations Institute (CAI).

- LSM® - Large-Scale Manager® is a designation available to PCAMs who specialize in managing large-scale developments, offered through CAI.

- AMS® - Association Management Specialist® is the second-level professional designation available to managers with at least 2 years' experience in community association management, offered through CAI.

- CMCA® - Certified Manager of Community Associations® is the entry-level professional designation awarded by CAI.

4. Some "Facts of Life" Regarding POA Management

a. We Need Professional Managers

With continual increases in the number and complexity of laws regulating POAs, professional managers become indispensable. Unlike managers, volunteer directors are typically not tied into networks that communicate changes in the law, changes in marketplace resources (like insurance), or changes in "best practices."

b. Managers Are For-Profit Businesses

Although POAs are nonprofits, they hire for-profits. Like landscapers, managers are in business to make money. In highly competitive markets, managers may bid a monthly contract rate (sometimes called a "door fee" or "base rate") that may not adequately compensate them for the services they render under the contract, with the expectation of making up the difference in other ways.

c. Stretched Thin

Some POA managers are overworked, managing multiple POAs, leaving little time to fully understand the intricacies of a particular POA dispute. The owner or counsel who is patient about getting the POA manager to focus on the owner's issue may have a better chance of getting an amicable resolution with the POA board.

d. Economies of Scale

Although every POA and every set of POA documents is different, economics and efficiencies typically encourage a manager use its own "standard" set of procedures, practices, and forms on every POA that it manages. Customized management takes longer and costs more.

e. Personalities

Managers are people, too. They are capable of feeling overworked and unappreciated, of getting irritated, and power-tripping. It happens. Getting on the "bad side" of a manager can exacerbate dealings with a POA. Because the POA manager is often the only conduit for communicating with the POA's volunteer leaders, it becomes imperative to "manage" and document the communications with a manager. Using email to confirm telephone conversations or personal encounters is a good practice. Scheduling a face-to-face meeting with the board or committee helps ensure that the volunteer leaders have all of the facts, circumstances, and timelines, which have already been communicated to the manager.

f. Document Preparation

Texas Government Code Chapter 83 (Certain Unauthorized Practice of Law) provides that only Texas attorneys and brokers may be compensated for preparing documents affecting title to real property. POA managers who prepare documents may not be aware of the law and may not recognize notices of delinquency or notices of architectural violation as instruments affecting title to real property, which those documents may become when publicly recorded.

g. "Only" an Agent or Employee

A POA manager can have tremendous influence with a board of lay volunteers who rely heavily on the manager's advice. Accordingly, a POA manager can play an instrumental role in assisting or hindering the resolution of a POA dispute. At the same time, the manager may be shielded from liability for all but the most egregious of acts because the manager is only an agent of the POA, and also because the management contract may require the POA to indemnify the manager.

G. POA Attorney

Typically, the "POA attorney" represents the POA as an entity, and does not represent the POA's individual members, directors, officers, manager, or the developer of the CID. The attorney-client relationship should be defined by contract. Because the POA manager is often the source of attorney referrals, and is usually the conduit for communications between the board and the counsel, many people - even POA directors - think of the attorney as "the manager's lawyer" rather than the POA's. When in doubt about who represents whom, get it in writing. The challenge for the POA attorney is to keep the POA directors and managers focused on what is "in the best interests of the POA" - as an entity.

Most POAs in Texas use the services of a lawyer, at least from time to time. Some use different lawyers for different purposes - one for assessment collection, another for amending the documents. The large cities in Texas have attorneys who concentrate their practices on POA representation. Smaller markets may not have such expertise close at hand. Any attorney who is contacted by a POA is advised to consider his own competency in the area of applicable law and how best to close the gap (if any). In gauging the attorney's competency, the POA client should also inquire about the attorney's other clients who might be related to the CID. Has the attorney also represented the CID's developer, or individual members of the POA, or the POA manager?

H. Others

The POA "team" also includes the POA's accountant, the POA's insurance agent, banks that extend credit to the POA, institutional mortgage lenders who hold deed of trust liens against the individual units or lots, employees of the POA, and the many vendors and professionals who provide goods and services to the POA. Depending on where the CID is located, city officials or special district representatives may also frequently interact with the POA.

III. ENTITIES

A. POA Defined

Tex. Prop. Code §202.001(2) 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 through 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.*

Although widely used as the definition of POA, this particular definition applies only to Chapter 202 of the Tex. Prop. Code, and to the few chapters that borrow 202's definition by reference. Other Texas statutes - like Chapters 204 and 209 - define POA differently and do not embrace condos within the term.

In lay terms, a POA is distinguished from other neighborhood organizations by virtue of the fact that the declaration or "deed restrictions" require the property owner to be a member of the POA and to pay assessments to the POA. Mandatory membership and an assessment obligation are the two hallmarks of POAs.

B. Types of POAs

The framework and terminology for describing and classifying mandatory owners association have evolved - and continue to evolve. It started with dichotomies - "either this or that" - and has grown into more of a continuous spectrum of characteristics that often overlap and blur the legal and technical differences.

1. Statutory v. Common Law

In the 1970s we might have described mandatory owners associations as either arising out of real property common law (private deed-restricted single-family subdivisions), or arising out of statute (condominiums, cooperatives, and timeshares). The dichotomy of statutory and common law is rapidly eroding as all levels of government get on the bandwagon of regulating POAs with statutes and ordinances. Some laws apply to both condominiums and planned communities, others apply to one but not the other. The formerly "common law" planned communities are increasingly becoming creatures of statute.

2. Uniform Acts

The evolution of blurring entities has played out in the drafting of uniform real property acts by the National Conference of Commissioners on Uniform State Laws. The Conference initially adopted separate model acts for each type of property ownership - Uniform Condominium Act (1977), Uniform Planned Community Act (1980), and Model Real Estate Cooperative Act (1981). Realizing that the similarities of these entities outweigh their differences, in 1982 the Conference rolled the three acts into the Uniform Common Interest Ownership Act.

3. Texas Entities

In Texas, the legal distinctions remain significant because some of our POA laws apply to condominiums only, and others apply only to non-condo planned developments. To know which laws apply, be certain of the type of CIS.

a. Condominiums

Being creatures of statute, condominiums are defined by state law - two of them in Texas. Condominiums created between 1963 and 1993 were born under the Texas Condominium Act, now Chapter 81 of the Tex. Prop. Code - a skeletal "first generation" condo statute. Condominiums created on or after January 1, 1994, were born under the (Texas) Uniform Condominium Act, Chapter 82 of the Tex. Prop.Code, a comprehensive flexible "second generation" condo statute, affectionately referred to as TUCA, pronounced "too-kah". The single most important thing to know about condominiums is that it is a form of real property

ownership defined by statute, not a type of building. Hence, if a property is condominium in ownership, Title 7 of the Tex. Prop. Code applies, regardless of what form the units take.

b. Planned Communities

By default, every mandatory membership development that is not a condominium is a planned community, which is not a legal term, but which is used by the authors as a "handle" for the default category. The POA for a planned community is governed by Chapter 209 of the Tex. Prop. Code. In the Greater Houston area, this type of POA is also subject to Chapter 204 of the Tex. Prop. Code. Neither Chapter 204 nor 209 applies to condos.

The mandatory membership entity that governs a planned community goes by many names, none of which is defined by statute, such as homeowners association, townhome association, community association, maintenance association, civic association, owners association. The only entity name that is defined by statute is "property owners association," which is sometimes defined to include condominiums and thus cannot be used exclusively for planned communities. What a conundrum for the uninitiated!

c. Cooperatives

Real property cooperatives are all but nonexistent in Texas. In a cooperative, a corporation owns the entire real property. Its members buy shares of stock in the cooperative, in exchange for which they get perpetual exclusive use of a particular unit. Because the consumer owns stock rather than real estate, long term mortgage financing is not available in states like Texas that do not have enabling legislation.

C. Similarities & Differences

In terms of organization, operation, management, budgeting, and accounting, the POAs for condominiums and planned communities are remarkably similar. There are, of course, differences in rights and responsibilities that emanate from the different statutes to which they are subject based on type of ownership.

There are also significant differences based on features other than type of ownership (condo or non-condo). For example, large-scale POAs (condo and non) operate differently from very small POAs (condo and non). POAs for high-density developments (condo and non) have issues that are less prevalent in low-density developments (condo and non). See the "POA Features Checklist" in the Exhibits portion of this article. Each feature may have implications for some aspect of the way the POA operates.

D. Incorporated POAs

Every POA is not incorporated or required to be incorporated. However, it is a customary practice to incorporate POAs as nonprofit corporations if for no other reason than to fulfill the trio of POA documents that are found on almost every list of "required POA documents" - the declaration, bylaws, and articles of incorporation (now called a "certificate of formation" in Texas). Another rationale for incorporating when not required is to provide the POA with a well- developed body of organizational law to fill the voids in its governing documents, and possibly as a shield from personal liability.

1. When Incorporation is Not Required

Condominiums created prior to 1994 are governed by a "council of owners," according to Tex. Prop. Code Chapter 81, which does not require incorporation of the council. No law requires incorporation for planned communities. A POA that is not incorporated - either by choice or by happenstance - may automatically become subject to Tex. Bus. Orgs. Code Chapter 252 titled "Unincorporated Nonprofit Associations."

2. When Incorporation is Required

A POA must be incorporated if:

(1) The condominium regime was create on or after January 1, 1994, and is therefore subject to TUCA §82.101.

(2) The condominium regime was created before 1994, but amended its declaration to voluntarily adopt TUCA, in its entirety, as its governing law, and is therefore subject to Property Code TUCA §82.101.

(3) The project documents require incorporation of the POA, regardless of when the POA was created and regardless of whether it is a condominium or non-condominium.

3. State Franchise Tax

Every corporation is required to pay franchise tax to the State of Texas, unless it qualifies for one of several exemptions. Since 1982, Tax Code §171.082 has provided an exemption from franchise tax for "Certain Homeowners Association." To qualify, a POA must be "legally restricted" to residential use. Also, the POA must be homeowner controlled and no person or group may have voting control of the POA. The exemption is available to condominiums and planned developments. However, the exemption is not automatic. A POA must apply to the State Comptroller for the exemption, and may be required to provide documentation from which the State Comptroller's office can verify the diversity of unit or lot ownership. Once the POA qualifies for the exemption, it may not be required to reapply or

re-qualify. A POA that does not qualify for the exemption, such as during a period of declarant control, is liable for franchise tax and may lose its corporate status for failure to pay the tax to the State Comptroller.

4. EIN

Whether or not it is incorporated, a POA is a taxable business entity, albeit not-for-profit. Just as social security numbers are used to identify individuals, Employer Identification Numbers (EINs) are used to identify businesses. To open a bank account in the name of the POA may require an EIN for the POA. The IRS makes it easy to apply for an EIN, such as providing an online interview with information prompts instead of the traditional Form SS-4 (which may also be used). For more information, visit the "EIN Assistant" at http://www.irs.gov. The task of obtaining an EIN is usually performed by the POA's manager or accountant.

5. Attorney's Checklist for Corporate Status

Many POAs are not aware of the requirements of incorporation or their current corporate status. Therefore, you should take the following steps:

(1) Review the project documents and state law to determine if incorporation is required.
(2) Review the project documents, POA website, and POA publications for all variations of the POA name.
(3) Contact the Secretary of State for the existence and status of the POA's charter. The information may be available via a subscription service, such as SOSDirect.
(4) If the POA is or was incorporated, obtain copies of the corporate records from the Secretary of State, even if the charter has expired.
(5) If the corporate charter is active, obtain the name and address of the corporation's registered agent.
(6) Advise the client to change the registered agent and/or registered office, if warranted.

6. When the POA Loses its Charter

It is not unusual for an incorporated POA to lose its corporate status from time to time during its long existence, for the reasons noted below. Whether or not a POA is incorporated - or required to be incorporated - it continues to be governed by the Tex. Bus. Orgs. Code. While incorporated, the Nonprofit Corporation Law applies. When not incorporated, the Unincorporated Nonprofit Association Act may apply.

a. So What?

The typical POA is a real property association, whether or not it is incorporated. Unlike other types of entities that may cease to exist if a corporate charter is forfeited, the POA may validly exist pursuant to its publicly recorded governing documents - or by statute in the case of condominiums - irrespective of the POA's corporate status. If the declaration clearly creates the POA as a mandatory association of unit or lot owners, the POA arises from real property law and documents recorded with the county clerk. Condominium associations also have condominium statutes on which to base their existence.

Nevertheless, in some parts of our State, litigious owners and their creative attorneys like to seize on a POA's loss of corporate charter as evidence that the POA "doesn't exist" and is not "properly constituted." Individual owners have been known to incorporate under the POA's name, claiming that they are the true association described in the CID's governing documents. Although such tactics do not usually prevail, they confuse courts, embarrass the POA, and increase the costs of litigation. So, one incentive for a POA to maintain its corporate status is to not give the other side a courtroom tactic.

b. Reasons for Losing Charter

The three primary reasons why a POA loses its corporate status are (1) failure to maintain an effective registered agent or registered address for the corporation, (2) failure to return a periodic report to the Secretary of State, and (3) failure to pay franchise tax (if the POA has not obtained an exemption from franchise tax).

(1) Lack of Registered Agent/Address

Sometimes the person designated as the POA's registered agent ceases to have a connection with the POA, and the POA does not think to designate a new registered agent on the Secretary of State's records. This may happen when the developer finishes the CID and the homeowners assume control of the POA. Or, when the POA changes managers. Or, when the homeowner who had volunteered as registered agent moves away from the property. As a result of such changes, a letter or notice from the Secretary of State, or from the State Comptroller, may not be deliverable, or may go unanswered. Either inaction triggers the chain of events that result in forfeiture of a corporate charter.

(2) Lack of Report

As authorized by §22.357 of the Tex. Bus. Orgs. Code, the Secretary of State sends a Periodic Report to nonprofit corporations, no more often than once every four years. If the corporation fails to return the Periodic Report (also known as Form 802, formerly known as a 9.01 Report), the charter may be forfeited. The forfeiture can be set aside if (a) the corporation name is still

available, (b) there is no additional reason for forfeiture, such as nonpayment of franchise taxes, and (c) the corporation submits the required Periodic Report. Often, the POA need only submit a new Periodic Report to have its charter restored.

(3) Non-Payment of Franchise Taxes

Failure to pay franchise taxes is grounds for forfeiture of a corporate charter. If a POA has lost its charter for non-payment of franchise taxes and desires to reinstate to the date of forfeiture, it may be required to document to the satisfaction of the State Comptroller that the POA qualified for the statutory exemption from franchise tax during the years the POA was not incorporated. The POA may be required to pay franchise taxes for any year for which it cannot document its eligibility for the exemption. Before the POA can apply to the Secretary of State for reinstatement of its corporate charter, it must obtain from the State Comptroller a statement that the franchise tax obligation has been satisfied.

c. Reinstatement v. Reincorporation

A POA that loses it corporate status has two options under the Tex. Bus. Orgs. Code if incorporation is required. Reinstatement is a process by which the forfeiture is set aside and the original charter (name and number) are revived for the POA. This provides continuity of a POA's corporate status by creating a legal fiction that the POA was incorporated for the intervening years when the charter was lost. Reinstatement may not be possible because the POA's original corporate name is no longer available, or may be too costly and cumbersome to attain. In that event, the POA may be re-incorporated under its old name with a new file number, or under a new name and file number. In addition to often being faster and less costly than reinstatement, reincorporation also has the advantage of allowing counsel to prepare a new state-of-the-art certificate of formation. Discussions regarding tax consequences and other possible issues with reincorporation fall outside the scope of this paper; but know they may exist.

7. Miscellany About Incorporated POAs

a. Inc.

A little known fact is that Texas law does not require a nonprofit corporation to use "Inc." or "Incorporated" or "Corporation" in its name.

b. Limitations on Liability

Tex. Bus. Orgs. Code §§22.221 & 22.235 shield directors and officers of a nonprofit corporation from liability under certain circumstances. Tex. Bus. Orgs. Code §7.001 titled "Limitation of Liability of Governing Person," authorizes indemnification of officers and directors in the corporation's certificate of formation [pay attention, drafting attorneys]. Also relating to indemnification, Chapter 84 of the Tex. Civ. Prac. & Rem. Code includes certain homeowner associations among the organizations eligible for immunity from prosecution under the Charitable Immunity & Liability Act of 1987.

c. Corporate Names

For many reasons, the corporate name of a POA may not match the name of the platted subdivision, the name of the CID as used in the declaration, the name of the POA as used in the declaration, or the commonly used name for the POA. This mismatch occurs for a number of reasons, such as the preferred name not being readily available from the Secretary of State at time of incorporation. As a general rule, the Secretary of State does not allow replication of the first two words of a registered name. There are two principal routes around the general rule. One is to obtain the written consent of the name holder, which may be difficult unless the developer is using the name for the declarant entity. The other is to qualify the name as a "geographic" term if the first two words include the name of a place, a region, or a platted subdivision, which is often the case. The Secretary of State may accept the name corner of a subdivision plat as evidence of the geographic name. If the official corporate name is not the one that the POA uses on a daily basis, an assumed name certificate may be filed with the Secretary of State and with clerk of the county in which the CID is located or does business.

IV. AUTHORITIES

Understanding the complicated, multi-layered, and dynamic legal framework in which the POA exists is fundamental to the creation, representation, management, and leadership of a POA. It is naive to assume that if an action or a decision is not expressly prohibited by law or document, then it must be "legal" and, hence, permitted.

"POA law" consists of the interplay of several traditional substantive areas of the law, such as real property, corporate, and municipal - both statutory and common. In the context of POAs, these traditional substantive areas overlap - and sometimes collide. Overlay this dynamic concoction with constitutional law and federal law and there is quite a list of possibly applicable laws for any given POA question.

In addition to the unique interaction of applicable laws, attorneys must also stay mindful of the hierarchy of the POA's project documents and how they relate to each other and to public law. An attorney who works with POAs will encounter many opportunities for explaining this hierarchy.

A. Public Law

The highest - most powerful - category affecting POAs is public law. Although it seems 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 mistakenly believe that the publicly recorded project documents are "the law" for the project, and that the POA can make internal decisions without regard to public law if the project documents permit. WRONG! POA leaders may also be reluctant to accept that changes in public law can "undo" the enforceability or validity of a document provision that the POA has relied on for decades.

The categories of public law have their own hierarchy, ranging from federal law (highest authority) to local ordinance (lowest authority).

1. Federal Law

Obviously, federal law is the highest legal authority for the POA. Two examples are the Telecommunications Act of 1996, which invalidates some satellite and antenna restrictions and prohibitions in POA project documents, and the Fair Housing Act Amendments of 1989, which supersedes some occupancy restrictions that affect families.

2. State Law

Some state laws are targeted directly at POAs. A larger number of state laws, like the Nonprofit Corporation Law, are not specific to POAs but do regulate aspects of POA operations. Further, some federal laws - such as the Fair Debt Collection Practices and Fair Housing Acts - have counterparts in state law.

3. Local Ordinances

POAs are also subject to the ordinances, codes, and regulations of the cities and counties in which they are located. Some cities have adopted codes and ordinances that are specific to condominiums or planned developments. As with State laws, a larger number of local ordinances are not specific to POAs but do regulate aspects of a common interest development. Also, some cities have local counterparts to state or federal laws.

B. Project Documents

The second-highest authority on the hierarchy ladder is the POA project documents. As with public laws, the category of project documents also has an internal hierarchy.

1. 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.

2. Recorded Declaration

Of the non-plat instruments, the one that creates the development is supreme. The supreme creation document is usually titled a "Condominium Declaration," "Master Deed," or "Declaration of Covenants, Conditions & Restrictions."

3. Articles of Incorporation

If the POA is incorporated, its articles of incorporation (now called a certificate of formation) are the third highest authority on the hierarchy ladder. It is customary to record Articles in the county's real property records, pursuant to Tex. Prop. Code §202.006. As a recorded document it may become an encumbrance against the land.

4. Bylaws

After the Articles, the next highest authority is the Bylaws, which 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. So sayeth TUCA §82.053(c), for one. In case of a conflict between the Bylaws and the Articles, the Articles generally controls. It is customary to record Bylaws in the county's real property records, pursuant to Tex. Prop. Code §202.006. As a recorded document it may become an encumbrance against the land.

5. Rules

The lowest authority on the hierarchy ladder are the board-made policies, practices, procedures, and rules (collectively "rules" for shorthand) of the POA. All rules of a POA are not equal. Rules that directly affect the lives, pocketbooks, and private property of people are worthy of the clearest authority and the most transparency. Understandably, POA members are generally less concerned about rules that are administrative in nature. Many POAs record their rules in the county's real property records, pursuant to §202.006 of the Property Code. As a recorded document it acquires the mantle of "deed restrictions."

C. Custom

The lowest authority for any POA practice or procedure is the POA leaders' insistence that "We have always done it this way." For some matters, invoking that mantra may be sufficient "authority" - relying on the leadership's 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. For most matters, however, the mantra of "always done this way" may not be sufficient authority.

V. ASPECTS OF REPRESENTING POAS

The entire Primer is about working with POAs. This article picks up an assortment of aspects of POA representation.

A. Who Is Your Client?

A POA has many faces and speaks in different voices. For a specific purpose, a POA may use a particular face or voice. The POA attorney must recognize each voice and face, without losing the focus of who his client is. It's not as easy as it sounds.

1. Five Faces

The five faces and voices of a POA are (1) the members of the POA, being the owners of lots or units; (2) the directors of the POA, who are typically elected by the members; (3) the officers of the POA, who are typically elected by the directors and who are often themselves directors; (4) the manager of the POA, who is typically an employee or agent of the POA and who has been hired by the directors; and (5) the developer of the POA during its early years. By representing the POA, the attorney becomes a sixth face and voice.

2. Perceptions

An attorney who works with a number of POAs that are managed by the same company may be perceived as being the "manager's lawyer." An attorney who has good relations with the individual directors may be perceived as the "board's attorney." Although it is hard to avoid such perceptions, the attorney should have a clear concept of who his client is.

3. Conflicts

Identifying potential conflicts of interest can be challenging. It can be difficult to distinguish the POA entity from the individuals who comprise and represent it. Should an attorney who represents the POA entity be permitted to represent individual members of the POA on matters not related to the POA? What about representing the officers and directors on unrelated matters? The manager? The POA's vendors? What if the attorney is already representing these parties when the POA asks for representation? An attorney should be alert to potential conflicts of interest and decline representation unless written waivers are obtained. The attorney who anticipates being asked to represent individual members, employees, or agents of the POA, may want the topic addressed in his fee agreement with the POA.

B. Documenting the Relationship

1. Fee Agreements

Attorneys differ widely in their use of engagement letters or fee agreements. Because of the potentials for conflict in connection with POA representation, it is advisable to have a fee agreement that clearly identifies the client. When the POA entity is the client, it may be advisable to have the fee agreement signed by an officer or director of the POA, even though the manager may be authorized to execute contracts for the POA. Working directly with the POA leadership reinforces the perception that the attorney works for the POA, and not for the manager. Also, it may help the attorney survive the POA's change of management. Anticipating changes of leadership and management that may occur during the attorney's tenure of representing the POA, the agreement should provide that it is deemed ratified by successive administrations and continues until terminated in writing.

2. Appointments of Agent

Although you may have a written fee agreement with the POA, certain circumstances warrant a separate appointment of agent, appointment of trustee, or appointment of attorney-in-fact. The attorney who anticipates those circumstances may try to draft the additional appointments into his engagement letter. The authors of this article, however, favor the use of separate instruments of appointment, some of which may need to be in recordable form.

C. The Economics of POA Representation

Understandably, most POAs do not budget heavily for legal services, preferring to put members' dollars into grass and management. In many markets, the bulk of POA legal work is performed by solo attorneys and small law firms. In some markets, POA lawyers are expected to charge fixed fees for certain services, like assessment collection, which may only be profitable in a volume practice that employs paralegals for routine aspects. Volume practices typically use "standard" forms and assembly-line procedures that have been vetted to comply with applicable consumer-protection laws. This may mean that no single matter gets a lot of personal attention. However, a POA that is trying to keep its expenses down may not get the benefit of volume pricing unless the lawyer can use his "standard" forms and assembly-line procedures, which have been vetted.

In the spirit of managing expenses by not paying legal fees, some POAs are adamant about seeking reimbursement of legal fees from homeowners who are "turned over" to the attorney because of delinquencies or violations. The POA's logic is that the "good" rules-abiding dues-paying homeowners should not be forced to pay for legal services that were necessitated by the "bad" rule-breaking non-paying homeowners.

On a cautionary note, many POA leaders and managers do not understand that the POA does not have an inherent "right to reimbursement" without specific authority in a statute, governing document, or court

order. And, believing the POA to be "entitled" to reimbursement, they may expect the POA's attorney to recover his fees from the owner if the attorney wants compensation for his services. POA attorneys who try to recover their fees directly from individual homeowners has been the subject of hearings at the State Capitol.

D. Assembling Project Documents

As a prerequisite to representing a POA, the attorney should obtain all of the project-related documents.

1. Types of Documents.

The exhibits portion of this Primer contains a one-page list of 17-or-so types of documentation that an attorney should compile at the inception of a relationship with a new POA client. Although the term "project documents" is often used to refer to only the POA's core governing documents, in this part of the Primer it is used to refer to the entire body of project-related documents, which is much broader than just the declaration, bylaws, articles, and rules.

2. Quality of Documents

Work only from complete, legible, and "official" copies of the POA project documents. Filed and recorded documents should be so marked. All instruments should display evidence of having been properly adopted. In some cases, it may be necessary to obtain resolutions, certificates, or minutes of adoption or execution. Check that the documents are complete and legible - no missing pages or exhibits. It is advisable to have evidence of the end of a recorded document, such as the back of the last page with the county clerk's recording stamp. A document may have exhibits or may be recorded with a second instrument. Without evidence of the document's end, you will not know that you are missing pages.

3. How to Get the Documents

It should be as simple as asking your POA client to provide them. As a practical matter, however, many POAs do not have copies of all the pertinent documents, and the copies they have may be incomplete or "unofficial" (i.e., no evidence of recording or filing). However, the client will swear that what he gives you is all there is. After graciously accepting whatever the client provides, the attorney should satisfy himself that no other pertinent documents exist in the public domain by checking with the secretary of state for corporate records, and by having an abstract service check the county records if the county clerk does not provide online access to the public.

4. Helpful Hints about Project Documents

a. Some people say the "bylaws" of the POA when they are actually referring to the condominium declaration or the CC&Rs. Inquire about the purpose and content of the document without reference to its name.

b. Keep the documents for each POA in a separate binder or file with a table of contents. Expect to update the file periodically as documents are amended and as additional documents are discovered.

c. Read the entire document - not just the headings and table of contents. And, read the core documents together - as a whole. The nugget or thorn you are looking for may be buried where you least expect to find it, or may depend on the interplay between related provisions in different documents.

d. Make sure the binder of POA documents is easily retrievable when the client calls or visits. One method is to keep the document binders for all projects in one place - perhaps alphabetical by project name - that is convenient for everyone in your office who works with the POA. Of course, you will also maintain an electronic file with images of the project documents on your network server. But, the paper file has definite advantages for certain purposes.

e. When your POA client calls, make sure you have the project documents binder in front of you. There is hardly any question or issue that does not benefit from a review of pertinent provisions in the governing documents. The client will be awed that you are quoting from one of its documents during the conversation. And you can follow up with an email into which you paste pertinent provisions from the electronic version of the document.

f. For a quick-and-dirty list of recorded documents in the county records, get a copy of the Schedule B from the title policy of a recently purchased unit or lot in the project.

E. Tough Love - It's "Legal", but is it "Right"?

Boys and girls, this is where we stand on our soapbox. Let's talk about tough love for POAs. The purpose of this part of the Primer is to provoke our bar into thinking about some sticky issues which - we acknowledge - warrant further evaluation from the perspective of legal ethics and professional responsibility. Consider this a casual exchange among colleagues to get the ball rolling.

1. Old School Ways

It is only natural that attorneys want to please . . .

and keep . . . their clients. Besides the genuine sense of satisfaction of a job well done, attorneys like to eat. So, we often have a mindset of doing whatever is asked of us - efficiently and effectively - to produce results for our client . . . the developer, or the POA directors, or the POA manager.

Consider these dynamics. Non-lawyers (volunteer directors, property manager, CID developer) hire a lawyer for a stated purpose - to write a document, enforce a rule, collect money. The client knows what he wants and hires the lawyer to execute the task.

The client feeds the lawyer only the information that the client thinks the lawyer will need - just the tail or the trunk of the proverbial elephant. The lawyer has no reason to think that more information exists that may color his perception of the legal issues.

The client may ask "Can we do this?", by which the client means "Is it legal?" Even if the client does not ask, the lawyer will let the client know if the proposed action is prohibited or conditioned by the law or the project documents. The underlying assumptions of this attorney-client dynamic are that the attorney does not need to know any more than the client tells him, and the client will get what the client requests as long as it is "legal."

The client rarely asks "Should we do this?" And the lawyer doesn't ask because he's just a hired gun, not the local judge. Besides, the client might get irritated if its decision is challenged, and will switch to a more compliant lawyer.

As a result, everybody keeps his head down - focused on narrowly-defined delegated tasks to attain specific results, and nobody raises his head to look at the big picture. What's wrong with that? Legally, nothing. But, that is why we rightfully get our heads bashed in the media and at legislative hearings.

When things go amuck, as they do in full view of television cameras, nobody takes responsibility. The manager was "only carrying out the instructions of the board elected by the homeowners." The board was "relying on the advice of our professional manager." In unison, the board and the manager say "Our attorney didn't say we couldn't." And the lawyer? "The POA acted within the law and the governing documents."

2. Accountability

POAs seem to be incredibly reluctant to fess up when they mess up in the eyes of the community. An occasional "mea culpa," to the POA's members and even to the media, would go a long way towards improving the perception of POAs.

Because POAs are not immune from prosecution, in this litigious era POA attorneys may be advising their clients to hold steadfast to the "legality" of a decision or action, and to withhold comment on the consequences. Such advice is touted as being in the best interests of the POA members, who may be required to fund litigation and judgments that ensue from admissions of wrong-doing.

That's the pocketbook perspective. What about the heart and soul of the POA? What about the feelings of people? Respect? What about the sense of community? Don't those perspectives have value for the POA?

As a bar, we could be exploring ways for our POA clients to acknowledge when they hurt people, property, or pocketbooks without incurring liability for the admission. Even a promptly issued "non-apology apology" might be better than silence.

What is certain is that the legislature is not shy about making POAs accountable to their members. Neither is the media. Even the courts are getting on that bandwagon. Do we want to be out in front of this parade, or bringing up the rear?

3. It's Legal, But Is It Right?

Is it "right"? Is it "fair"? Does it "make sense"? Does it seem "reasonable"? Is it "neighborly"? Can we be "kinder"? Does the time fit the crime? How about giving one more chance? Could we be doing more? How would I feel if my POA treated me this way?

This is the dialogue that we could be having with our POA clients on a regular basis, without waiting for the client to initiate. To help get the dialogue going, look at the 9-step framework for decision-making in the exhibits portion of this Primer.

Why us? Because there may be no one else to do it. We are the professionals - we may be the "adults" of the POA family.

VI. OVERVIEW OF TYPICAL ACTIVITIES

It is beyond the scope of this paper to provide a thorough discussion of each activity performed by a POA attorney. Each topic is worthy of its own seminar paper. The purpose of this part of the paper is merely to alert the novice practitioner to what is ahead - to provide a taste of what is involved with a POA practice.

A. Assessment Collection

The collection of delinquent assessments is often the issue that first compels a POA to seek legal counsel. Beware it is also the issue most likely to get a POA and its counsel thrown into the court of public opinion, either in the media, in front of legislators or even with colleagues.

1. Reasons Why POAs Pursue Delinquencies

Most POAs have no substantial source of revenue other than assessments. Without scheduled infusions of assessments from its members, the POA cannot fund its budget and fulfill its duties to the members. It is unfair to require the contributing members of a POA to pay

more than their respective shares of the common expenses to cover the shares of the defaulting members. Also, the project documents of many POAs create an affirmative legal duty for the board of directors to collect delinquent assessments.

2. Basis on Which Levied

The POA project documents, usually the declaration, specifies the basis on which assessments are levied against the owners. The two most prevalent methods are (1) a percentage basis, which is often used with condominiums, and (2) an equal or uniform basis, which is often used with PUDs. It is also common for developers to be afforded a reduced assessment rate, which is often also extended to builders.

3. Due Dates

The POA project documents typically provide that regular assessments are due on a specific date, such as the first day of each calendar month in the case of monthly assessments, or by January 1 of each year in the case of annual assessments. Some POA project documents leave the setting of the due date to the board, in which case it is imperative that be done by the board and reduced to a resolution or included in some dedicatory instrument and filed of record to comply with Tex. Prop. Code §202.006. POA leaders and managers sometimes fall into the trap of thinking that assessments are not due until the date penalties will be incurred, such as 15 days after the due date.

4. Authority to Levy & Collect

A POA wields a very powerful tool over the heads of owners - the POA's right to levy and collect money. From whence cometh the POA's authority to demand that an owner pay money to the POA? It should come from a public record - something of which the owner has notice when he purchases his unit or lot, so that the act of purchasing is a tacit agreement to be bound by the obligation. The public records that authorize money charges are generally of two types: state law and recorded project documents.

A number of state laws empower POAs to levy certain types of charges against unit/lot owners. TUCA authorizes condominium associations to levy assessments, late charges, interest, reasonable fines, and reimbursements for damages and attorney's fees. The bracketed Chapter 204 of the Tex. Prop. Code at §204.010(a)(9) provides the authority for a community service charge and §204.010(a)(10) provides the authority for late charges. Other state laws permit limited charges for bounced checks and utility terminations.

The other source of authority is the recorded project documents. The declaration typically authorizes levies for regular and special assessments, and interest on delinquent assessments. Most also obligate the delinquent owner to reimburse the POA's collection costs and reasonable attorney's fees. Some permit the POA to charge late fees on delinquent assessments. Some authorize the POA to levy fines for violations of the documents.

Prior to the September 1999 effective date of Tex. Prop. Code §202.006 it was not customary to publicly record POA bylaws, rules, or articles of incorporation Therefore, the recorded restrictions were considered the appropriate source of authority for a monetary claim. Now that POAs are recording their other governing documents, a monetary provision in the publicly recorded bylaws or rules may prove to be sufficient authority for a levy on an owner or unit, although such authority (existing solely in the bylaws or rules versus the declaration) should be carefully analyzed and may not pass judicial scrutiny since there is no case law directly on point.

The clincher is that without a source of specific authority for a monetary charge, the POA may be prohibited from making the levy. Similarly, Master Card cannot begin charging you one plucked chicken a month in addition to interest when your credit card agreement specifies that you will pay interest only on past due accounts.

Many POAs believe that the board of directors has "inherent" authority to charge late fees and fines, even if these are not expressly permitted by state law or the restrictions. After all, they say, it is a common practice and the owners seem to pay them without complaint.

The problem arises when an owner refuses to pay a charge that was levied without adequate authority. The POA attorney may advise the board to back down from a challenge that it has little hope of winning in court. Indeed, the POA's D&O policy may not protect the directors in a lawsuit arising from unauthorized acts. Therefore, as a general rule, for every charge it levies, a POA should identify the specific authority for the levy.

5. Making Demand

Making demand for POA fees is becoming increasingly complex. Attorneys may be "debt collectors" under the federal Fair Debt Collection Practices Act, 15 U.S.C. §1692 ("FDCPA"), and Texas' Debt Collection Act, Chapter 392, Texas Finance Code. Although this issue has not been addressed by a court - federal or state - having jurisdiction over Texas, courts in other jurisdictions are split as to whether maintenance fees and assessments owed to a POA are "consumer debts" within the meaning of the FDCPA. Although the issue is undecided in Texas, the authors recommend taking a conservative approach. In short, the best advice is to assume if the unit or lot is the owner's home, then all expenses connected with the unit or lot are potentially

"consumer debt."

Further, assume that the federal and state statutes apply to your collection work, and act accordingly. Being the creditor, the POA itself has no liability under these statutes. Therefore, any duties of the POA attorney to comply with the statutes - and corresponding risks for violations - fall solely on the attorney. The authors withhold comment on how the FDCPA applies to the managing agent of a POA.

While it is beyond the scope of this paper to provide a treatise on the FDCPA, be advised that the statute prohibits the debt collector (you) from communicating with third parties (such as mortgagees) about the consumer debt. This creates a dilemma when the POA project documents direct the POA to notify the mortgagee about assessment defaults. Also be aware, TUCA §82.113 authorizes the condominium association to communicate directly with a mortgagee about a unit owner's delinquency and Tex. Prop. Code §209.011(a) requires notice be given to a lienholder after a POA foreclosure.

To this end, there may be some statutory protections for notifying third parties. In short, these consumer debt statutes were obviously not written with POA debts in mind. As a result, their application to the POA context raises many questions. Watch out for new cases and changes in the law.

6. Security for the Debt

The POA typically has two primary forms of security for the owner's monetary obligations. One is the owner's personal liability for the debt. The other is the POA's lien against the unit or lot. The two forms of security are independent and often must be explained to the POA leadership and management.

a. Personal Obligation of Owner

Under most project documents, a person who acquires a unit or lot becomes personally liable for charges levied by the POA against the owner during the period of ownership. For condominiums, TUCA §82.113(a) also creates the unit owner's personal obligation to pay. Under the project documents of most POAs, a person ceases to be liable for future accruing charges when he transfers or is divested of his interest in the unit or lot. Under some project documents, however, an owner remains personally liable until the ownership change is reflected on the POA's records. A former owner continues to be liable to the POA for debts that arose during his period of ownership. When the POA files a lawsuit against an owner (or former owner) to recover a money judgment, the POA is pursuing the owner's personal liability. An owner or former owner may be released from his personal obligation through bankruptcy.

b. Lien Against Real Property

In most POAs, the recorded declaration creates a lien against each individual unit or lot in favor of the POA to secure the payment of assessments and other charges against the unit/lot or its owner. For condominiums, TUCA §82.113 also creates a statutory assessment lien. Typically, the POA's lien against a unit or lot continues to be enforceable even though the ownership of the unit or lot changes and the new owner is not personally liable for debts that arose before the transfer date. When the POA records a notice of its lien or forecloses its lien, the POA is exercising its lien rights against the real property. Consider that the lien created by the project documents may not secure all of the owner's monetary obligations. For example, the declaration may require the owner to pay late fees on delinquent assessments, but may not include late fees among the lienable charges. The FDCPA will prohibit "lumping" secured and unsecured debts together and threatening to foreclose on the entire combined amount. Accordingly, it is recommended to clearly delineate which are the secured charges subject to foreclosure and which are not. There are two ways to foreclose a POA lien, either judicially (by filing suit) or non-judicially under Tex. Prop. Code §51.002. In order to foreclose non-judicially, it is generally accepted by POA practitioners that the declaration must specifically provide the "power of sale" language (except for condominiums where the language is provided by TUCA §82.113(d). Also, be aware that if a POA forecloses the "right of redemption" statutes must be followed, TUCA §82.113(g) for condominiums and Tex. Prop. Code §§209.010 and 209.011 for all other POAs.

7. Effect of Owner's Bankruptcy

When the owner of a unit or lot files for bankruptcy protection, the POA is stayed from taking action against the owner or his property without approval of the bankruptcy court (i.e., lifting the stay). One exception to that general rule applies to a POA that furnishes a utility to the owner's dwelling via the POA's master meter. Under certain circumstances, the utility-providing POA may discontinue service after a period of 20 days following entry of an order for relief per 11 U.S.C. §366. Unless the debtor abandons and/or surrenders the unit in his bankruptcy, he is required to cure his debt to the POA. In a typical Chapter 13 bankruptcy, the debtor pays post-petition assessments directly to the POA, and cures the pre-petition debt via his payments to the bankruptcy trustee under his plan. In Chapter 7 bankruptcy, a debtor will not typically be discharged from POA debts if he continues to use or enjoy the benefits of the property. Whether assessments are discharged depends largely on valuation of the property

and the POA's status as secured or unsecured as a result. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 provides a more concise guideline as to POA debt dischargeability under 11 U.S.C. §523(A)(16). Here are a few other stray tips about bankruptcy:

a. In the bankruptcy plan and schedules, the POA's claim may be listed under the name of the POA manager or POA attorney, and it may be shown as an unsecured claim instead of secured. These are good reasons to file a proof of claim.

b. Educate your POA client about the effect of bankruptcy and the necessity of stopping direct communications with the debtor about his debt.

c. Advise your POA client to divide the debt into pre- and post-petition components. Payments received from the trustee are applied to the pre-petition debt. Payments received from the debtor are applied to the post-petition debt.

d. In some instances a discharge could release the debtor's personal obligation to the POA for pre-petition assessments, but does not affect the POA's assessment lien against the unit or lot as long as the debtor retains an interest in the property.

8. Notice of Assessment Lien

The assessment lien created by covenant is a continuing lien contained in the recorded declaration. The POA project documents may or may not require that a lien notice be recorded as part of the collection process. If a lien notice is so required, the POA attorney should pay close attention to the lien notice provisions in the project documents which may require, for example, that the notice be signed by a POA officer and that a copy be given to the unit/lot owner. No matter how many times the POA attorney explains to his client that every unit or lot is forever subject to a continuing lien, expect your client's instruction to "put a lien on the lot." If a lien notice is filed, when the default is cured the POA should remove its cloud on the title to the unit or lot by recording a release of the lien notice – but not a release of the underlying continuing lien. For this reason, the wording in releases is important so as not to release the lien in the declaration itself.

B. Covenant Enforcement

After assessment collection, covenant enforcement is the next issue most often to compel a POA to seek legal counsel. Like assessment collection, covenant enforcement can be politically charged and can often bring out the fighter in even the meekest of owners. (See Section I.C. above "Theories for Emotionalism in POA Issues.") This apparent willingness to fight for ones rights (be they the rights of an owner or POA) may account for the vast body of case law regarding POA covenant enforcement. As with the remainder of this paper, a detailed analysis of POA case law on covenant enforcement is beyond the scope of this paper, but a few general rules are set forth below for good measure.

1. Injunctive Relief

If there is a distinct or substantial breach of a restrictive covenant, a POA is entitled to injunctive relief; actual damages and irreparable harm are presumed. Courts will weigh the equities of the POA against those of the owner against whom the covenant is sought to be enforced. A trial court is not only empowered, but required, to balance rights and equities between homeowners and POAs. The granting of a mandatory injunction ordering removal of a nonconforming structure is a proper way to enforce restrictions. The granting of an injunction to a POA by a trial court will not be overturned absent a showing of abuse of discretion.

2. Declaratory Judgment Actions for Determination of Validity of Restrictions

A party seeking determination of the validity, applicability, or enforceability of a restrictive covenant, may bring suit under Civ. Prac. & Rem. Code Ann. §37.001 et seq. for declaratory judgment. §37.009 provides for a discretionary award by the court of attorney's fees and costs; however, a declaratory judgment cause of action cannot be used as a counterclaim in a suit between the same parties for the same issues solely as an avenue to obtain attorney's fees.

3. Defenses to Enforcement

Generally, a property owner has the burden to use reasonable diligence to determine whether any restrictions are still in force before deliberately disregarding them. Ordinarily, unless a restriction is removed either by agreement of all interested property owners or by declaratory judgment, restrictive covenants are not removed, but there are exceptions to this general rule in light of the defenses highlighted below. All of the discussed defenses are "kissing cousins" and may be combined in some instances. Most cases which address them overlap in interpretation and enforcement, probably as a result of "shotgun" pleadings. The important lesson is that a POA practitioner should educate his client regarding these defenses and the proper avoidance of same.

a. Statute of Limitations

Actions to enforce restrictive covenants are controlled by the four-year statute of limitations which is measured from the date of discovery of the violation. Generally, the four-year statute of limitations to enforce a

restriction begins running from the date a POA discovers the violation. The question of when a violation should have been discovered, so as to start the running of the statute of limitation, is typically a question of fact which requires evidence and findings.

b. Waiver and Abandonment

To establish waiver, an owner has the burden of proving the POA voluntarily and intentionally relinquished its right to enforce the restriction, by showing that the other violations then existing were so extensive and material as to reasonably lead to the conclusion that it had been abandoned. The failure of a POA to object to trivial violations will not preclude obtaining an injunction when the other violations are more substantial. If the prior violation which existed without objection was insignificant or insubstantial when compared to the proposed new use, a waiver is not established. However, once a nonconforming use has existed for a period of time, the covenant is waived as to that use, but it will not support a waiver of a new and greater violation.

c. Abandonment

To establish abandonment of a restrictive covenant, a party must prove that the violations are so great as to lead the mind of the average man to reasonably conclude that the restriction in question has been abandoned. One violation is not so great as to lead to an abandonment of a restriction. A trial court may refuse to enforce deed restrictions if there has been such a change of conditions in a restricted area or surrounding it that it is no longer possible to secure, in a substantial degree, the benefit sought to be realized through the covenant.

d. Laches and Estoppel

Laches is an affirmative defense consisting of unreasonable delay in asserting legal or equitable right, and good-faith change of position by another to his detriment because of such delay. Party asserting defense of laches has burden of proving both elements when a cause of action comes within any specific provisions of statute of limitations, equitable defense of laches does not apply unless extraordinary circumstances exist.

Estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps otherwise have existed, as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worst, and who on his part acquires some corresponding right. Estoppel, like laches, includes element of change of position in reliance on the conduct of other parties.

e. Ratification

Ratification is distinguished from other defenses in that it includes the acts of the entire POA membership, rather than those of the board of directors acting in its management capacity. An example is when the membership unofficially approves and pays an assessment not authorized by the project documents and an individual owner challenges the assessment. The elements of the affirmative defense of ratification are (1) approval by act, word or conduct; (2) with full knowledge of the facts of the earlier act; and (3) with the intention of giving validity to the earlier act.

4. City and County Enforcement

Be aware that certain cities (e.g., Houston) have the power to enforce certain restrictive covenants as do certain counties. For example, Tex. Prop. Code §203.003 authorizes the county attorney in counties with a population of more than 200,000 to enjoin or abate violators of a restriction contained or incorporated by reference in a properly recorded plan, plat, replat or other instrument affecting a real property subdivision.

C. Reviewing & Interpreting Project Documents

When the POA client asks whether the POA or the owner is permitted to or prohibited from doing a certain act, the POA attorney hopes to find a clear statement of authority in the project documents or public law. Absent express authority, the POA may have certain inherent powers stemming from its general authority to govern the community. In some instances, however, the absence of an express provision may mean the owner has NO duty or the POA has NO authority, as the case may be.

1. Liberal Construction

In reviewing the POA project documents, be mindful of Tex. Prop. Code §202.003 effective June 18, 1987, which requires that dedicatory instruments be construed liberally to give effect to the intent of the document. Real estate practitioners and litigators believed this provision changed the rules of construction of restrictive covenants in Texas from the historical holding that restrictive covenants must be construed with all doubts in favor of the free and unrestricted use of the land. Subsequent rulings by appellate courts have been split, making this issue ripe for the Supreme Court.

2. Rules of Construction

Restrictive covenants are by case law considered to be contracts. Accordingly, the rules of construction applicable to contracts also apply to restrictive covenants.

3. Conflicting Provisions

If you find 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.

4. Ambiguous Provisions

Be alert to provisions that may be capable of more than one interpretation. The ambiguity may be resolved by application of rules of construction. In some instances, it may be advisable for the board to adopt a resolution that interprets an ambiguous provision.

5. Source of Provision

Consider the nature of the source document. As a general rule, the greater the document's inherent authority, the greater the prospect that the provision is enforceable. For example, a late charge provision in the declaration is probably more enforceable than a late charge provision in a board-made rule.

6. Prohibited by Public Law?

Review pertinent statute and case law to determine whether the provision is valid and enforceable.

7. Authorized by Public Law?

If the project documents contain no express authority for the desired action, determine whether public law gives the POA rights and remedies in addition to the specific provisions of its project documents. The POA may have certain remedies under state law (such as the right to recover attorney's fees under Tex. Prop. Code §5.006) or equitable legal doctrines.

8. Industry Customs

In interpreting project documents and public law it is helpful to know what is considered customary or standard for the type of POAs with which you are working. The knowledge comes with time and experience - or with phone calls to colleagues.

D. Making & Enforcing Rules

An enlightened POA may consult its attorney before embarking on the road to rules. However, many POAs try to make, interpret, and enforce their rules without legal assistance. When the matter reaches the POA attorney, it may be necessary to review the processes of making and enforcing rules with your POA client. That is the purpose of this section.

1. General Guidelines for POA in Making Rules

a. POA must have authority to make a rule. Is the authority stated or implied by the project documents or state law? No authority - no rule.

b. Do not mix and match authorities. The authority to promulgate architectural guidelines cannot be used to enact use rules and regulations.

c. Rule should rationally relate to the purposes of the POA. Prohibiting styrofoam cups because they are bad for the environment may be noble, but may not rationally relate to the purposes of the POA.

d. Rule should reasonably relate to the specific goal or purpose the POA is trying to achieve.

e. Rule should be narrowly tailored to fit the purpose or problem. If the problem is dog poop on grounds, pooper-scooper and leash rules are more narrowly tailored than a complete prohibition on all kinds of pets.

f. Rule must conform to property rights granted by the declaration (e.g., some declarations give the right to lease common area, but only if approved by a certain percentage of the members).

g. Rule must be lawful. Prohibiting families (children) from living in units has not been lawful since the 1989 Fair Housing Act, unless a retirement community exemption applies.

h. Rule must be capable of being enforced. Can the POA tell when the rule is broken?

i. The POA must be willing to enforce the rule. Does the POA have the desire, manpower, money, and time to enforce the rule?

j. The meaning of the rule must be clear. Does the rule clearly state what is permitted or prohibited in a way that is read the same by everyone?

k. The rules must be reasonable. In short, does the rule pass the "smell test." Remember Tex. Prop. Code §202.004 provides an exercise of discretionary authority by a POA concerning a restrictive covenant (the definition of which includes properly adopted rules and regulations) is presumed reasonable unless the exercise of discretionary authority was arbitrary, capricious or discriminatory.

2. Steps in Rule-Making Process

a. Identify the problem.

b. Evaluate alternative ways of solving the problem. Is a rule needed?

c. Research the legal base for the rule.

d. Research previous rules dealing with this problem.

e. Seek the help of pertinent professionals in defining the rule.

f. Draft a resolution creating the rule.

g. Board publishes the proposed rule to the POA's members.

h. Board adopts or rejects the rule.

i. Board publishes the result (e.g., the adopted rule) to the POA's members.

j. Record the rule in the county's real property records.

k. Board periodically re-publishes the rule to the members.

l. Board includes copy of recorded rule with the project documents given to prospective owners.

3. General Guidelines for Enforcing Rules

These guidelines assume that the POA's rules are valid, reasonable, and enforceable. These guidelines do not address architectural violations.

a. Violation

Identify the violator and the violation. Document the activity that violates a rule. Who observed the violation? Are photographs of the violation available?

b. Hyper Sensitive?

Investigate the source of the complaint to determine whether the person reporting the violation is hyper sensitive or seeking retribution. It is preferable to have independent verifications of the violation.

c. Rule

Identify the rule or covenant that is broken. Many offensive activities are not expressly prohibited. For example, few, if any POAs have rules prohibiting the use of offensive or provocative hand gestures. Although such conduct is disturbing to residents, it may not be prohibited by any law or POA rule.

d. No Rule?

If the objectionable conduct does not violate a specific covenant or rule, the POA should consider amending its covenants or rules, as appropriate, to create the prohibition. A newly created rule cannot be used against a prior action. The "violator" must be given notice of the new rule and an opportunity to conform his conduct before being subjected to the penalties for violation.

e. Authority

Locate the highest source of authority for the rule. For example, if the rule is stated in both the declaration and the community rules, the provision in the declaration has higher authority than the board made community rules.

f. Law

If the conduct violates a law, contact the appropriate public agency and let those officials enforce the law.

g. Whose Problem?

Determine whether the complained of conduct is a POA problem or a neighbor to neighbor problem. The POA cannot be the arbiter of every dispute between neighbors.

h. Uniform & Consistent Enforcement

The POA should be uniform and consistent in enforcing its rules. It is not necessary for the POA to enforce every one of its rules in order to enforce any rule. However, if the POA is enforcing a rule, it must enforce that rule against all violators in a manner that is uniform and consistent. It cannot choose to enforce a rule against one owner but not against another. Therefore, when a violation arises, the POA should audit the property to determine if other similar violations exist. The POA should also audit its records to determine how similar violations have been treated in the past.

i. Notice

Promptly notify the violator of the violation and provide a copy (text) of the rule that is being broken. The notification should be in writing. If a communication is oral, it should be followed up with a writing. The letter should describe the violation with specificity. The letter should also demand that the violator cease the violation or refrain from repeating the violation. If the violation is a continuing one, the letter should provide a specific date by which the violation must be cured to avoid further consequences.

j. Due Process

The much-valued concept of due process requires that the violator be given notice and an opportunity to be heard before sanctions (see the remedies below) are imposed.

k. Status of Tenants

Tenants who violate rules pose another problem for the POA. The tenant has a contractual relationship - the lease - with the unit owner, who is a member of the POA. The owner, in turn, is responsible for his tenant's compliance with the POA rules. When a tenant breaks POA rules, the POA should direct its communications to both the owner and in some cases the tenant. Beware the owner may perceive that the POA is harassing an otherwise good (i.e., rent-paying) tenant and claim that the POA is tortiously interfering with a contractual relationship. For this reason, dealing directly with the owner is generally recommended.

4. Remedies for Rules Violations

The selection of a remedy is determined, in part, by the nature of the violation. The following list of remedies is not intended to be applicable to every type of violation.

a. Fines

POAs do not have inherent power to fine owners and residents for violations of rules. The authority for fining must be found in the project documents or state

law. Since 1994, every Texas condominium has had statutory authority under TUCA §82.102(a)(12) and (d) for levying fines for violations of its rules, subject to a statutory requirement of notice and hearing. Non condominiums must look to their declarations or possibly other recorded dedicatory instrument for fining authority, which is sometimes implied by the word "sanctions." In adopting a fining policy, the POA should consider the following points:

(1) The amount and frequency of the fine should be reasonable in light of the violation. Some violations warrant higher fines than others. Some fines should be per occurrence, others per day or per month. (Recall the "smell test" rule of thumb discussed in Section VI.D.1.k. above.)

(2) Before levying a fine, Tex. Prop. Code §82.102(d) and §209.006 require the violator be given notice of the violation and the amount of the fine, an opportunity to cure the violation and be heard before the board.

(3) Fines should not be allowed to accumulate indefinitely. The board should determine a maximum amount of fine that will be permitted to accrue. If fining is not effective in curing the violation, the POA must seek a different route.

(4) The owner should be given periodic notices of the amount owing for unpaid fines (after the initial statutory notice). Do not assume that the owner knows he is being fined.

(5) The POA should not levy fines without trying to collect them.

b. Suspension of Privileges

If the declaration expressly provides, the POA may suspend the resident's use of common elements or certain facilities during the period of violation. The POA should not suspend the use of a facility that is unrelated to the violation without stated authority in its project documents. However, a board made rule may suspend use privileges for a facility to which the violation relates, such as suspending pool privileges because of pool violations. Suspension of privileges should not be used unless the POA has an effective means for restricting access. As an aside, Texas condominiums have authority under TUCA §82.102(a)(18) to suspend an owner's use of certain general common elements for nonpayment of assessments. As with fining, Tex. Prop. Code §209.006 requires a 30-day period in which to request a hearing prior to termination of the use rights, unless the suspension is the result of a violation that posed a significant and immediate risk of harm to others in the subdivision in accordance with Tex. Prop. Code §209.007(d).

c. Self-Help

Self help occurs when the POA takes action to cure the violation itself without litigation. For example, removing a bicycle chained to a common element fence. The POA may have an inherent right to use self help on the common elements. The POA should give the resident notice of its intent to exercise self help (most especially if required by the declaration and, if so, in accordance with the declaration) and should store the resident's property in a secure place so that it can be returned to the property owner. It is a commonly accepted legal principal that the law does not favor self-help. So, unless the right to self-help is contained in the declaration, the better reasoned advice is (i) not to enter a unit or a lot (except for condominiums in accordance with TUCA §82.102(a)(16) for bona fide emergencies), and (ii) to leave the premises if requested to do so by the legal occupant.

d. Recorded Notice of Violation

If the conduct violates a covenant in the declaration, the POA may record a notice of covenant violation in the county's real property records. Because such a notice clouds title to the property, it should be prepared by an attorney licensed in Texas. Because this remedy affects title to real property, it should be used sparingly and only on advice of counsel. The recorded violation notice should be released after the violation is cured. This remedy is most often used with architectural violations.

e. Eviction of Tenants

A tenant who violates the POA's rules may be evicted by his landlord, the unit owner, if the lease so provides. What if the owner refuses to act? The POA has no authority to evict an owner's tenant unless the right of eviction is contained in the project documents, or (less likely) the lease itself grants such authority. On rare occasions, justice courts have ordered the eviction of tenants whose conduct outraged the community - even though the POA had no specific authority to seek eviction. POAs should consider amending their declarations to create a right of eviction by the POA. This authority is specifically spoken to in TUCA §82.067(h).

f. Lawsuit

Ex parte relief may be granted by a Court to immediately enjoin a violation of a covenant, typically referred to as a temporary restraining order or TRO. The TRO can be turned into a temporary injunction as allowed by the Tex. Rules of Civ. Proc. For a POA seeking determination of the validity, applicability, or enforceability of a restrictive covenant, a declaratory judgment action under Civil Practices & Remedies Code Ann. §37.001 et seq. is an appropriate means. In a suit to enforce a covenant, a POA's exercise of authority is

presumed reasonable unless the court determines by a preponderance of the evidence that the POA's actions were arbitrary, capricious, or discriminatory, under Tex. Prop. Code §202.004(a). The ultimate remedy for any POA is a court's order (injunction) directing the resident to cease the violation, either temporarily or permanently. In connection with the lawsuit, the POA may recover its legal expenses and fines. If the conduct violates a provision of the declaration, the POA may be awarded penalties of up to $200 per day for each day of the violation under Tex. Prop. Code §202.004. (Refer to Exhibit 5 of this paper for tips in representing a POA in litigation.)

g. Reimbursement for Legal Expenses

Tex. Prop. Code §§5.006 and 82.161(b) and/or the project documents for many POAs require the violating owner to reimburse the POA for the expenses it incurs in obtaining the owner's compliance. If the documents are well written, the provision includes all attorney's fees, not just those incurred in connection with litigation. Since 1995, non-condominium POAs in Harris County have had statutory authority for reimbursement of attorneys fees under Tex. Prop. Code §204.010(11). For non-condominium POAs, Tex. Prop. Code §209.008(a) requires prior written notice to the owner that attorney's fees will be charged to the owner, if the violation continues after a date certain. Tex. Prop. Code §209.008(b) provides an owner is not liable for any attorney's fees charged prior to a hearing required by Tex. Prop. Code §209.007 or the date by which an owner must request a hearing. Tex. Prop. Code §209.008(f) limits attorney's fees in a non-judicial foreclosure to one-third of all actual costs and assessments, excluding attorney's fees or $2,500, whichever is greater. Tex. Prop. Code §209.008(c) provides that 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 POA or its managing agent; which statute has been interpreted by most POA practitioners to prohibit a POA attorney from depositing monies collected from an owner in the attorney's bank account. Rather, the better practice is to forward all monies collected from an owner directly to the POA and bill the POA for the attorney's fees.

E. Governance Issues

The POA attorney is often asked to clarify issues of governance and administration. Typical problems deal with proxy voting, qualifications for officers and directors, calculation of consents required to approve certain actions, and the general interpretation and explanation of the corporate bylaws and certificate of formation.

Whether or not the POA is incorporated, the Tex. Bus. Orgs. Code (in particular Chapter 22 dealing with nonprofit corporations) serves as a useful guide in working with governance issues. In applying that statute to the POA project documents, the POA attorney should consider that bylaws are among the "dedicatory instruments" to be liberally construed under Tex. Prop. Code §202.003. In addition to statutes and documents, generous doses of common sense will be needed by the POA attorney who guides the POA leadership through the often murky waters of governance issues.

The leadership of a POA embroiled in power struggles may try to have the POA attorney endorse its self-serving applications and interpretations of the bylaws. On occasion, the POA attorney may find it necessary to differ with the POA leadership on what is "best" for the POA as a whole.

F. Document Amendment

Amending a project document requires knowledge of the document's amendment provisions and a review of applicable law, if any. For example, condominium associations are prohibited by state law from amending their declarations with less than 67% approval by the ownership interests, even if the declaration states that amendments require only majority approval. There is no statutory minimum for amending the declaration of a non-condominium POA. One should also understand how the several project documents work together to avoid creating conflicts between documents. The practitioner should also be alert to the inherent resistance of many owners to a board "tampering" with the governing documents. Transparency, education and inclusiveness are the rules of the day when advising owners as to the need for an amendment.

1. By Authority in the Project Documents

By way of general rules, in order for a subsequent instrument to amend original restrictive covenants governing a condominium or PUD, unless statutory authority applies: the instrument creating original restrictions must establish both the right to amend the restrictions and the method of amendment; changes must contemplate correction, improvement, or reformation of agreement rather than complete destruction of it; and the amendment to the restrictions may not be illegal or against public policy. The objective of a well drafted amendment provision is to ensure continuity of the original development scheme and avoid adversely affecting owners who relied on the protection of the restrictions when they purchased their property.

Some restrictive covenants are drafted so that they are virtually impossible to amend. They may require the owners who vote in favor of the amendment to sign the amendment instrument, which some construe as requiring that each signature be notarized. In a moderately sized

development this requirement is extremely difficult. In a large development it is not likely to ever be accomplished. Artfully drafted the restrictions require that the amendment instrument contain a certification by the president and/or other officer stating that the requisite votes were obtained to successfully amend. It is also possible when notarization of an owner's signature is not required by the declaration, to attach owner's consents to the amendment that are likewise certified by the president or other officer as being the requisite number required to amend; the officer's signature can then be notarized thereby allowing the amendment to be filed in the applicable real property records.

A declaration may require mortgagees to vote on all amendments or only certain "material" amendments. Developers insert such mortgagee provisions that are favored by institutional lenders and mortgage underwriters to help obtain financing for home buyers. These provisions interfere with the POA's right to control its own community and may be unreasonably restrictive unless they provide for "deemed" mortgagee approval.

Developers often reserve the right to unilaterally amend the declaration during the development period. The reservation may be global, allowing the developer to make any type of change. Or, the reservation may be limited to certain types of actions, such as amending the documents to conform to a mortgagee's changing requirements.

2. Statutory Authority for Declarations

Tex. Prop. Code Chapter 201 is an oddly bracketed statute that applies to residential real estate subdivisions in most urban areas of the state. It was enacted in 1985 to assist Houston area PUDs that had deed restrictions lacking mechanisms for extension and modification, or which required unanimous or nearly unanimous approvals. The bracketing has been enlarged to include other metropolitan areas. The statute does not apply to restrictions that may be amended by less than 75% of the owners. The statute's amendment process is rather detailed and requires the appointment of a Petition Committee which must file a notice in the real property records that a petition is being circulated, including a description of the documents being amended and the property being encumbered. The statute sets forth the required contents of the petition. The Petition Committee has one year from the filing of the notice to file the actual petition, and no other committee can be formed during that year.

If the POA is in a county with a population of 65,000 or more and it needs to amend its restrictions to come into compliance with HUD or VA requirements, Tex. Prop. Code Chapter 205 provides a procedure whereby the board can amend the restrictions. Also the bracketed and extension Chapters 204, 206, 208, and 210 of the Tex. Prop. Code, provide a procedure for amendment to certain restrictions.

3. Statutory Authority for Condominium Declarations

The condominium statutes address the declaration amendment process. The old Texas Condominium Act - §81.111 - provides that an amendment of the declaration must be (1) approved at a meeting of the owners; and (2) approved by at least 67% of the ownership interests in the condominium. The requirement of a meeting seems to preclude voting by mail or petition. The old Act also requires the consent of "affected" owners and their mortgagees for an amendment that alters or destroys limited common elements. This statute still applies to condominiums created before 1994.

For condominiums created since January 1, 1994, TUCA §82.067 also requires that declaration amendments be approved by at least 67% of the votes of unit owners or any larger majority specified in the declaration. However, TUCA offers more flexibility for obtaining the consents of owners. A declaration amendment may be adopted (1) by written ballot that states the exact wording or substance of the amendment and that specifies the date by which a ballot must be received to be counted; (2) at the meeting of the members of the association after written notice of the meeting has been delivered to an owner of each unit stating that a purpose of the meeting is to consider an amendment to the condominium declaration; or (3) by any method permitted by the condominium declaration.

4. By Operation of Waiver and Abandonment

In some cases POAs make an unintentional decision not to enforce certain covenants (i.e. the scheme or appearance of a property has changed so much over time that certain covenants have been waived or abandoned) in effect "amending" the covenants so they are no longer enforceable.

G. Defending POA Litigation

It happens. POAs get sued. If your incorporated POA client gets served through its registered agent, you may or may not hear about the lawsuit in a timely manner, depending on who the registered agent is. If POA leaders or managers are sued individually, you may receive a distress call from a worried defendant who has never before been sued. It can be an unnerving experience. The following is a checklist of practical things to consider in addition to the customary litigation processes of calculating the answer deadline and making sure a default judgment is not taken against your client.

1. Identify the Defendant

One of your first tasks is to determine whether the

party being sued is your client and whether you are authorized to represent the defendant in the litigation. When a POA gets sued, the named defendants may be the POA as an entity, the board of directors as an entity, individual directors, individual officers, the manager or management company, members of the POA acting on behalf of the POA, or any combination of these.

2. File Claim with POA Insurance

It is prudent to recommend that the POA notify its insurance agent of the suit, in event the claim is covered by any of the POA's insurance coverages. Failure to timely notify the insurer may result in a denial of coverage. For a number of reasons, your client may hesitate to, refuse to, or fail to notify its insurer. Clarify with your client (in writing if possible) whether the POA instructs you to notify its insurer, or whether the POA assumes responsibility for that function. If the POA's insurer is notified, do not assume your work is done. Some insurance companies need time to evaluate a claim, make a decision about coverage, and assign it to an attorney. Sometimes, a denial of coverage must be appealed or litigated. Monitor your client's answer deadline to ensure that it does not lapse without appropriate attention, by you if necessary.

3. Pleading Defects

As you read the complaint, you may discover many technical imperfections. Perhaps the pleading does not state the full or correct name of the POA, or the registered agent was not served, or the declaration is referred to as "bylaws." You may petition the court to cure these errors by filing special exceptions under Rule 91, Texas Rules of Civil Procedure.

4. Check Project Documents

Your POA client's project documents may address litigation. Some documents have due process provisions or ADR as a prerequisite to filing suit. Some may even require member approval to fund litigation, or formal board action to authorize it.

5. Costs of Defending

In many POA disputes, the costs of litigation far exceed the cost of enforcement or the damages claimed. By requiring a realistic litigation retainer, you may help your POA client evaluate its resolve for the litigation. Be prepared to answer your client's inevitable question "Can we recover our legal fees if the plaintiff loses?" This is where the rubber meets the road and the client must determine if a cost of defense settlement is in order.

6. What is it "really" about?

Some POA disputes have ancient origins rooted in egos and hurt feelings over matters that should have been long ago forgotten. What fuels the lawsuit is not necessarily the problem presented in the pleading. Be prepared to dig beneath the surface of facts and materials given to you by the client for a thorn embedded in the plaintiff's hide.

7. Working With Insurance Defense

If the POA's insurer elects to defend the POA in the lawsuit, your role as litigation counsel may not be over. You may represent the POA in its counterclaims as typically insurance carrier will not allow the insurance defense counsel to do so. Also, the POA may benefit by having you work with its insurance defense counsel. You have knowledge about the POA, its governing documents, and the facts of the dispute. You may also have more knowledge about the particular law that applies to the dispute than does the insurance defense counsel. It may be difficult to convince your POA client that it should continue paying for your services while it is represented in the suit by insurance defense counsel. However, if the POA desires to obtain a certain outcome in the suit, the POA may need to make your expertise available to its insurance defense counsel.

H. General Counsel

In many respects, a POA attorney often functions as a general counsel to the POA. The grab bag of legal needs can be from simple to complex. Resist the temptation to be a jack of all trades. If the matter falls outside your comfort level do not hesitate to refer the matter to outside counsel with the needed expertise. While not at all inclusive, the areas set forth below demonstrate some of the more typical general legal needs of a POA.

1. Legal Certification for FHA Financing

POAs sometimes cooperate with their individual members in obtaining FHA financing for the sale of a unit or lot. FHA financing typically requires FHA approval of the POA, including a "legal certification" of the project documents. The legal certification is an attorney's opinion letter regarding compliance with state laws and HUD regulations. Because the POA attorney is familiar with the project documents, he may be asked by the POA to prepare the legal certification to FHA.

2. Vendor Disputes

Like any small business, a POA periodically finds itself in contract disputes with vendors. Although the POA attorney is rarely consulted when the POA engages the vendor, he can expect to be consulted whenever the vendor relationship sours.

3. Working with the ACC

POAs often have separate committees for

architectural matters, which committee may or may not be appointed by the board and may or may not be similarly aligned with the board. It is not uncommon for the POA attorney to also serve as counsel to this committee. It is also not uncommon for developments to have new construction ACCs (generally composed of developer employees) and post new construction ACCs (generally composed of residents) often referred to as a modifications committee. Transfer of power from a developer controlled ACC to a resident/board controlled ACC should be documented, either by authority in declaration, separate assignment or, if applicable Tex. Prop. Code §204.011.

4. Dispute with Adjacent Landowners

Like other land owners, POAs get into disputes with adjacent land owners from matters as diverse as nuisance claims to easement disputes.

5. Annual Audit Letter

Many POAs obtain an annual audit by a certified public accountant. State law (Tex. Prop. Code Chapters 81 & 82) requires annual audits for condominium associations. The bylaws of many POAs also require annual audits. In connection with the annual audit, the CPA typically asks the POA attorney to submit a letter if the POA spent funds on the attorney during the audit year. §22.352 of the Tex. Bus. Orgs. Code requires all nonprofit corporations to annually prepare a financial report conforming to standards adopted by the American Institute of Certified Public Accountants. Typical requests from CPAs request verification of lawsuits against the POA; be mindful of all such suits and their characterization as to potential damage.

6. Bank Loans

From time-to-time POAs borrow money from lending institutions. Depending on the bank, an attorney's opinion letter may be required by the lender. The requirements of the attorney opinion letter vary widely from lender to lender, but if an opinion letter is required it will invariably ask for the POAs authority to borrow money and secure the obligation. For condos, beware of TUCA §82.102(a)(17), which many POA practitioners believe prohibit the assignment of the right to future income unless the right is contained in the declaration.

7. Dealing with Governmental Entities

There are a myriad of occasions a POA will be called upon to deal with a governmental entity. The most common occurrence is dealing with municipal utility districts, either on a congenial cost-sharing mutual benefit basis agreements (e.g. for common areas/recreation) to adversarial dealings concerning the same cost-sharing mutual benefit agreements. Other situations with governmental entities include, but are not limited to: condemnation matters; privatization of streets to accomplish gating; zoning; ordinance violations, etc.

8. Employment Disputes

POAs often hire employees. This employment can result in employment questions, including a wide range of incumbent employment law issues.

VII. SELECTED ISSUES & HOT TOPICS

A. Management Certificates

POAs that expect to collect delinquent assessments when the home changes owners may be shocked to hear "you snooze, you lose" because of a significant change in 2009 to the Texas law of "management certificates." Texas has two laws requiring management certificates – TUCA §82.116 for condominium associations (residential + non-residential), and Tex. Prop. Code §209.004 for all the other residential POAs. The 2009 law change applies only to the non-condo POAs that are required to issue the Chapter 204 certificate.

Since January 1, 1994, every condominium association in Texas has been required by State law to record a notice in the county records that identifies the property and tells the public how to contact the condominium association. TUCA §82.116 crowned the notice the possibly-misleading name of "Management Certificate." Since January 1, 2002, all other types of residential POAs have been required by Tex. Prop. Code §209.004 to prepare and record the same type of notice, also called a "Management Certificate."

The requirements for the two certificates are similar, but not identical. Both require that the certificates be amended within 30 days of a change of information. Until 2009, the primary difference was that the TUCA notice could be signed only by a POA officer, whereas the Chapter 209 notice could also be signed by the POA's managing agent.

In 2009, the Texas Legislature amended the requirements for the Chapter 209 notice in response to title companies which had wearied of being unable to locate POAs that had failed to record certificates, or had not updated the certificates when the contact information changed. The new law says, in essence, that a POA is not entitled to collect past-due assessments at a title closing if the POA has not maintained a current management certificate in the county's records. The new law also tweaked the required contents for the certificate. The 2009 law change does not apply to condos.

Bottom line. Every POA should periodically look at its most recent management certificate on file with the county, to make sure it meets the statutory requirements and that the information on it has not changed. POA

managers have a monetary incentive to perform this function for their POA clients. POAs that are managed by volunteers may not be aware of the requirement for a management certificate, or the importance of keeping it current.

B. Sales Tax Exemption

This is included as a "Hot Topic" because attorneys outside the Houston area may not know about the sales tax exemption for POAs. The authors have no personal experience with exemption applications, which are usually handled by a couple of Houston attorneys and accountants who have done it before.

But first, some background about POAs and taxes, which can be confusing to the uninitiated. Although POAs are generally "nonprofit" entities, they are typically not "tax exempt" for purposes of federal income taxes. Accordingly, POAs are required to annually file federal income tax returns, even if little or no tax is owed.

For other types of taxes, POAs may be exempt under State law. For example, residential POAs that are incorporated may be eligible for an exemption from State franchise tax under §171.082 of the Texas Tax Code (Exemption--Certain Homeowners' Associations). For more information about POA exemptions, look for Publication AP-206 on the State Comptroller's website.

Texas law also looks favorably on POAs when it comes to property taxes. Common area lots in a residential CID must be appraised at a nominal value for property tax purposes under §23.18 of the Texas Tax Code (Property Owned by a Nonprofit Homeowners' Organization for the Benefit of its Members). It is not an exemption, and it requires an application and approval.

So, where do sales taxes fit in? As a general rule, POAs are not exempt from sales tax on the goods and services they purchase. POAs that consume a lot of taxable goods or services - such as landscape maintenance in a large-scale CID - pay sizable amounts of sale tax. Under certain limited circumstances, a POA may be eligible for an exemption from sales taxes on what it purchases.

The State Comptroller has a process for granting an exemption from sales tax to a homeowners association that has obtained an exemption from federal income tax under §501(c)(3), (4), (8), (10) or (19) of the Internal Revenue Code. Of these, the one most often used with POAs is IRC §501(c)(4) - Civic Leagues and Social Welfare Organizations - which typically requires evidence that the POA is operated for the "public good" and not only for the residents of the CID. A POA that maintains the exteriors of individual homes is not eligible, no matter how much it does for the public good.

The irony is that the federal tax exemption, per se, is not the prize. After all, POAs typically do not pay much income tax to the feds. It is valued as a stepping stone to the State sales tax exemption. That is the prize.

C. Federal Law Protects Tenants in Foreclosure – until 12/31/12

A federal law that became effective in May 2009 protects tenants in homes that are foreclosed upon. The new law applies to any POA that is the high bidder at its own assessment lien foreclosure sale, if the foreclosed home is tenant occupied. The Protecting Tenants at Foreclosure Act of 2009, enacted as part of Pubic Law 111 22, Helping Families Save Their Homes Act of 2009, expires on December 31, 2012. The essence of the short term law is that "bona fide" tenants are entitled to a 90 day notice to vacate following a foreclosure on residential property, and in some cases may be entitled to remain in the home until the end of the lease term.

D. Handicap Protections Under Fair Housing & ADA

When the POA gets a request for special treatment of a handicapped resident or a handicapped guest of an able-bodied resident, the POA should respond within the parameters of the Fair Housing Act. POA rules against large dogs must be waived for the large service dog that aids a blind resident. Requests for window air conditioners, handicapped parking spaces, and sidewalk ramps are not uncommon in the POA setting.

The two primary federal laws dealing with architectural barriers to the handicapped are the Fair Housing Act and the Americans with Disabilities Act, 42 U.S.C. 12101 et seq. Many people are not aware that the Fair Housing Act addresses accommodations for handicapped persons in private residential settings, such as the typical residential POA. The ADA, on the other hand, applies only to "public accommodations," which are sometimes found in otherwise private developments.

As a general rule, the common area amenities of a POA are not "public accommodations" if use of the common area is restricted to the exclusive use of the POA residents and their guests. If a POA member uses the POA clubhouse for a meeting of the member's book club or the member's Christmas party, that by itself is not likely to create a "public accommodation."

In the context of a typical residential POA, the most likely context in which the ADA would apply is when the POA invites the public to use its facilities. For example, if the POA allows residents of other neighborhoods to purchase "pool memberships." Or if the POA invites civic groups to use its clubhouse for meetings, unrelated to membership affiliation in the POA. Also, be alert to mixed-use developments in which the commercial or retail activities in parts of the POA may bring some or all of the common areas under the ADA.

Whether or not the ADA applies in a residential POA, the Fair Housing Act does apply. It applies to every type of residential property, regardless of the nature of ownership or the types of structures. It applies to a POA with detached single family houses as well as to a high-rise condominium. In addition to the federal statutes, Texas has statutes relating to the Fair Housing Act (Tex. Prop. Code Chapter 301) and the ADA (Tex. Govt. Code Chapter 469). Some Texas cities also have fair housing ordinances.

E. Satellite Dishes & Antennas - FCC OTARD Rule

As directed by Congress in §207 of the Telecommunications Act of 1996, the Federal Communications Commission adopted the Over-the-Air Reception Devices ("OTARD") rule. Telecommunications equipment (antennas) covered by the Rule are DBS antennas one meter or less in diameter, broadband radio services antennas one meter or less in diameter, and television broadcast antennas regardless of size. Antennas may be installed on individually owned property in subdivisions and limited common elements in condominiums (i.e. balconies, patios). Legal opinion differs on how "exclusive use" is defined, and may depend on how project documents read.

POA restrictions may prohibit antenna if the restrictions are based on safety - with clearly-defined safety objectives in the text of the restriction or in another document referenced by the restriction. If there is another way to accomplish the objective, the POA must use the least restrictive method.

POA restrictions may regulate antenna and satellite dishes if the regulations do not: (1) prevent or unreasonably delay installation, maintenance, or use of antennas (total bans on antennas and drawn out application and permit processes); (2) unreasonably increase the cost of installation, maintenance, or use of antennas (requiring expensive fencing and landscaping to screen antenna); or (3) preclude an acceptable quality signal (a requirement to place an antenna in the backyard, which faces the wrong direction to obtain reception).

POA may be permitted to have restrictions that require compliance with building and safety codes, and manufacturer's instructions on installation of antennas.

POAs may apply to the FCC for a waiver under specific or unusual circumstances. The FCC is unlikely to grant many waiver petitions.

To determine whether a specific restriction is valid under OTARD, a POA has two options: to file for a declaratory judgment from the FCC, or to file for a declaratory judgment in a local federal or state court. Filing with the FCC requires that all papers be sent to Washington, D.C. No trial or personal appearance is required. The procedure for initiating and obtaining a declaratory judgment in your local federal court is governed by Rule 57, FRCVP, and pursuant to 28 U.S.C. §2201, and with a state district court under Civ. Prac. & Rem. Code Ann. §37.001 et seq. POAs may not assess penalties for violation of antenna restrictions until the restriction has been declared valid.

Covenant provisions requiring ADR are unenforceable under OTARD. It is unclear whether state law procedures requiring ADR are still enforceable in light of OTARD.

If an owner files a petition with the FCC for a declaratory judgment to clarify a restriction, the POA may not sue the owner for a violation of the restriction until the FCC has determined whether it is enforceable. The POA has the burden to prove that its restriction complies with OTARD.

OTARD preempts state and local laws that conflict with the rule. However, state and local laws governing antennas will still be enforceable if they do not conflict with FCC regulations.

An excellent resource on this topic can be found on the FCC's website at www.fcc.gov/mb/otard.html.

VIII. LAMENT OF THE POA LAWYER

Veteran POA lawyers in big cities wistfully remember an era when POAs were smaller in size and in number. POA lawyers worked directly with the volunteer leaders, as well as with the managers. We visited the properties to look at problem issues and to attend board meetings. We traveled to the managers' offices for meetings or to look at records. We knew the personality and governing documents of each POA client - the strengths and weaknesses of each manager - the unique features of each community - and tailored our services accordingly. We got to know the directors and managers as people with personal lives and individual quirks. We also got to know the individual homeowners with talents for challenging their POAs.

Before emails and scanning and conference calls, there was time . . . between communications, between meetings . . . time to reflect and reconsider, time for research and evaluation, time for "one more chance." It was an era when attorneys and clients knew and liked each other . . . and POA lawyers were respected (or at least, we thought we were).

We hope it's still that way in small towns, or for lawyers with small practices in big cities. At public hearings on POA bills at the State Capitol, we see that lawmakers expect the POA law practice to still be the way it once was - personal, thoughtful, customized, and focused on the individual. For better and for worse, it becomes less so each day.

In large competitive markets, POA law has become a managed business that relies on a high-volume of fixed-fee work and routinized procedures handled by paralegals and associates-in-training who communicate

solely with and through a property manager who they rarely if ever see. Properties, POAs, problems, and people become faceless and interchangeable. Callers to the firm are greeted with automated impersonal-but-necessary messages that echo compliance with federal and state laws regarding debt collection. The "name" attorneys work on the issues that fall outside of the routine procedures.

To the good, regulated practices - like debt collection - are more likely to be consistently compliant with consumer protective laws. And, a high volume of fixed fees helps keep legal expenses affordable for the POA and for the individual owner who may be required to reimburse those expenses.

Unfortunately, in the modern era POA lawyers also risk becoming faceless and interchangeable - "just another vendor" of the POA, competing to maintain good relations with the POA managers who are the conduit for future business.

Perhaps our greatest lament is that our colleagues in the real property bar may think of us as "third class" members of the bar. We have one strike against us because of the residential context (real property lawyers who work in the commercial arena may disdain residential work). We have a second strike as consumer debt collection lawyers, which is "beneath" our commercial colleagues who collect for banks and mortgage lenders. The third strike is the continual barrage of negative media attention without an opportunity to tell "the other side of the story" (which no one wants to hear).

Although we elders have our laments, the old ways aren't coming back. Younger lawyers will find new creative ways to make their practices enjoyable and personable, possibly by using the amazing technologies that give us all a "more connected" world. Technology may help POA leaders, members, lawyers, and managers to better communicate with each other - even simultaneously, even with eye-to-eye contact via webcams. Many POAs and lawyers already have websites and blogs, some have webcams and use social networks. By letting go of the old, and embracing the new, the POA law bar may pioneer new platforms for consumer-friendly attorney/client relationships.

We wish for the next generation of POA lawyers the respect that we once enjoyed.

LIST OF EXHIBITS

To The Texas POA Primer

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EXHIBIT 1

POA JARGON
~ 50 Nifty Words & Phrases for Common Interest Developments in Texas ~

Prepared for The Texas POA Primer
by Sharon Reuler & Roy Hailey
Published by the State Bar of Texas, July 2010

Every area of specialization is blessed and cursed by jargon, acronyms, and abbreviations. In the field of common interest developments, these are some of the many specialized terms frequently used in Texas today. In this exhibit, Texas Property Code is abbreviated as "TPC".

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1. **Architectural Control Committee** (ACC), **Architectural Review Committee** (ARC), **Architectural Reviewer**, **Design Review Board**, **Modifications Committee**, and **New Construction Committee** are the terms most often used for the entity that deals with the function of regulating appearance and construction within the common interest community.

2. **Articles** or **Articles of Incorporation** refers to the governing document by which an association is incorporated under Texas law. In 2006 the Tex. Bus. Orgs. Code changed the statutory term to "Certificate of Formation." Articles is still the term used by national lenders and the TPC.

3. **Assessment** is a charge levied by the POA on the owners of lots or units to fund the POA's operating expenses and reserve funds, and for any other purpose authorized by the Declaration or State law. The governing documents may establish assessments that are levied on a regular periodic basis, such as annually or monthly, and "special assessments" that may be levied as needed when circumstances warrant. Governing documents may also establish other types of assessments, such as individual, insurance, utility, reimbursement, and deficiency. Regular periodic assessments may also be called "maintenance fees" or "dues."

4. **Assessment Cap** is a provision in some governing documents that "caps" or sets a limit on the amount or rate by which the association's board of directors may increase a regular periodic assessment without soliciting the approval of association members. Caps are not required by statute.

5. **Association** is the entity that administers the development on behalf of the owners who constitute the entity's members. In the context of CIDs, membership is mandatory, not voluntary. The association is often referred to with acronyms such as "HOA," "POA," or "the Master," regardless of the association's formal name.

6. **Bill of Rights**, in the context of common interest developments, refers to consumer protections from perceived abuses or excesses by the leaders, managers, and attorneys of associations. Two examples are the Uniform Common Interest Owners Bill of Rights Act published in 2008 by the National Conference of Commissioners on Uniform Laws, and A Bill of Rights for Homeowners in Associations published in 2006 by the American Association of Retired Persons.

7. **Bracket** is used in the context of a Texas law that is not statewide in application, instead being "bracketed" to a specific population range or geographic location. For example, TUCA §82.118 (a statewide law) is bracketed to apply only to the City of Houston. A number of statutes in TPC Title 11, such as Chapter 204, are bracketed to the Greater Houston area.

8. **Bylaws** is the document that deals with governance and administration of the association. Associations typically have bylaws whether or not they are incorporated. Some people (hopefully not attorneys!) mistakenly use "bylaws" as a generic term for any POA document. A document titled "Declaration" may contain bylaws-type provisions. A document titled "bylaws" may contain provisions more typically found in Declarations or Rules. Modern usage does not hyphenate "bylaws" (as in "by-laws").

9. **CAI** is the acronym for the Community Associations Institute, the national educational membership organization serving the POA industry, with local chapters in Houston, Dallas, San Antonio, and Austin, and a statewide Texas Legislative Action Committee ("TLAC" pronounced "tee-lack").

10. **Capital Contribution**, **Capital Improvement Fee**, **Capitalization Fee**, **Initiation Fee**, and **Working Capital Fee** are terms used in declarations to refer to a fee paid to the association by the buyer of a unit or lot at time of purchase.

11. **CC&Rs** is the acronym for "Declaration of Covenants, Conditions, and Restrictions." **DRs** is the acronym for "Deed Restrictions." CC&Rs and DRs may be used (properly) to refer to a Declaration, no matter how its title is styled. See "Declaration."

12. **Chapter 204** refers to TPC Chapter 204, a state law bracketed to the Greater Houston area which creates powers for non-condo POAs and provides a mechanism for amending restrictions.

13. **Chapter 209** refers to TPC Chapter 209, also known as the Texas Residential Property Owners Protection Act ("**TROPA**"), a statewide law which regulates non-condo POAs and provides consumer protections.

14. **Common Area**, **Common Element**, and **Reserve** are terms used to designate an area or component of a common interest development that is not a lot or unit intended for individual ownership and use.

15. **Common Interest Development** (**CID**), **Common Interest Community** (**CIC)**, **Common Interest Ownership** (**CIO**), or **Community Association** (**CA**) are all-inclusive terms used in professional literature to describe a real property development for which ownership of a lot or unit automatically conveys membership in a mandatory association of property owners, such as condominiums, planned communities, and cooperatives. It does not apply to subdivisions with voluntary neighborhood associations.

16. **Community Service Charge** refers to a non-lienable fee charged by an association pursuant to authority granted under TPC Chapter 204, which is bracketed to the Greater Houston area.

17. **Condominium** is a type of real property ownership, defined by State law, that combines fee simple ownership of a unit with tenancy in common ownership of common elements. TPC Chapter 81, the Texas Condominium Act, applies to condominiums created before 1994. TPC Chapter 82, TUCA, applies to condominiums created after January 1, 1994. Certain sections of TUCA also apply to condominiums created before 1994. "Condominium" also refers to the entire project or development that contains condominium units.

18. **Condominium Association** is the owners association that governs a condominium. Prior to 1994, the condominium association was also known as a "council of owners" or "council of co-owners."

19. **Condominium Information Statement** (**CIS**) is the package of disclosures and documents that TUCA requires declarants to give to purchasers of condominium units. Because of its large size, the title "Statement" is a bit misleading. In the model uniform acts and in other states, the package is called a "Public Offering Statement."

20. **Declarant** is the person or entity who "declares" that the land in a common interest development will forever be subject to the restrictions being imposed on the land, this being the person or entity who executes the Declaration and who, typically, is defined as "Declarant" in the Declaration. "Declarant" is sometimes used interchangeably with "Developer."

21. **Declaration** is the document that creates the common interest development, regardless of how it is titled. For condominiums, popular titles are "Condominium Declaration" or "Declaration of Condominium." For planned communities, the document is often titled a "Declaration of Covenants, Conditions and Restrictions," or "Deed Restrictions," or "Master Deed," or "Declaration of Restrictions and Covenants." "Declaration" may be used interchangeably with "Restrictions", "Covenants", "CC&Rs," "DRs", and other such terms.

22. **Dedicatory Instrument** is the term used in TPC Chapter 201 et. seq. to refer to the many project-related documents of a common interest development. The statutory definition is broader than the plain meaning of the words.

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

24. **Dues** is a layman's term for regular periodic assessments or maintenance fees, as distinguished from extraordinary special assessments. The term "dues" is not used in Texas statutes nor in most governing documents.

25. **Governing Documents**, **POA Documents**, **HOA Documents**, and **Project Documents** refer to the body of documents by which the common interest development is created and operated, and typically include the subdivision plat, Declaration, Bylaws, Rules & Regs, and Certificate of Formation (Articles of Incorporation). In many contexts, these terms are synonymous with "Dedicatory Instruments."

26. **HOA** is the acronym for Homeowners Association (no matter how "homeowners" is spelled or punctuated). HOA often refers generically to the governing body of any type of residential common interest development, but is sometimes used to distinguish planned communities from condominiums. Texas statutes use the term "Property Owners Association," rather than "Home Owners Association," even when referring to residential-only communities.

27. **Management Certificate** is the name of a State-required publicly-recorded disclosure that tells the public where the project is and how to contact the association. For condominiums, a Management Certificate is required by TPC §82.116. For other types of residential CIDs, the requirement is in TPC §209.004.

28. **Master or Umbrella Association**, sometimes shortened to "**the Master**", refers to an association that governs a large-scale, master planned, or mixed-use common interest development, and usually implies the existence of one or more condominium or neighborhood associations within the larger development.

29. **Master Planned Development** is a common interest development that is unusually large in size, or combines different land uses (such as commercial and residential), or contains one or more sub-associations.

30. **Mixed-Use Development** is a common interest development with different land uses, such as commercial and residential. Vertical Mixed-Use refers to a multi-story building with different uses, such as retail on the ground floor, parking on floors 2-4, and residential on floors 5-10. Mixed-Use does not usually refer to a mix of residential uses, such as houses, duplexes, patio homes, and townhomes.

31. **Neighborhood or Service Area** may be defined in a dedicatory instrument to mean a specific portion of a common interest development that is subject to additional or different restrictions, and possibly an additional assessment.

32. **OTARD** (pronounced "oh-tard') is the acronym for Over the Air Reception Devices, and refers to the rules for satellite dishes and antennas 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 common interest developments.

33. **Owner-Occupancy Ratio** refers to the number (stated as a percentage) of units that must be occupied by owners before a particular mortgage lender will consider making a loan to a homebuyer. The amount may vary from lender to lender, and from era to era.

34. **Planned Community**, **Planned Development** (**PD**), **Planned Development District** (**PDD**), or **Planned Unit Development** (**PUD**) refer to common interest communities other than condominiums and cooperatives.

35. **POA** is the acronym for Property Owners Association, the term used in Texas statutes (TPC Chapters 201 et. seq.) for any type of mandatory membership real estate owners association. Some Texas statutes include condominiums within the defined term, others exclude condominiums. Most Texas statutes limit application of the term to residential uses.

36. **Presale Requirement** refers to the number (stated as a percentage) of units in a new project that must be under contract to qualified buyers before a particular mortgage lender will consider making a loan to a homebuyer. The amount may vary from lender to lender, and from era to era.

37. **Resale Certificate** refers to the disclosures required by Texas statutes to be given by a common interest community to purchasers of residential units or lots in connection with the purchase contract. For condos, the requirement is in TPC §82.157. For non-condo HOAs, in TPC Chapter 207.

38. **Reserve Funds** or **Replacement Reserves**, sometimes shortened to "**Reserves**", means the pot of money that the association sets aside to pay for future expenses that are not funded from regular and special assessments. A reserve fund that is earmarked for a particular activity is called a "dedicated reserve."

39. **Reserve Study** refers to a multi-year schedule that anticipates the repair and replacement of common area improvements, and the correlative costs, to guide the association in funding its replacement reserves.

40. **Restrictions** and **Restrictive Covenants** are terms used interchangeably with Declaration, CC&Rs, and DRs.

41. **Right of First Refusal**, in the context of common interest developments, refers to a provision in a dedicatory instrument that gives the association, its members, or the Declarant the right to purchase a unit for the same price and terms as stated in a bona fide contract that is acceptable to the selling unit owner. Rights of first refusal are disfavored in most contexts, and are rarely used in modern governing documents.

42. **Rules & Regulations** (sometimes called "**Rules & Regs**") is an all-inclusive term that refers to the rules, regulations, restrictions, policies, and guidelines that regulate the use and appearance of the development, and are usually distinguished from the bylaws and from procedural rules and policies established by the board.

43. **Sub-Association** or **Neighborhood Association** refers to a subordinate association of owners within a master association.

44. **Subdivision** is the division of land into smaller parcels using ordinary and legally recognized methods for surveying and platting land and publicly recording the results (Black's 7th Ed.). Although "subdivision" is not defined in the Tex. Gov. Code, which regulates the platting of subdivisions, it is defined in TPC Chapters 201, 207, and 209. None of the statutory definitions expressly excludes condominiums, which raises a question of whether a condominium qualifies as a subdivision under those statutes if not excluded by the statute's applicability provision.

45. **Supplemental Declaration** has no precise meaning but most often refers to an instrument that annexes lands to the common interest development, and which may also impose phase-specific restrictions on the land that is being annexed.

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

47. **Transfer Fee** means a fee charged by the association or its managing agent when the ownership of a unit or lot changes, but may have a specific meaning in the POA documents. In some developments, transfer fees are administrative charges for changing the association's records. In other developments, transfer fees may be contributions to reserves or special funds benefitting the community of owners.

48. **TUCA** (pronounced "too-kah") is the nickname for (Texas) Uniform Condominium Act, TPC Chapter 82.

49. **UCIOA** (pronounced "you-kiowa") is the acronym for the Uniform Common Interest Ownership Act, a model statute published by the National Conference of Commissioners on Uniform State Laws.

50. **Unit** or **Lot** or **Parcel** is usually defined in the Declaration to refer to portions of a development that are platted for individual ownership. Although most often used with condominiums, "unit" may also be used interchangeably with "lot" in a non-condominium development.

EXHIBIT 2

10 FAQS ABOUT POAS

(Not Foreclosure-Related)

Prepared for The Texas POA Primer
by Sharon Reuler & Roy Hailey
Published by the State Bar of Texas, July 2010

These are ten of the many frequently-asked questions, for which we are providing purposefully breezy answers. There is an exception to every rule and circumstances that would cause us to give a different answer to these questions.

1. If a delinquent owner files bankruptcy should the POA write off the debt?

No! The mere act of filing for bankruptcy protection does not relieve a person of his debts. If the bankruptcy is "dismissed" because the debtor failed to fulfill all the requirements, the POA may pursue the owner as if he had never filed for bankruptcy protection. On the other hand, if the bankruptcy is "discharged" by the bankruptcy court, the owner/debtor may or may not be relieved of his debt depending on the type of bankruptcy and his plans for each asset. In a typical Chapter 7 discharge, the owner/debtor is relieved of his personal obligations other than those that he reaffirms. In a typical Chapter 13 bankruptcy, the owner/debtor tries to pay off his debts under a 3 to 5 year payment plan that is supervised by the bankruptcy court. The POA should not write off the debt unless the owner/debtor obtains a bankruptcy discharge and does not reaffirm his debt to the POA. A bankruptcy discharge does not effect the POA's lien against the unit or lot. The discharge merely extinguishes the owner's personal obligation for the debt.

2. As nonprofits, aren't POAs exempt from taxes?

Nope. Being a "nonprofit" entity is not the same as being "tax exempt." However, residential POAs are eligible for favorable tax treatments at all levels of government. Incorporated POAs may be eligible for an exemption from State franchise taxes. Common areas owned by a POA may be eligible for appraisal at nominal values for purposes of ad valorem taxes, under Texas Tax Code §23.18. Whether incorporated or not, POAs must file annual federal income tax returns, but may be eligible for alternate ways of calculating taxes provided especially for POAs in the Internal Revenue Code. Some small number of POAs may qualify as "tax-exempt 501(c) entities", for purposes of federal income tax, in order to obtain a State exemption from sales tax.

3. Is a POA required to have open meetings under the "Open Meetings Act"?

No, not under *that* act. As a general rule, the "Open Meetings Act" refers to state and federal laws that apply only to governments and public bodies, but do *not* apply to private entities like POAs. In Texas, only a couple of huge master-planned developments are required by unusual bracketed statutes to comply with the State's "Open Meetings Act" for municipalities. Although the "Open Meetings Act" does not apply, other laws and the POA's project documents may require that meetings of the POA board and POA members be open to all members of the POA. For example, every condominium in Texas is required by TUCA §82.108 to have open meetings, no matter what its documents say. And even if a law or a POA's governing documents do not require open meetings, a POA may want to open its meetings in a spirit of transparency and accountability.

4. Does the POA have to open its records to any owner who asks? What about the "Privacy Act"?

Like the "Open Meetings Act," the "Privacy Act" applies to government bodies and does not apply to private entities, such as POAs. On the other hand, the POA may be required to open its records under other authorities, including its own project documents. An incorporated POA is subject to the open records provision of the Texas Nonprofit Corporation Law. A condominium POA is also subject to the open records provision of TUCA §82.114. Other POA-related statutes have requirements pertaining to the maintenance and availability of POA records. Even if a POA is not required by law or its documents to open its records, the POA may want to make its records available for inspection and copying in a spirit of transparency and accountability.

5. Who maintains a component of the property that is not specifically addressed in the POA project documents - the POA or the individual owner?

The answer relies on the interplay of two general rules. The first general rule is that the owner of property is responsible for maintaining the property. Under this rule, if the component is owned by the POA, it is the POA's responsibility to maintain it. Similarly, if the component is part of the unit or lot, it is the responsibility of the individual owner to maintain it. The other general rule is Tex. Prop. Code §202.003, which requires that the project documents be construed liberally to give effect to the

intent of the document. Under this rule, the POA project documents must be read as a whole with an eye towards the overall maintenance scheme and the intent of the maintenance provisions of the project documents.

6. **How much should the POA charge as standard fines for violations of the rules?**

Although POA leaders and managers like the concept of fines for violations, as a practical matter they are difficult to collect. As a general rule, courts frown on monetary penalties. The purpose of a fine is to encourage conforming behavior and discourage violations. A fine must be large enough to be "felt" by the violator but not so high as to be outrageously punitive. Further, the amount and frequency of the fine should be reasonable in light of the nature of the violation and the frequency of its occurrence. The bottom line is that the POA should be discouraged from setting an inflexible fining schedule or a predetermined amount of fine for any violation regardless of its nature. Also, the POA should be encouraged to establish a "cap" for accruing fines to prevent them from reaching astronomical amounts. Faced with repeated or continuing violations, the POA should not sit back and merely allow fines to accumulate. Instead, the POA should seek other avenues for curing the violation, such as marching to the courthouse or exercising self help remedies if available. Finally, condominiums are subject to the fining provisions of TUCA §82.102(d)&(e).

7. **Does the POA have to pay for an audit every year?**

Depends. If the governing documents of the POA require an annual audit, failure to obtain an audit may be a breach of duty. Every condominium in Texas is required by State law to have an annual audit of its financial records. That has been the law for condos since 1963 - nothing new. See TUCA §82.114(c). If the POA is incorporated, the Texas Nonprofit Corporation Law (§22.352(b) of Tex. Bus. Orgs. Code) requires only that the board prepare or approve a financial report for the prior year. If an impoverished POA can't generate the funds for an audit that is required by statute or its documents, a decision to dodge a duty is best made by the general membership, and not by the board alone.

8. **Don't you have to be an owner who lives at the property - or even an owner - to serve on the POA's board of directors?**

Depends. Many folks think that officers and directors of a POA *must* be owners or residents of the community. No law has that requirement. The qualifications for service on the POA board are determined by the POA's governing documents - usually the bylaws. State corporation law does not require that the officers and directors of a nonprofit corporation be members of the organization. For condominiums, TUCA §82.103(e) states that directors need not be owners. If the project is new, the developer has probably reserved (in the declaration) the right to designate all the directors in the POA's early years. Those appointees are typically not owners or residents of the property. Bottom line - if the project documents say only owners or owner-occupants may serve (after the developer is gone), then that is the case for that POA. Otherwise, neither ownership nor occupancy is required. However, as a practical matter, who wants to serve on a POA board who is not a member of the POA, a resident of the property, or involved with the property's development?

9. **Can the POA be "disbanded"?**

Not easily. This question is usually asked by owners who are so angry with their POA that they want to make it go away. If the POA is incorporated, the State has procedures for dissolving the corporation. However, dissolving the corporate status of the POA does not - by itself - get rid of the POA, which may become an unincorporated nonprofit association under Chapter 252 of the Tex. Bus. Orgs. Code. What this question overlooks is the fact that the obligations and duties under the POA's governing documents that are publicly recorded against the land are unaffected by a corporate dissolution through the Secretary of State. To get rid of functions like common area maintenance and the obligation for assessments would require procedures and consents that are beyond the scope of these FAQs, and may require the involvement of platting authorities, city councils, special districts, and the owners' mortgage lenders, in addition to the owners themselves. Suffice to say that dissolving the corporation does not make the POA go away.

10. **How can we get rid of a board that makes bad decisions?**

Depends. First, try working within the system by constructively sharing your concerns with the board and volunteering to serve on a task force that gathers information or proposes options for the board to consider. Been there, done that? If your perspective is shared by a sizable percentage of owners, you may be able to remove the board and elect new directors by following the recall provisions of your POA's governing documents. If you are in the minority, support reform candidates in the next election. If you can afford to litigate and are willing to gamble with your money, you can try getting a court to see things your way. However, the POA may be using your assessments to pay for the defense of your lawsuit. If none of those options seem feasible, consider that differences of opinion exist in every POA and that the leadership will change . . . . eventually. Even so, it is possible that your POA will never embrace your point of view. Different strokes . . .

EXHIBIT 3

13 POA BASICS FOR TEXAS ATTORNEYS

Prepared for The Texas POA Primer
by Sharon Reuler & Roy Hailey
Published by the State Bar of Texas, July 2010

Please preface each "basic" with "absent unusual circumstances" or "in most instances" or "typically". You get the idea. TPC = Texas Property Code

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1. Condominium is a form of ownership, not a type of structure.

Houses, duplexes, and townhouses are types of structure, not forms of ownership. A subdivision of single family houses or duplexes or townhouses is capable of being condominium in ownership. Individually owned units that are stacked on top of each other must be condominium. Units that are detached, or that are attached on the sides but not stacked, may also be condominium in ownership. Do not assume you know which laws apply to a project because of the nature of the structures. Please refer to the definition of "condominium" in TPC Sec. 82.003(a)(8).

2. "Townhouse" or "Townhome" is a type of structure, not a form of ownership.

Texas law does not recognize "townhome ownership." Condominium, yes. Fee simple, yes. Townhome, no. Nevertheless, something in the water makes people believe that "townhome" is a form of ownership distinct from condominium or fee-simple. Don't argue with your client about it, do make sure you know the form of ownership you are dealing with, because different statutes may apply.

3. "Common area" is not required for a non-condo subdivision to have a mandatory owners association.

By statute, a common element is a required feature for condominiums. No such requirement exists for mandatory non-condominium POAs. Then, why have a mandatory POA? To create "community," to enforce architectural and use restrictions, to maintain a public right of way or an entry feature on a private lot, to have a point of contact for the subdivision in dealing with public officials or with a neighboring or master POA, or because the platting authority required it when the subdivision was approved.

4. Navigating Title 11 of the Tex Prop. Code requires a roadmap.

The two main hazards are bracketing and the varying definitions of "property owners association". "Bracketing" is the term used by the Texas Legislature for state laws that are not statewide in applicability, which is a prominent feature in TPC Title 11. Some chapters and sections of TPC Title 11 are "bracketed" to certain cities or counties based on location or population, or a combination of the two. Also, TPC Title 11 uses different definitions of "property owners association" - some chapters borrow from each other, some have their own definitions. Beware that some definitions include condominiums, some do not. Hence, some sections of TPC Title 11 apply to condominiums as well as non-condo POAs, others do not.

5. Chapter 209 of the Tex. Prop. Code does not apply to condominiums.

People involved with condominium disputes sometimes find something helpful in TPC Chapter 209, and want to believe that it applies to their problem. Granted, the wording of Chapter 209's applicability provision leaves something to be desired. However, the legislative history and the recently-reported *Duarte v. Disanti*, 292 S.W.3d 733 (Tex.App.-Dallas 2009; no pet.) should be enough to resolve the issue when it rears its head.

6. Know which laws apply to each development, by type and location.

Although all POAs are similar in how they function, they are subject to different laws. The first determination is whether the development is condominium and subject to TPC Chapter 82 (possibly also TPC Chapter 81). If the answer is "no," then determine if the POA is voluntary or mandatory. If mandatory, it is subject to TPC Chapter 209. Then determine if the development's location makes it subject to any of the bracketed chapters of TPC Title 11, such as TPC Chapter 204 for the Greater Houston area. If the POA is voluntary, TPC Chapter 11 probably does not apply.

7. **Don't assume anything about a development or POA from its name.**

No matter how long we practice, we keep re-learning this lesson. A development with "condominium" in its name may not be condominium in ownership. A development with "townhome" in its name may have free-standing detached homes, or duplexes, or stacked flats. Words like "villas," "courtyard homes," "patio homes," and "cottages" are marketing terms that may say nothing about the development. A POA with "Inc." or "Master" in its name may be neither incorporated nor tiered. The name of a development in the declaration may not match the platted name of the subdivision, both of which may be different than the POA's name. None of this should surprise Texans, who love giving streets and subdivisions names that have nothing to do with their locations - like treeless streets named "Forest". Assume nothing!

8. **Don't rely on POA documents provided by client or posted on client websites.**

Sadly, most people who belong to or work for POAs do not have complete legible copies of all publicly recorded documents affecting the development. Even the POA's "official website" may be deficient. There is no substitute for a search of the county records and the Secretary of State's records. The document you are missing is the one that will stab you in the back.

9. **The POA's existence does not depend on incorporation.**

Unlike a business entity which may cease to exist (legally) if it loses its entity charter, POAs are typically created by the dedicatory instruments recorded in a county's real property records, and exist with or without a corporate charter - even if incorporation is required by the declaration or by State law. Which is a good thing, because the volunteer leaders of many POAs are not attentive about reporting changes of contact information to the Secretary of State, which can result in the loss of a charter. It happens a lot and is not fatal to a POA, although the POA may lose its "given" name with the State if the name is acquired by another entity during the lapse period. An assumed name certificate may bridge that gap.

10. **Being a "nonprofit" POA does not mean "tax exempt."**

The public often confuses "nonprofit" with "tax exempt." For starters, distinguish among income, sales, franchise, and property taxes. Each has different laws regarding POAs. Most POAs are nonprofit, but are subject to income taxation by the IRS, and are required to file annual returns even if no income tax is owed. Some POAs are able to qualify as a tax exempt 501.c.3 entity by the IRS in order to qualify for a State sales tax exemption on services, such as landscaping. Even though liable for income tax reporting, there are other types of taxes from which a POA may be exempt. Residential POAs that are incorporated may be eligible for an exemption from State franchise tax. And, common areas in residential subdivisions must be assessed at "nominal value" for purposes of property taxes.

11. **The law of POAs is a distinct body of law that is rapidly evolving, expanding, and changing.**

Roy Hailey's Survey of Texas Case Law Affecting POAs should be sufficient evidence of the evolution of POA law in Texas. Attorneys who are well versed in the law of real property, corporations, or special districts may think they have a grip on POA law, only to discover that although it looks familiar, nothing is quite as it seems. If POA law is outside your comfort and competency zone, either refer it to an attorney who concentrates in that area, or sign up for the short course in POA law competency at the school of hard knocks where tuition is sometimes very steep.

12. **Beware of the disconnect between maintenance, repair, replacement and insurance.**

A pitfall that often trips up even more adventurous reviewers of governing documents is the difference between requirements to maintain, to repair, to replace, and to insure something. Insider's tip: don't assume any of these responsibilities go hand in hand. Often, whoever is responsible for maintaining a certain element in the community is not the same party responsible for replacing that element when it reaches the end of its useful life, or insuring that element in the event of catastrophe.

A good example is a condominium balcony. Declarations differ, but often unit owners are responsible for cleaning and maintaining their balconies, while the association may be responsible for repairing, replacing and insuring them. To find the right answer for your association, you must carefully read the applicable maintenance and insurance provisions of your Declaration without preconceived ideas about seemingly natural connections between those duties.

13. **POA issues are like icebergs - there's more to it than the "facts presented."**

There may be "bad blood" between the parties that happened so long ago that know one thinks it is relevant today. In POAs, feelings are raw and memories are long. You will be caught off guard if you don't ferret out "the other side of the story" - if you don't anticipate that there is more going on than you are being told.

EXHIBIT 4

14 TIPS FROM TRENCHES REPRESENTING POAS

Prepared for The Texas POA Primer
by Sharon Reuler & Roy Hailey
Published by the State Bar of Texas, July 2010

1. Some POAs do not budget adequately for legal expenses. Ask how much is budgeted and how the POA expects to pay for legal services that exceed the budgeted amount.

2. A POA may be an infrequent consumer of legal services. It may use a lawyer to collect a batch of delinquent accounts. And, then, they may go for several years without using the services of an attorney.

3. A POA may be inexperienced in using a lawyer effectively. The POA that is adamant about hiring you for a certain purpose may need to be counseled out of its original plan. By helping the POA understand how and when to use an attorney, you are more likely to develop a long term and satisfied client.

4. A POA may not have a complete set of its official records, even though it believes it does. It is usually best to do an independent search of public records to make sure you have all pertinent instruments.

5. A POA may not have complete records of its internal affairs. Volunteers may not understand the importance of maintaining one body of records, and may assume that the POA's records are their personal records. Warring factions may confiscate records. Records may get stored with changes of management. It's okay to feign surprise when your POA client says that it has no records or that its records are very spotty.

6. Beware of factions, lame ducks, mavericks, and brothers in law.

7. Watch out for managers and directors who do not understand the formality with which board decisions should be made. If the manager gets on the phone with 2 of the 3 directors and they decide something, what's the point of meeting with the third director? Ask about the decision-making process.

8. The veteran POA attorney may find himself with more history about certain aspects of the POA than its leaders or management. New directors and managers have no knowledge of the artful policies and well-reasoned advisory letters that you prepared for the POA during prior administrations.

9. Beware of your own previously issued opinions and advisory letters (and advisory emails). Over time, especially if more than one attorney works with the POA client, it is difficult to know which issues have already been researched and "opined upon." Keep it all in one place.

10. The people on both sides of a POA issue may have relationships that are not apparent. You may be dealing with the residue of a grudge match that originated decades ago. Probe for information about the personalities and histories of the individuals involved in a dispute.

11. In some POAs, the leaders and managers change with the wind. In other POAs, a leader or manager appears to be entrenched for life. The most powerful person or most revered decision maker may not be the person with the obvious title. Know where the power lies in each POA.

12. Each POA seems to have a "permanent" personality - projecting the same character and values from generation to generation, regardless of changes in membership, management, and leadership. Some POAs are perpetually factious and litigious. Others are orderly and business like. Must be in the dirt and mortar.

13. Two developments, built by the same developer at approximately the same time, and using the same original project documents may operate differently, may interpret their documents differently, and may have very different approaches to dealing with problems and issues. Think "fraternal twins."

14. Otherwise intelligent and rational people are capable of becoming very emotional and illogical on issues dealing with their homeplace. The degree of passion the parties have for an issue is inversely proportionate to the issue's distance from the front door.

EXHIBIT 5

11 TIPS FROM TRENCHES REPRESENTING POAS IN LITIGATION

Prepared for The Texas POA Primer
by Sharon Reuler & Roy Hailey
Published by the State Bar of Texas, July 2010

These practical tips, learned the old-fashioned hard way - by experience - address only some of the aspects of litigation that are specific to POAs, and should not be treated as "everything you should know" on the subject.

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1. **Just because you can, doesn't mean you should.**

Having legal grounds for filing suit doesn't always mean a lawsuit should be filed. Too often POA clients ask "can we?" without also asking "should we?" Inexperienced lawyers may be reticent to challenge clients about a decision to litigate. Lawyers must carefully counsel their POA clients about the wisdom of litigating an issue, under certain circumstances, against a particular person, as well as the legality of the POA's position. Lawyers must also make sure the POA client understands the possible negative outcomes and consequences, in addition to the desired results. No matter that the POA is technically and legally "right," it may not prevail. On the other hand, sometimes the POA lawyer must explain why litigation is the best way to address an issue, under certain circumstances, against a particular person. Clients should be told that courts typically order the parties to mediate before setting the case for trial. The POA that refuses to settle in mediation may end up with no better result in the courtroom after many thousands of additional dollars have been spent on legal fees. If the POA receives a pre-litigation settlement offer, encourage the board to seriously consider whether it would accept such an offer in mediation, or as the court's order. If so, the POA can save time and money by resolving the conflict without litigation.

2. **Be aware of the "Six O'Clock News Rule."**

A POA board's carefully-considered legally-sound decision to sue a homeowner may look like manifest stupidity when "exposed" on tonight's six o'clock news or on the front page of tomorrow's newspaper. Little neighborhood disputes can be (and will be!) dramatically blown out of proportion when spoken into a reporter's microphone or as impassioned testimony at a public hearing. Prepare yourself and the board to deal with the media, with public officials, and with POA members who do not agree with the board's decision to litigate. Be ready to explain why a lawsuit was necessary given the facts. Encourage your POA client to rethink its decision to litigate if it wants to keep its name out of the news, or if you or your client have trouble justifying the decision to sue under the circumstances presented.

3. **Check POA's corporate status.**

Always check the corporate status of your POA client (if it's required to be incorporated) before filing suit, and make sure it's current. POAs, especially self-managed POAs, are prone to losing their charters or having ineffective registered addresses. Having opposing counsel advise you that your POA client has lost its charter is embarrassing. Even worse, learning that the other side reserved the POA's name through the Secretary of State (the name was available because of the lapsed charter), so your POA client is prevented from reinstating its charter. Try explaining *that* to your client!

4. **Expect to be vilified.**

In the court of public opinion and in the courts themselves, POAs are sometimes viewed as overbearing tyrants who abuse hapless homeowners. A few bad apples have poisoned the well. Even if a POA acts reasonably in pursuing a legitimate violation or delinquency, a judge or jury may sympathize with the defending homeowner - regardless of the facts, regardless of the law. Judicial sympathy may translate into more latitude for the defendant homeowner to comply with procedural requirements, or in a reduction of attorney's fees awarded to a prevailing POA. Make sure your POA client knows about the anti-POA bias and understands how it may be disadvantaged before committing to the lawsuit.

5. **Expect transparency that is embarrassing and damaging.**

In addition to the POA's traditional books and records, the directors' e-mails regarding the defendant or the subject matter of the suit may also be "fair game" for discovery in a lawsuit to which the POA is a party. A lawsuit that appears neutral on its face may become less neutral when the court is presented with e-mail exchanges between directors, or between directors and managers, informally discussing the "ne'er do well" homeowner in terms that were not intended for courtroom consumption.

6. **Communicate, communicate, and then communicate some more.**

Some POA directors are very litigation savvy, others aren't. Best practice is to assume that the board is not sophisticated about litigation and needs a thorough explanation about the entire process, before committing to the lawsuit. Periodic status reports are valuable tools for communicating with the directors. Take every opportunity to inform the POA directors about the costs of litigation, expected timelines and inevitable delays, strategies, remaining stages of the suit, and the probability of being ordered to mediate before going to trial.

7. **Know POA law. (Duh!)**

This should be a "no-brainer," but . . . many lawyers have been deluded by the apparent simplicity of a POA case on its face, only to discover there is precedent on the seemingly obscure issue made the basis of the lawsuit.

8. **Expect your communications to fall into the wrong hands.**

In this technological age, e-mails and letters are easily copied and forwarded. POA directors and managers are often unaware of the ramifications of disseminating a privileged communication from the POA's counsel. Indeed, some POA leaders think it is their "duty" to share everything they know with all POA members and anyone who asks. Do all that you can to make a director or manager think twice before sharing something with another person. Do not be shy about identifying a writing as privileged and confidential - in ways that catch the attention of a volunteer director or an overworked manager. Nevertheless, under the rule of "better safe than sorry," anticipate that your communications will be shared without your permission and in spite of your cautions about confidentiality. So, heavens-to-betsy, use a professional tone and appearance in every communication - even seemingly mundane back-and-forth exchanges with a director or manager.

9. **Communicate important information in writing.**

POA directors and managers may be victims of information overloads that make it hard for them to separate wheat from chaff. Also, information given to the POA manager for the benefit of the board, or given to one director for the benefit of all directors may not reach the intended audience in a manner worthy of the information's importance. Many directors are clueless when it comes to how costly litigation can become, both time-wise and financially. Don't be surprised to see board's vigorous war cry of "Sue the bumpstards!" quickly fade as legal fees mount and the directors get bogged down in producing documents, answering interrogatories, attending depositions and, ultimately, trial. The POA counsel should communicate in writing when discussing issues or strategies, and attendant costs and efforts, so the attorney has a record of imparting the information, in case the POA client denies having received it. Don't let the client pull the "If we had known . . ." card.

10. **Know when spoken communications are better than writings.**

There may be times in the life of a lawsuit when oral communications with a POA client are preferred over writings. Conference calls and face-to-face meetings may be better vehicles for discussing topics that are highly confidential or highly sensitive. In this age of communicating by e-mail, lawyers may forget the importance of "picking up the phone" and actually meeting with the client. Face-to-face meeting generate issues and questions that might otherwise be overlooked - until exposed at trial by defense counsel!

11. **Remind POA of litigation disclosures required for resale certificates.**

Periodically advise your POA client of its legal duty to disclose certain information about lawsuits in which the POA is a defendant, and any unsatisfied judgments against the POA in the resale certificates issued by the POA for prospective purchasers. When a "problem" is in the hands of the POA's attorney or an insurance defense attorney, the POA directors and managers may stop thinking about the dispute. (Out of sight, out of mind.) During the long pendency of a suit, the POA may acquire new directors and managers who know nothing about a still-active lawsuit filed "before their time."

EXHIBIT 6

10 TIPS FROM TRENCHES REPRESENTING DEVELOPERS OF PLANNED COMMUNITIES

Prepared for The Texas POA Primer
by Sharon Reuler & Roy Hailey
Published by the State Bar of Texas, July 2010

1. The worst thing that happens - and it does happen - is when a home buyer closes on his new home before the CC&Rs have been recorded against the lot. This nightmare is most likely to occur with subsequent phases. There are creative ways to anticipate and mitigate this event. Better to not let it happen.

2. Before you record the CC&Rs or an annexation instrument, confirm that the entity that executed the instrument owns the land and is still the only owner of the land being subjected to the CC&Rs. If your client has not yet taken title to the land, add a land owner's consent to the CC&Rs. If your client has already closed lots to builders, add builders' consents to the CC&Rs. The consents can be recorded separately from the CC&Rs.

3. Be alert for property name changes. Your client may change the name of the project to Blackacre for marketing purposes, after the land has been platted as Whiteacre. It has been known to happen after you send the CC&Rs to your client for execution. He is preparing to sign when he realizes that the CC&Rs use the "wrong" name for the project. Along the same vein, your client may erect a name monument at the subdivision entrance that does not match the project name he gave you to use with the CC&Rs. What name DO you use in the CC&Rs?

4. You may discover belatedly that the "Declarant" name and signature provided by your client does not match the name in which land title is held. Sometimes it is easier to change the title, other times the signature block and Declarant references.

5. Be wary when your client assures you that his next project is identical to the one you just finished, and thus is worthy of a rate reduction. It will be just different enough to be a drafting nightmare.

6. When your client is the registered agent for the POA you incorporated, check periodically that the charter is active. Developers have been known to let POA charters lapse for failure to attend to some state requirement.

7. Expect your client to change fundamental land use decisions after the project has been created, such as deciding to annex additional land to what had started as a single phase project, or changing Phase 3 from detached single family to townhouses (for which the CC&Rs lack appropriate provisions).

8. Do not be surprised to discover that your developer client closed lot sales to builders before the CC&Rs were recorded. He did not realize that you needed that information. It helps if you are handling the lot sales as well as the POA documents.

9. Chuckle when your client asks you to tweak the POA documents that came with the land buy, thinking it will save him some money. (It doesn't).

10. Developers are the last of the cowboys. Successful land developers are not required to have an advanced degree, a license, or a certificate. They just "do it." They take risks and create. They have a vision and an instinct that may elude us desk jockeys. They need us to keep them out of trouble - to focus on the details while they are combining resources and getting results. You gotta love them.

EXHIBIT 7

10 TIPS FOR ATTORNEYS REPRESENTING OWNERS AT POA BOARD MEETINGS AND HEARINGS

(Excerpted from Roy Hailey's 2005 article "Practical Tips for Dealing with Property Owners Associations")
Prepared for The Texas POA Primer
by Sharon Reuler & Roy Hailey
Published by the State Bar of Texas, July 2010

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**. Don't be surprised if the POA's attorney does not attend the meeting or hearing. Most POAs have to watch their pennies. Because Tex. Prop. Code Chapter 209 prevents the POA from seeking reimbursement from the owner for legal fees incurred by the POA in connection with a "209 hearing," POA attorneys are often not asked to attend. If the POA's attorney is absent, don't be surprised if the board listens to your presentation but refuses to engage in a dialogue about the issue. That was probably on advice of the POA's counsel.

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.

5. **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.

6. **Be 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 homeowner is a welcomed relief and may lead to a more productive conversation and/or solution.

7. **Scour the neighborhood**. Ask your client to inspect his neighborhood for parallel situations and to document his discoveries with photographs. While a true waiver defense may be hard to prove, showing that the POA has approved (or ignored) other similar situations helps bolster your client's argument that the POA is acting in an arbitrary, capricious or discriminating manner. (see Tex. Prop. Code §202.004(a)).

8. **Don't 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.

9. **Be aware of insurance**. The presence or lack of insurance coverage for a lawsuit brought against a POA can be a powerful motivator for the POA to resolve a conflict without litigation. The practitioner should ascertain what POA insurance policies may apply to a given POA dispute and then artfully determine how to present his client's position so that the POA does or does not have coverage, depending on the desired result. A typical POA may carry several types of insurance policies, including D&O, liability, and property.

10. **Remember the bias against POAs**. Most POA attorneys readily acknowledge the built in prejudice against POAs that seems to permeate not only by the media, but also judges and juries. This bias can work to the advantage of an attorney representing an owner against a POA.

EXHIBIT 8

19 FAQs ABOUT POA FORECLOSURE

Prepared for The Texas POA Primer
by Sharon Reuler & Roy Hailey
Published by the State Bar of Texas, July 2010

Because POA directors and managers often want a better understanding of the foreclosure process as applied to POA assessment liens, we are sharing 19 of the frequently-asked questions. These FAQs are based on Texas law in 2010.

Perhaps more than any other POA topic, assessment lien foreclosure polarizes people, in part because of the relative disparity between the home's value and the size of the POA's claim. Opponents are impassioned about perceived abuses and inequities. Defenders claim that POAs will experience financial doomsday if they can't use foreclosure as a collection tool. As with most hotly contested topics, the middle ground is the most solid. Foreclosure (mostly the threat of foreclosure) can be an effective, efficient, and affordable collection tool when used responsibly and moderately.

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1. **Must a POA file a lien against an owner's property in order to proceed with foreclosure?**

   The POA's assessment lien is typically contained in the recorded declaration, and no additional public recording (or "filing") is required by State law, except what's required by TPC §51.002 for all types of real property foreclosures. For some POAs, the declaration requires that a certain type of notice be publicly recorded as a prerequisite to foreclosure - typically a notice or affidavit that assessments are owing against the unit or lot. In those POAs, the leaders may tell the POA attorney to "file a lien" when they actually are referring to the notice or affidavit. Be aware that some debtors' lawyers argue that recording a notice of delinquency - without being required to do so by the declaration - violates the Federal Fair Debt Collections Practices Act because it discloses the debt to third parties.

2. **Can a POA foreclose, even over an owner's homestead exemption?**

   Yes. Under Texas law, a POA may foreclose its assessment lien against a residential homestead if the lien is contained in the declaration that was recorded against the property before it became the current owner's homestead. The legal basis is that the lien predates the homestead, even though no assessment was delinquent when the owner acquired the property. It was, therefore, a "dry lien." Condominiums have additional authority for their assessment lien. TUCA §82.113(k) allows foreclosure of the assessment lien against a condominium unit that is the owner's homestead, with a carve-out for the rare instance when the recorded condominium declaration does not contain a lien.

3. **Can a POA foreclose non-judicially?**

   Depends. "Non-judicially" means a foreclosure on the first Tuesday of a month, on the courthouse steps, without court supervision. A non-condo POA may not use the non-judicial method to foreclose its assessment lien unless the declaration grants a "private power of sale" to the POA. Without that express power, a non-condo POA must file a lawsuit and pursue judicial foreclosure. Condominium POAs also look to their declarations for an express power of sale to foreclose non-judicially. However, condominium POAs also have statutory authority to use non-judicial foreclosure pursuant to TUCA §82.113(d)&(e).

4. **How does a POA get the money to bid at the foreclosure sale?**

   Any creditor – even a POA – does not need cash to bid up to the amount of the debt at the creditor's foreclosure sale. Typically, a POA bids a nominal amount to start the bidding, and is typically advised to bid no more than the amount of the owner's debt to the POA so no out-of-pocket money is necessary.

5. **Could a POA bid more than what it is owned, if it wanted to ensure the POA was the successful bidder?**

   Yes, it could, but that would be highly unusual. The POA would have to pay cash for the difference between its purchase price and the amount owed to the POA. In the vast majority of POA foreclosures (and threatened foreclosures), the POA moves against a property with a superior mortgage lien and little if any equity. In that

circumstance, the POA expects to lose the property when the mortgage company forecloses. So, it would be an unwise business decision to come out of pocket for the purchase money.

6. **How do you know if the POA's lien is subordinate to the mortgage?**

By looking in the recorded declaration, which almost always has a subordination clause that determines priority of liens. Additionally, condominium associations are subject to the statutory lien priority provision in TUCA §82.113(b).

7. **So what happens if the POA's assessment lien is subordinate to the mortgage company lien?**

If the POA's lien is subordinate – the mortgage company's foreclosure of its superior lien will extinguish the POA's claim against the property for the debt that accrued prior to the foreclosure. However, the former owner may still personally liable to the POA for the pre-foreclosure debt, but that's another story (see No. 11 below).

8. **What happens if the POA's assessment lien is superior to the mortgage company lien?**

If the POA's assessment lien is superior to the mortgage on the property, then the POA's lien will remain secured by the property even if the mortgage company does foreclose. And, if the mortgage company doesn't cure the assessment debt on the property, the POA can foreclose against the mortgage company. For this reason determining lien priority in the POA setting is important.

9. **Does a mortgage company that forecloses the mortgage lien owe future assessments to the POA?**

Whomever buys the property at the mortgage company's foreclosure sale will be liable to the POA for all future assessments on the property until it is resold. If the mortgage company is the high bidder, then it must pay.

10. **If someone bids more than what is due the POA at the POA's foreclosure sale, can the POA keep the excess?**

No, the trustee at the POA foreclosure is obligated to forward the excess proceeds to the former owner.

11. **What if the owner's debt is not fully satisfied at the POA's foreclosure sale (i.e., the highest bid at the sale is less than what is owned)? Can the POA still pursue the former owner for the unsatisfied amount?**

Yes, the POA may pursue a deficiency judgment against the former owner, who remains personally liable for the debt. However, if the former owner is broke, it may be like "throwing good money after bad" unless the POA has reason to believe the former owner will eventually have non-exempt assets against which the POA can recover.

12. **May a POA director or manager bid on a property individually at a POA foreclosure sale in hopes of being the successful bidder and ultimately personally owning the property?**

While there is no direct law on the topic, seasoned POA attorneys dissuade POA "insiders" from personally participating in the bidding. The perception may be that the POA is foreclosing on delinquent owners so the director or manager can benefit. The possible repercussions to the POA in terms of distrust, bad press, and possible allegations of breach of duty should be reason enough for the POA attorney to advise against bidding by individual officers, directors, and managers for their own accounts.

13. **If a POA is the highest bidder at the sale and ends up owning the property, does the POA have to do anything or is the mortgage company ultimately responsible for the property?**

The mortgage company is not responsible for the property until it forecloses and owns the property. As such, appropriate steps should be taken to ensure the POA is protected from liability by its ownership of the property, including ensuring property insurance is in place and making certain the property is properly secured.

14. **If a POA purchases the property at the foreclosure sale will it be responsible for the owner's mortgage payments?**

No, no purchaser at a foreclosure sale – even the POA - is liable for the former owner's mortgage payments because there is no privity of contract between the POA and the mortgage company. When the mortgage company ultimately forecloses, the foreclosure will be against the owner that signed the deed of trust and not the POA (although the POA will lose its ownership interest in the property as a result of the mortgage company foreclosure).

15. **How about ad valorem taxes?**

The tax rolls are determined on January 1 of each year. If the POA owns a unit or lot on January 1st, the taxing authority will show the POA as the owner - based on the deed recorded after the foreclosure sale. The POA will receive a property tax statement, including any back taxes. Whether or not to pay property taxes may depend on a number circumstances, such as whether the property has other liens, and the likelihood that the mortgage company will foreclose its lien against the property before the taxing authority files a tax suit. If the taxes don't get paid, and if the POA still owns the unit or lot when the taxing authority files suit, the taxing entity generally pursues only the debt in rem by seeking foreclosure of its tax lien against the property. It is rare for a taxing authority to pursue a personal judgment against the POA in that scenario.

16. **Is successful purchaser at a POA foreclosure sale responsible for future assessments?**

Yes, whoever purchases the property at the POA foreclosure sale is responsible for future assessments.

17. **Can an owner foreclosed upon by a POA be evicted by the successful purchaser at the POA foreclosure sale?**

The successful purchaser at POA foreclosure sale (whether the POA or a third party) can evict the owner by filing a forcible entry and detainer lawsuit – even during the applicable right of redemption period. Some POAs even attempt to recoup amounts due it by renting the property to third parties prior to a mortgage company foreclosure. Be aware of the Helping Families Save their Home Act of 2009, which includes protection for tenants of properties that are foreclosed upon. Under this new law, when property occupied by a bona fide tenant is foreclosed upon, the successor in interest must provide the tenant at least 90-days notice prior to proceeding with action for forcible detainer. Additionally, the tenant has the right to stay in the premises for the balance of the lease term, under an existing lease, if the tenant is a qualifying tenant.

18. **Can an owner foreclosed upon by a POA "undo" the sale?**

In most cases, yes, by exercising a statutory right of redemption. However, in 2010 the "right" is different for condominiums and non-condo POAs. With condominiums, the redemption period is 90 days and applies only if the POA is the unit purchaser (the high bidder) at its foreclosure sale - TUCA §82.113(g). For other POAs, the redemption period is 180 days and applies no matter who purchases the lot at the foreclosure sale - Tex. Prop. Code §209.011.

19. **Can an owner's mortgage company redeem a property foreclosed upon by POA?**

Yes, Tex. Prop. Code §209.011 now provides that mortgage companies must be notified of the POA foreclosure and they have the right to redeem the property 90 days after the date the POA makes written notice of the sale. This statutory right for mortgagees is not available for condominiums under TUCA in 2010.

EXHIBIT 9

23 POA FEATURES CHECKLIST

~ All POAs are not alike. Some things to consider before creating or representing a POA. ~

Prepared for The Texas POA Primer
by Sharon Reuler & Roy Hailey
Published by the State Bar of Texas, July 2010

It can be difficult to grasp the kaleidoscope of features that CIDs and POAs have. This checklist is one way to get to know a property. Each item is not legally significant, and this isn't "everything you need to know." But, it is a start.

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1. **Mandatory/Voluntary**. Is membership in the POA mandatory or voluntary?

2. **Lot/Unit Ownership**. Are the individual units/lots/dwellings condominium in ownership?

3. **Size**. How big is the CID in terms of members/dwellings? 5? 50? 500? 5,000? 50,000? *(Size matters.)*

4. **Location**. Location- specific laws or ordinances? Special districts? ETJ? Urban or rural?

5. **Environment**. Does CID contain or abut natural areas? Wildlife issues? Conservation requirements?

6. **Land Uses**. Besides housing, what land uses are within or abutting the CID, and do the uses result in additional or different restrictions on nearby lots, such as a golf course, beach, marina, equestrian trail, cemetery, private airport?

7. **Relationships**. Does CID share maintenance or access agreements with neighboring subdivisions, or is it tied to a master or sub-association, or does it contract with a special district?

8. **Streets**. Public or private? Gated?

9. **Uses**. Is the CID single-use (e.g., residential) or mixed-use (e.g., residential + retail)?

10. **Unit Styles**. One style of unit (e.g., houses only) or mixed styles (e.g., houses and townhomes)?

11. **Lot Configuration**. Lots with traditional set-backs, or lots with easements, such as zero-line or "flag" lots?

12. **Buildings**. Are dwellings attached or detached? If attached, is any part of one unit above/below any part of another unit? If detached - houses, patio homes, zero lot line homes?

13. **Maintenance**. What is the scope of the POA's maintenance duties? No maintenance? Nominal or extensive common area? No, some, or complete maintenance of dwelling exteriors or unfenced yards.

14. **Services**. Does the POA provide services (e.g., utilities, cable, trash) used by residents in their dwellings?

15. **Common Area**. Any common areas? High or low maintenance? Available to general public?

16. **Terrain**. Does CID have drainage issues, retaining walls, erodible banks along creek or lake? Who maintains?

17. **Water**. Does CID have man-made or natural water features? Potential for erosion? Retaining walls?

18. **Life Cycle**. Is the CID still subject to annexation or developer control? Has control of the POA just transitioned to the owners? Does the CID have an established owner-controlled POA - for how long?

19. **Incorporation**. Is the POA incorporated? Is incorporation required by statute or by POA documents?

20. **Management**. How is the POA managed? Volunteers, employees, third-party agent? On-site or off-site office?

21. **Budget**. Is the POA's budget and each unit/lot's periodic assessment small, medium, or large?

22. **Residents**. Who lives in the CID? Owners, renters, or second-home vacationers? Families, singles, seniors?

23. **Persona**. What is the POA's reputation? Litigious or cooperative, strong or weak leadership, strict or lax enforcement?

EXHIBIT 10

17 PAPERS TO ASSEMBLE
BEFORE CREATING OR REPRESENTING A POA

Prepared for The Texas POA Primer
by Sharon Reuler & Roy Hailey
Published by the State Bar of Texas, July 2010

Get complete legible copies of the following instruments and any exhibit, amendment, supplement, and restatement of these. Make sure you have photocopies or scanned images of the actual public records - with indicia of recording. ***!!! FOREWARNING !!!*** Do not assume that what is on a project website, in a client-prepared binder, or on a marketing disc is complete or accurate.

FROM THE COUNTY CLERK'S OFFICIAL PUBLIC RECORDS.

1. Subdivision plats.
2. Each easement, lease, or license affecting the project as a whole or the common areas.
3. Each deed to any real property owned by the POA, such as the common area lot of a PUD or individual units or lots acquired by the POA at foreclosure.
4. Recorded liens or deeds of trust on POA-owned property or the common areas.
5. Documents that create the development, commonly titled "Condominium Declaration" or "Declaration of Covenants, Conditions & Restrictions."
6. Governing documents, such as bylaws, certificate of formation (articles), and community rules.
7. Any restrictions affecting the project as a whole or the common areas, such as separately recorded deed restrictions and restrictions contained in prior deeds.
8. In a tiered development, the restrictions and governing documents for the master or sub-association.
9. Any management certificate or other instrument instructing the public how to contact the POA.
10. Any abstracted judgment of a suit to which the POA is a party.
11. Any other recorded document, however titled, that affects the project as a whole or the common areas.

FROM THE CITY. (May be available from the City Secretary or from online City Code.)

12. The site-specific planned development ordinance (if any) authorizing the project.

13. City ordinances (if any) pertaining to the type of development - currently in effect, and those in effect when the development was created. (as needed)

FROM THE STATE.

14. From the Secretary of State, corporate documents, such as the certificate of formation (aka "articles of incorporation"), the most recent statement of change of registered agent (if any), and reasons for loss of charter (if applicable). Also, confirm the name and address of POA's registered agent.

15. From the State Comptroller, evidence that the incorporated POA is exempt from franchise tax.

FROM THE COURTS.

16. Any court order or final judgment in a lawsuit to which the POA was a party.

FROM THE POA.

17. The book of resolutions or any other record of major policies adopted by the POA board and any POA governing instruments that are not recorded. Because your POA client may not understand "governing instruments" as broadly as you intend, it helps to ask specifically for bylaws, articles of incorporation, rules & regulations, policies, and anything that the POA wants to enforce against the owners or implement. We recommend asking about amendments to each document. Also, consider that your POA client may not know which documents are or should be recorded.

EXHIBIT 11

26 THINGS FOR POA LEADERS TO CHECK EACH YEAR

ANNUAL CHECKLIST FOR OFFICERS & DIRECTORS OF TEXAS PROPERTY OWNERS ASSOCIATIONS

Prepared for The Texas POA Primer
by Sharon Reuler & Roy Hailey
Published by the State Bar of Texas, July 2010

LEGAL ISSUES

1. **LAW CHANGES**. Ask the POA's attorney to meet with the board to discuss changes in the law affecting the POA.

2. **LAWSUITS**. Review every lawsuit involving the POA. (Don't overlook those handled by insurance.) What is the nature and status of each suit? Make sure they are reported in resale certificates.

CORPORATE ISSUES

3. **CHARTER**. If the POA is required to be incorporated, confirm that the charter is active by contacting the Secretary of State.

4. **REGISTERED AGENT/ADDRESS**. If the POA is incorporated, confirm that the registered agent and registered address are effective. If not, change them with the Secretary of State.

5. **ANNUAL MEETING**. Confirm the date of the annual meeting required by the POA's governing documents and plan the POA's calendar accordingly. Find minutes of prior annual meeting to be approved at next annual meeting.

6. **TERMS**. If all offices, directorships, and committees are not filled, make appointments or elect replacements, as permitted by POA documents. Confirm date each directorship ends. Remove and re-elect officers as needed.

7. **MEMBERSHIP**. Inspect the most current membership or ownership list. Does every unit/lot have an owner with effective contact information? Who is responsible for updating the list, and how often is it done?

PROPERTY ISSUES

8. **CONDITION**. Evaluate the condition of the property maintained by the POA. Any long term or recurring problems? Does the POA anticipate major repairs? How will they be financed?

9. **VIOLATIONS**. Evaluate the status of architectural and use violations. How does the POA respond?

10. **POA OWNED**. Inventory POA-owned property - real & personal. Check the central appraisal district website for real property owned by the POA. Any changes from last year? Adequate insurance?

CONTRACT ISSUES

11. **CONTRACT TERMS**. Calendar the expiration dates for all the POA contracts, and calendar the termination notice dates. Do you know when the management contract renews?

12. **INSURANCE**. Evaluate the POA's insurance & bonds -- types & amounts. Is the POA bonding the people who handle the POA's funds? Does the POA have duty-to-defend D&O coverage?

DOCUMENT ISSUES

13. **GOVERNING DOCUMENTS**. Get copies of all the governing documents. Is each one recorded? Record anything that is not recorded and work only with copies that show evidence of recording.

14. **CHANGES TO DOCUMENTS**. Last year was there a decision and vote to change something in a document? If so, make sure the POA recorded an amendment with the change and notified the membership of the outcome.

15. **RULES**. Review the condition of POA rules, which are also governing documents. Are they published and recorded?

16. **RECORDS**. Review the location and status of the POA's records - such as financial, membership, architectural, administrative. Are they being maintained? Are they accessible? Who is responsible for them?

17. **SHALL v. MAY**. Review the governing documents to identify what the POA and the board must do, what they may do, and what they may not do. Do the POA's practices fit with the documents? If not, change the practice or amend the documents.

FINANCIAL ISSUES

18. **BANK ACCOUNTS**. Identify the signers on the POA's accounts. If they are not current, change them.

19. **BUDGET**. Make budget information available to all members, such as last year's proposed budget, last year's actual budget, and this year's proposed budget.

20. **RESERVES**. Update the replacement reserve schedules for 5 years, 10 years, and 20 years.

21. **SAVINGS**. Evaluate the POA's savings program and investment plans. Time for a change?

22. **LIENS/LOANS**. Is the POA paying off a loan? Are there any liens against the common areas -- e.g. mechanics liens, deed of trust liens, judgment liens? What is the nature and status of these?

23. **AUDIT**. Has the POA budgeted for and scheduled the annual audit that is required for all condominiums (by statute) and for many other POAs by their governing documents?

DISCLOSURE ISSUES

24. **MANAGEMENT CERTIFICATE**. Review the POA's recorded management certificate that has been required for condominiums since 1994 and for other POAs since 2002. Is it still accurate? Does it comply with law changes? If not, record another.

25. **WEBSITE**. Visit the POA's official website and evaluate it for completeness and accuracy of information. Update and upgrade as necessary. Confirm the POA representative responsible for website content.

26. **RESALE CERTIFICATE**. With almost every home sale, your POA makes certain disclosures. Review a recent resale certificate and examine the materials that your POA gives with the resale certificate. Are they accurate? Complete?

EXHIBIT 12

9 STEPS FOR POA DECISION-MAKING

Prepared for The Texas POA Primer
by Sharon Reuler & Roy Hailey
Published by the State Bar of Texas, July 2010

In the world of POAs, almost every decision has a context with multiple players and moving pieces. Circumstances are rarely isolated. Accordingly, decision-making should not occur in a vacuum. This 9-Step Framework is one possible way of viewing the elements that may (or should, perhaps) play a role in the way a POA contemplates an issue and arrives at a decision that is communicated to a member. The same analysis may be useful for an owner or his counsel in deciding whether or how to bring a matter to the POA's attention.

---

1. **PEOPLE**. With whom are you communicating and what is that person's relationship to the issue, to the other parties involved with the issue, and to the POA? Who are the other players? What is the relationship of each player to the others, to the issue, and to the POA? Is anyone in a "protected class," such as handicapped or familial status?

2. **ISSUE**. What are the circumstances that bring the matter to your attention? How has it been handled so far? Has it happened before? Involving the same people? Is it likely to happen again? What documentation relates to the issue - emails, letters, notes of phone conversations? What does the issue look like from each person's perspective? What is the degree of urgency?

3. **POA DOCUMENTS**. Having compiled and reviewed the POA's complete library of official project documents, identify the document provisions that address the people and the issue at hand - both specifically and generally. Evaluate the hierarchical relationships among the provisions - do they support or conflict with each other?

4. **PUBLIC LAWS**. Identify which public laws, if any, apply to the people and issue at hand. Evaluate the hierarchical relationships among the applicable laws - do they support or conflict with each other? What affect do the applicable laws have on the pertinent provisions of the POA's project documents?

5. **POA PRACTICES & PRECEDENTS**. Is this an "issue of first impression" for the POA, or one for which the POA has a policy, and with which the POA has experience? Identify which POA practices and policies apply to the people and issue at hand. If the POA has previous dealings with these parties, what were those outcomes? If the POA has previous experience with this type of issue, what were those outcomes? Have you or your law firm previously advised this POA about this type of issue, or something analogous?

6. **REMEDIES**. What is the range of possible outcomes or remedies that is indicated by the project documents, public law, and POA policies? Does the POA have options?

7. **BALANCE**. What is the proportionality of the POA's proposed response to the actual harm that has occurred or may be occur? How does "saving face" or "the principle of the thing" measure against "doing what's 'right'"?

8. **DISCRETION**. Is this a matter for which the POA has or could have discretion - within the bounds of the project documents and applicable public laws? Does the POA have wiggle room - room for creativity? Do the circumstances warrant a new policy, or a change of policy, or an exception to the existing policy, or a carve-out from the existing policy for similar situations? What is "fair"? What is "right"? What is neighborly? What does common sense suggest? Do the circumstances warrant compassion?

9. **PERCEPTION IS REALITY**. Will the response proposed by the POA contribute to the perception of the common interest community as a desirable place live - where respect and civility are reciprocated? Will the proposed response avoid or contribute to a perception that POA leaders or the POA manager are power-tripping or favoring their friends? Will the POA be able to justify its response to the media - or to a legislative committee - if the issue becomes fodder for bloggers and reporters?

EXHIBIT 13

10 IMPORTANT STATUTES WITH IMPLICATIONS FOR TEXAS POAS *(Out of Hundreds!)*

~ AS OF APRIL 2010 ~

Prepared for The Texas POA Primer
by Sharon Reuler & Roy Hailey
Published by the State Bar of Texas, July 2010

This list is written for the Texas real estate attorney who wants to know which laws to start with in educating himself about POAs in particular. This list of 10 is in no particular order, and is merely a starting place. For another list of POA-pertinent laws, please refer to Sharon Reuler's "Statutory Minefield for Creating and Marketing Condominiums and Planned Developments," presented at the State Bar's 2008 Advanced Real Estate Drafting Course. Federal and state statutes and codes are available at no charge on public websites.

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1. Condominiums (residential and non-residential) - *Texas Uniform Condominium Act* ("TUCA"), Tex. Prop. Code Chapter 82, for all condominiums. Also, for condominiums created before 1994, the *Texas Condominium Act*, Tex. Prop. Code Chapter 81.

2. Non-Condominium Residential POAs - *Texas Residential Property Owners Protection Act*, Tex. Prop. Code Chapter 209.

3. *Construction and Enforcement of Restrictive Covenants*, Tex. Prop. Code Chapter 202 - applies to condominiums and non-condominiums.

4. Houston Area Non-Condominium Residential POAs - *Powers of Property Owners Association Relating to Restrictive Covenants in Certain Subdivisions*, Tex. Prop. Code Chapter 204.

5. Resale Certificates for Non-Condominium Residential POAs - *Disclosure of Information by Property Owners' Associations*, Tex. Prop. Code Chapter 207

6. Amendment and Extension of Restrictions – Tex. Prop. Code Chapters 201, 205, 206, 210 & 211 (all are "bracketed" to certain locations and/or populations).

7. *Texas Nonprofit Corporation Law* and *Texas Unincorporated Nonprofit Association Act* , Tex. Bus. Orgs. Code Chapters 22 and 252.

8. Occupancy, Handicap Accommodations, and Discrimination in Housing - Federal & State
   - *Fair Housing Act*, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. ''3601 3619.42.
   - Tex. Prop. Code, Chapter 301 (*Texas Fair Housing Act*).
   - Also, some cities have equivalent fair housing ordinances, such as Dallas City Code Chapter 20A.

9. Assessment Collection by POA Attorneys and Managers - Federal & State
   - *Fair Debt Collection Practices Act*, 15 U.S.C. ''1692 1692p, as amended in 2006 by Pub. L. 109 351, ''801 02, 120 Stat. 1966.
   - Texas Finance Code, Chapter 392 (Debt Collection).

10. Foreclosures - *Provisions Generally Applicable to Liens*, Tex. Prop. Code Chapter 51.

EXHIBIT 14

10 IMPORTANT POA CASES (*Out of Hundreds!*)

~ AS OF APRIL 2010 ~

Prepared for The Texas POA Primer
by Sharon Reuler & Roy Hailey
Published by the State Bar of Texas, July 2010

This list is written for the Texas real estate attorney who wants to know which *Texas* cases to start with in educating himself about POAs in particular. This list of 10 is in no particular order, and is merely a starting place. They are described in more detail in Roy Hailey's "Survey of Texas Case Law Affecting Property Owners Associations" presented at the State Bar's 2006 Adv. Real Estate Law Course. Of course, there's no substitute for reading the actual cases, which are freely available on the State Bar's website.

1. Inwood N. Homeowners' Ass'n, Inc. v. Harris, 736 S.W.2d 632 (Tex. 1987).

   A POA can foreclose the assessment lien in the recorded declaration against an owner's homestead because the declaration was recorded against the lot before the lot became a homestead.

2. Brooks v. Northglen Ass'n, 141 S.W.3d 158 (Tex. 2004).

   Important in counties covered by Tex. Prop. Code Ch. 204. Chapter 204's board powers don't override more limited board powers in POA documents. Charges levied solely under §204.010 are not lienable by POA.

3. Sharpstown Civic Ass'n, Inc. vs. Pickett, 679 S.W.2d 956 (Tex. 1984).

   Restrictive covenants may be enforced by degree without waiving the right to enforce.

4. Pilarcik v. Emmons, 966 S.W.2d 474 (Tex. 1998).

   Restrictive covenants are interpreted according to the rules that govern contract construction.

5. Evans v. Pollock, 796 S.W.2d 465 (Tex. 1990).

   In some circumstances, "doctrine of implied reciprocal negative easements" may be used to imply restrictions.

6. Tygrett v. University Gardens Homeowners' Ass'n, 687 S.W.2d 481 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

   A condominium owner's obligation for assessments does not create a creditor/borrower relationship between the POA and its member. Hence, Texas usury laws do not apply to late fees on delinquent assessments.

7. 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.).

   A POA's duties to its owner members, and the owners' duties to the POA are independent covenants.

8. Village of Pheasant Run HOA v. Kastor, 47 S.W.3d 747 (Tex. App.-Houston [14th Dist.] 2001, pet. denied).

   The ACC of a POA may create independent architectural standards to effectuate the intent of the restrictions.

9. Dickerson v. Debarbieris, 964 S.W.2d 680 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

   A condominium's bylaws may be amended to supplement the declaration without amending the declaration.

10. Malmgren v. Inverness Forest Residents Civic Club, Inc., 981 S.W.2d 875 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

    There is a 4-year statute of limitations for the enforcement of violations of restrictive covenants. AND, the knowledge of an agent of the POA can be imputed to the POA as a date of discovery of the violation.

[Intentionally left blank for duplex pagination purposes]

EXHIBIT 15

55 POA-RELATED ARTICLES
PUBLISHED BY THE STATE BAR OF TEXAS 1998 - 2009

Prepared for The Texas POA Primer
by Sharon Reuler & Roy Hailey
Published by the State Bar of Texas, July 2010

WOW! Were we ever surprised to discover how many articles pertaining directly to CIDs and POAs are in the State Bar On-Line Library. Each of these was presented at a CLE course sponsored by the State Bar of Texas, as noted. We did not include more general articles that contain only sections pertaining to CIDs and POAs. Apologies to the authors of any articles we inadvertently overlooked.

2009

Legislative Update for Real Estate Lawyers: Condos & Owner's Associations - "More Band Aid" Laws, by Roy D. Hailey and Sharon Reuler, presented at a 2009 webcast.

Drafting Special Purpose Forms for HOA Governance, by Marc D. Markel and Stephanie Quade, presented at 2009 Adv. Real Estate Drafting Course.

Transitioning Property Owner Association Control, by Robert D. Burton, presented at 2009 Adv. Real Estate Drafting Course.

Drafting Property Owner Association Documents to Mitigate Developer Liability, by Kathryn Leigh Malmgren, presented at 2009 Adv. Real Estate Drafting Course.

Green Building Issues in Residential Covenants, Conditions and Restrictions, by William Ray Weinberg, presented at 2009 Real Estate Strategies Course.

2008

Amending / Modifying Restrictive Covenants, by Reid C. Wilson, presented at 2008 Real Estate Strategies Course.

Deed Restrictions vs. Government Land Use Regulations, by Reid C. Wilson, presented at 2008 Real Estate Strategies Course.

No Exemption? Registering a Condominium with HUD Under the Interstate Land Sales Full Disclosure Act, by Jennifer B. Farnell, presented at 2008 Adv. Real Estate Drafting Course.

Between a Rock and a Hard Place? The Commercial Space Tenant in a Mixed Use Condominium Project, by Rebecca Anderson Fischer, presented at 2008 Real Estate Strategies Course.

Sales Free and Clear of Leases, Options, Liens and Rights of co Owners Strategies for Each Constituency, by Susan J. Brandt, presented at 2008 Real Estate Strategies Course.

Statutory Minefield for Creating and Marketing Condominiums and Planned Developments - A 2008 Drafting Guide, by Sharon Reuler, presented at 2008 Adv. Real Estate Drafting Course.

Lending to Condominium Developers, by Edward A. Peterson, presented at 2008 Real Estate Strategies Course.

High Rise Multi Use Development - The Rise of Vertical Multi Use Condominiums, by Edward A. Peterson, presented at 2008 Real Estate Strategies Course.

Where Do We Go From Here? Suggestions on Structuring Mixed Use Projects, by Lorin W. Combs and Jeff Matthews, presented at 2008 Real Estate Strategies Course.

Mixing it Up: Leasing Issues in a Multi Use Condominiums, by Lorin W. Combs and Jeanne Marie Caruselle, presented at 2008 Adv. Real Estate Law Course.

The Building Blocks of Condominium Law, by Lorin Combs and Jeff Matthews, presented at a 2008 webcast.

2007

You're Going to Lose That Girl: Interstate Land Sales Issues in Residential Condominiums, by Jennifer B. Farnell, presented at 2007 Adv. Real Estate Law Course.

2006

Condominium Defect Litigation If You Build It, They Will Sue, by Dale E. Butler, Michelle I. Rieger, and Edward A. Peterson, presented at 2006 Adv. Real Estate Law Course.

A Due Diligence Checklist for Condominium Developers, by Lorin W. Combs, presented at 2006 Adv. Real Estate Drafting Course.

Collection and Foreclosure Issues for Property Owners Associations ("POA's"), by Tamara Lynne Simich, presented at 2006 Adv. Real Estate Law Course.

Nuts and Bolts of Representing Community Organizations, by Richard Charles Lievens, presented at 2006 Adv. Real Estate Law Course.

Fair Housing Affecting Community Associations, by Marc D. Markel and Stephanie L. Quade, presented at 2006 Adv. Real Estate Law Course.

Survey of Texas Case Law Affecting Property Owners Associations, by Roy D. Hailey, presented at 2006 Adv. Real Estate Law Course.

Restrictive Covenants and Easements in Commercial Transactions, by Charles W. Spencer, presented at 2006 Adv. Real Estate Law Course.

Mixed Use Developments Single Site CC&Rs, by W. Austin Barsalou, presented at 2006 Adv. Real Estate Law Course.

Drafting Documents to Create Planned Communities with Owner Associations, by Sharon Reuler, presented at 2006 Adv. Real Estate Drafting Course.

Residential Condominiums: a Statutory, Liability and Transactional Overview, by Stephen Wood Butler, presented at 2006 Residential Real Estate Construction Law.

2005

Practical Tips for Dealing with Property Owners Associations, by Roy D. Hailey, presented at 2005 Adv. Real Estate Drafting Course.

Documentation for the To Be Built Office Condominium, by William H. Locke Jr., presented at 2005 Adv. Real Estate Drafting Course.

2004

Architectural Control Issues, by Marc D. Markel, presented at 2004 Adv. Real Estate Law Course.

Property Owners Association Litigation and Dispute Resolution [Or, Legal Resolution of Neighborhood Food Fights], by Rosemary B. Jackson, presented at 2004 Adv. Real Estate Law Course.

Drafting Tips and Traps for the "Other" Community Association Documents, by Marc D. Markel, presented at 2004 Adv. Real Estate Drafting Course.

Amenity Strategies for Planned Developments, by Jo Anne P. Stubblefield, presented at 2004 Adv. Real Estate Law Course.

Professional Responsibilities of Real Estate Attorneys Advising Developers and Purchasers - Knowing a Little More About A "Lot" - The Interstate Land Sales Full Disclosure Act, by William P. Sklar, presented at 2004 Adv. Real Estate Law Course.

Vertical High Rise Multi use Development: the Rise of Mixed Use Condominiums, by Edward A. Peterson, presented at 2004 Adv. Real Estate Law Course.

Aging in Place - the Development of Naturally Occurring Retirement Communities, by Ellen Hirsch De Haan, presented at 2004 Adv. Real Estate Law Course.

2003

Foreclosure of POA Assessment Liens, by Rick S. Butler, presented at 2003 Adv. Real Estate Law Course.

Age Restricted Communities, by Mary S. Alexander, presented at 2003 Adv. Real Estate Law Course.

2002

Property Owners Associations in Litigation, by Marc D. Markel and Stephanie L. Quade, presented at 2002 Adv. Real Estate Law Course.

Tex. Prop. Code Chapter 209 - Implementing the New Law, by Rosemary B. Jackson, presented at 2002 Adv. Real Estate Law Course.

Survey of Texas Case Law Affecting Property Owners Associations, by Roy D. Hailey, presented at 2002 Adv. Real Estate Law Course.

Documents to Create and Manage Property and Homeowners Associations, by Marc D. Markel and Stephanie L. Quade, presented at 2002 Adv. Real Estate Drafting Course.

Reinventing Master Planned Communities: Legal Structure to Create Community, by Wayne S. Hyatt, presented at 2002 Adv. Real Estate Law Course.

2001

Primer for Representing Condominium and Property Owners Associations (v.2), by Sharon Reuler and Rosemary B. Jackson, presented at 2001 Adv. Real Estate Law Course.

2000

Homeowner's Counterargument: Property and Constitutional Rights Do Not End at the Gates of a Deed Restricted Community, by David A. Furlow and Mitchell E. Ayer, presented at 2000 Adv. Real Estate Law Course.

Premises Liability Issues, by Rosemary B. Jackson, presented at 2000 Adv. Real Estate Law Course.

Modifying & Modernizing Deed Restrictions, by Marc D. Markel and Stephanie L. Quade, presented at 2000 Adv. Real Estate Drafting Course.

Recent Legislation Affecting Property Owners' Associations, by Roy D. Hailey, presented at 2000 Adv. Real Estate Drafting Course.

1999

Easements and Restrictive Covenants in Commercial and Mixed Use Development, by Brian C. Rider, presented at 1999 Adv. Real Estate Law Course.

Drafting for Premises Liability, by Rosemary B. Jackson, presented at 1999 Adv. Real Estate Drafting Course.

1998

Survey of Recent Texas Case Law Affecting Property Owners Associations, by Roy D. Hailey, presented at 1998 Adv. Real Estate Law Course.

A Primer for Representing Condominium and Property Owners Associations, by Sharon Reuler and Rosemary B. Jackson, presented at 1998 Adv. Real Estate Drafting Course.

Amendments to Restrictive Covenants and Condominium Declarations, by Roy D. Hailey, presented at 1998 Adv. Real Estate Drafting Course.

PRE-1998

Condominium Sales and Resales Under TUCA, by Sharon Reuler, presented at 1995 Adv. Real Estate Law Course sponsored by State Bar of Texas.

Texas Uniform Condominium Act, by Sharon Reuler, presented at 1994 Adv. Real Estate Drafting Course sponsored by State Bar of Texas.

EXHIBIT 16

RESOURCES FOR LAWYERS
(2 pages)

SOME WEBSITE RESOURCES

Prepared by Sharon Reuler & Roy Hailey
for 2010 Advanced Real Estate Law Course
Presented by The State Bar of Texas, July 2010

Websites are becoming efficient ways to monitor issues - nationwide - that are topical or controversial. Any list of websites is out-of-date when published. Most of these have shown some staying power, and all but one are free.

SOME PROFESSIONAL WEBSITES

Community Associations Network
Joe West
Location: Internet/Nationwide
http://www.communityassociations.net/index.html

HOATalk.com
Sponsored by Community123.com
Location: Internet/Nationwide
http://www.hoatalk.com

Florida Condo & HOA Law Blog
Becker & Poliakoff (Fla. law firm)
http://www.floridacondohoalawblog.com/
(hint: check out the right column + archives)

California Condo & HOA Law Blog
Beth A. Grimm, P.L.C. (Calif. lawyer)
http://www.californiacondoguru.com

HOA LEGI-SLATE
HindemanSanchez (Colo. law firm)
http://www.hoalegislate.com/

Ohio Condo & HOA Law Blog
Kaman & Cusimano (Ohio law firm)
http://www.ohiocondolaw.blogspot.com/

Community Associations Institute (CAI)
National membership organization
Headquarters: Alexandria, Virginia
Texas Chapters: Houston, Dallas, Austin, San Antonio
Many resources on website - for members only
http://www.caionline.org

SOME GRASS-ROOTS CONSUMER WEBSITES

American Home Owners Resource Center
Location: California (scope is nationwide)
http://www.ahrc.com

The Privatopia Papers
Prof. Evan McKenzie
Location: Chicago, Illinois (scope is nationwide)
http://privatopia.blogspot.com

Cyber Citizens for Justice
Location: Florida
http://www.ccfj.net/

Texas Homeowners for HOA Reform
Motto: HOA Abuse Must Stop
President: Robin Klar Lent
Best-Known Director: "Beanie" Adolph
Location: Houston, Texas
http://www.texashoareform.org/

Texas HOA Issues
Barbara Hogan
Location: Houston, Texas
http://www.texashoaissues.com/index.html

Stop Texas HOA Foreclosures
Harvella Jones, President of The National
Homeowners Advocate Group, LLC
Location: Richmond, Texas
http://stoptexashoaforeclosures.com/index.cfm

the HOA primer
Dorian MacDougall
Location: San Antonio, Texas (posted nationwide)
http://www.thehoaprimer.org/

HOA Data
Beanie Adolph
Location: Houston, Texas
http://pages.prodigy.net/hoadata/

SOME CLE-TYPE RESOURCES FOR LAWYERS
WHO WORK WITH POAS
(*and want to become and remain competent*)

Prepared by Sharon Reuler & Roy Hailey
for 2010 Advanced Real Estate Law Course
Presented by The State Bar of Texas, July 2010

- **COMMUNITY ASSOCIATION LAW REPORTER**
  A monthly case law reporter distributed by email with online archives
  Requires membership in the Community Associations Institute
  http://www.caionline.org

- **Annual LAW SEMINAR** (*typically in January or February*)
  Sponsored by the College of Community Association Lawyers
  Hosted by CAI - http://www.caionline.org
  Nonmembers + nonlawyers may register for the seminar

- **WAYNE S. HYATT** - Anything and everything written by our mentor - this Georgia lawyer and educator with a nationwide practice "wrote the book" on HOA law. His Atlanta-based firm is Hyatt & Stubblefield.
  http://www.hspclegal.com/wayne.html

- **ABA's Common Interest Ownership Development Committee**
  of the Hospitality, Timesharing and Common Interests Development Group
  of the Real Property, Trust & Probate Law Section
  Requires membership in the American Bar Association & in the Section
  http://www.abanet.org/dch/committee.cfm?com=RP270000

- **"Common Interest Communities**," Chapter 6 of Restatement of the Law (3d) of Property - Servitudes, Volume 2, new in 2000. Check your local law library, or contact http://west.thomson.com.

- **American Law Institute - American Bar Association (ALI-ABA)**
  CLE seminars and webcasts - some are repeated annually, others periodically
  Materials from previous courses can be purchased
  http://www.ali-aba.org/index.cfm

  - Meet Fannie Mae: A Practical Discussion of Fannie Mae's Underwriting Guidelines for Condominium Project Approval (Part 1 - February 2010, Part 2 - May 2010)
  - Homeowner Association Governance: New Developments in Troubling Times - Fall 2009 Update (November 2009)
  - Condos & Planned Communities: Bulk Sale of Units, Homes & Lots in Today's Shifting Economy (January & May 2009)
  - Drafting (and Re Drafting) Documents for Condominiums and Planned Communities in Troubled Times: Practice and Principles (February 2009)
  - Resort Real Estate and Clubs: Formation, Documentation, and Operation (November 2008)
  - Drafting Documents for Residential and Mixed Use Condominiums and Planned Communities: Practice and Principles (February 2008)

- **College of Community Association Lawyers**
  Membership by invitation & qualification
  Hosted by CAI - http://www.caionline.org

EXHIBIT 17

2006 - 2009 SUPPLEMENT TO SURVEY OF TEXAS CASE LAW AFFECTING PROPERTY OWNERS ASSOCIATIONS (1984 – 2005)

Presented By

ROY D. HAILEY

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BACKGROUND NOTE

This material supplements Roy D. Hailey's original 120-page Survey of cases reported in the 1984-2005 period, published in June 2006 by the State Bar of Texas for the Advanced Real Estate Law Course. The Survey is still available from the State Bar's On-Line Library. Although the Survey starts arbitrarily with cases reported in 1984, you would be wrong to assume that POA case law in Texas starts in 1984. A number of significant POA cases were reported prior to 1984, and should be part of the repertoire of any attorney who works with POAs. The format of this Supplement is designed to conform to the format of the original Survey.

State Bar of Texas
ADVANCED REAL ESTATE LAW COURSE
July 8 - 10, 2010
San Antonio, Texas

2006 - 2009 SUPPLEMENT TO SURVEY OF TEXAS CASE LAW AFFECTING PROPERTY OWNERS ASSOCIATIONS (1984 – 2005)

TABLE OF CONTENTS

2006 – 2009 SUPPLEMENT TO SURVEY OF TEXAS CASE LAW AFFECTING PROPERTY OWNERS ASSOCIATIONS (1984 – 2005)

I. INTRODUCTION, SCOPE AND DISCLAIMER

As with the "Survey of Texas Case Law Affecting Property Owners Associations" every reported case involving property owners' associations and restrictive covenants during the referenced timeframe has not been included in this Update. In some instances, reported cases with property owners associations as named parties had nothing to do with the law affecting property owners associations and restrictive covenants. Likewise, there are reported cases that could possibly impact the operations of a property owners association, due to the subject matter, but the reported case did not directly involve a property owners association – so the reported case was not included. Limits had to be placed somewhere. It is also possible some reported cases directly involving property owners associations and their operations may have been overlooked. And, no unreported cases involving property owners associations are included whatsoever.

The format of this Update generally follows the Survey as to categories. So, the reader may note there are certain Survey categories that are not mentioned in this Update, with the reason being there were no reported cases for the category in question. Likewise, there are some new categories in the Update that were not present in the Survey for the same reason.

An in-depth discussion of each case is also well beyond the scope of this CLE article and has not been attempted. Rather, the focus of the Survey and this Update is on the significant holdings in each case discussed, as those holdings concern the law governing property owners' associations and restrictive covenants. In that the facts and holdings in the following cases are often irreconcilably intertwined, the fact scenario of each case is summarized the first time a case is mentioned in the appropriate category. Subsequent references to the holding in the case (in a different category) refer the reader back to the first time the case is discussed in this article for the fact summary. As with any good disclaimer, the reader is also cautioned to perform his own research. In particular, the actual reported case itself should be reviewed, rather than relying on the synopsis in this article.

II. CREATION OF RESTRICTIONS

A. General Plan of Development

1. ***Ski Masters of Tex. v. Heinemeyer*, 269 S.W.3d 662 (Tex.App.–San Antonio 2008, no pet.)**

In 2004, Ski Masters of Texas (Ski Masters) purchased certain real property for commercial use, part of which was included in the original 6.76 acre tract originally platted and subdivided for the Carlson Subdivision (tracks four and five) and part of which was outside of the original platted subdivision tract. The Carlson Subdivision was subject to restrictive covenants, one of said restrictions being a residential-use only restriction. Residents of the Carlson Subdivision (Residents) and Ski Masters sued each other and the court consolidated the cases. The Residents were seeking enforcement of the restrictive covenants and Ski Masters was seeking a declaration that its property was not "subject to any valid restrictions enforceable by the Residents. At a bench trial the court entered a judgment for the residents and Ski Masters appealed.

In its appeal, Ski Masters challenged the Residents' standing to enforce a restrictive covenant, the existence of a valid express restrictive covenant, application of the doctrine of implied reciprocal negative easement and the award of attorneys' fees. The Court immediately dismissed Ski Masters' argument with regard to the existence of a valid express restrictive covenant and stated that while the original conveyance of tract four contained no restrictions, Ski Masters' deed specifically identified the covenants and the respective recorded instrument. The issue for the appellate court was whether the Residents had standing to enforce the restrictions against Ski Masters when all of the residents were outside the tract's chain of title.

Ordinarily, restrictive covenants are only enforceable by the contracting parties or those in direct privity. However, citing *Giles v. Cardenas*, the court's opinion stated "where many property owners are interested in a restrictive covenant, any one of them can enforce it."

In reviewing the general rule, the appellate court quoted the rule as set forth in *Hooper v. Lottman*:

> The general rule may be safely stated to be that where there is a general plan or scheme adopted by the owner of a tract, for the development and improvement of the property by which it is divided into streets and lots, and which contemplates a restriction as to the uses to which lots may be put, or the character and location of improvements thereon, to be secured by a covenant embodying the restriction to be inserted in the deeds to purchasers, and it appears from the language of the deed itself, construed in the light of the surrounding circumstances, that such covenants are intended for the benefit of all the lands, and that each purchaser is to be subject thereto, and to have the benefit thereof, and such covenants are inserted in all deeds for lots sold in pursuance of the plan, a purchaser and his assigns may enforce the covenant against any other purchaser, and his assigns, if he has bought with actual or constructive knowledge of the scheme, and the covenant was part of the

> subject-matter of his purchase. 171 S.W. 270 (Tex.App.-El Paso 1914, no writ).

The appellate court noted that whether or not the Residents have standing to enforce the restrictive covenants depend on two factors, (1)"the existence of a general plan or scheme of development" and (2) "that was part of the inducement for purchasers to obtain land within the restricted are." The appellate court further reasoned, stating that courts of equity have upheld similar cases, that the existence of a general building scheme or plan tends to make the property more attractive for residential purposes and induces the buyer to purchase that property and "it can be assumed that he pays an enhanced price" for the restricted property. The court stated that the standing "to enforce a restrictive covenant against another similarly situated property owner does not turn on whether the deed of the owner against whom enforcement is sought contains the restriction. If the deed of the property owner against whom enforcement is sought contains the restriction, standing is based on an implied mutuality of covenants among the various purchasers." If the restrictions are not contained in the deed, then the basis for standing comes from the doctrine of implied negative reciprocal easements.

Quoting *Evans v. Pollock*, the court explained that the "doctrine of implied reciprocal negative easements applies when a developer sells a substantial number of lots within a subdivision by deeds containing the restrictive covenant, and the party against whom the restriction is sought to be enforced had notice of the restriction but the deed did not actually contain the restriction." The only real difference is that the party seeking to enforce the restriction has the burden to show that a "substantial number" of the deeds in the subdivision contain the restriction.

The court found that because the first deed of the subdivided property to the Flemings stated that "Grantor…, by this instrument subjects the remainder of the 6.76 acres of land with the same restrictions, conditions and option, whether embodied in future instruments or not," and because the Fleming deed also provided that the restrictions would renew automatically, a general plan or scheme was clearly evidenced. Additionally, Ski Masters had notice of and was aware of the restrictions. In fact, the realtor for Ski Masters tried to get the other owners in the subdivision to waive the restriction for Ski Masters. The Residents also testified that the restrictive covenants were part of their reasons for purchasing in the subdivision.

Ski Masters further argued that there was no general scheme or plan because two of the lots were conveyed without the restriction, the plat referenced in the deed was never recorded and that ten tracts have been significantly re-subdivided. In its analysis of these arguments, the court explained that deviation from the restrictions in individual circumstances does not necessarily destroy the general scheme or plan and that the "failure to record the plat is not dispositive." The Residents here did not rely wholly on an unrecorded plat, but rather produced other evidence of the general plan or scheme.

With regard to Ski Masters' argument that there is no general scheme or plan due to the fact that ten tracts have been significantly re-subdivided, the court found that Ski Masters presented no supporting evidence. Further, though tracts four and five were re-drawn and subdivided, the deed to the owner prior to Ski Masters, contained the restrictions and referenced the Fleming deed even though they were not referenced in the deed to the previous owner. The court found that this re-draw of the tracts did not negate the general plan or scheme. Finally, as an alternative argument, Ski Masters argued that the general scheme or plan was abandoned and no longer binding because the plat was not recorded and because it appeared that another owner was using his property for business purposes. The court explained that "abandonment occurs when there are 'substantial violations within the restricted area.'" Ski Masters had the burden to prove that "the violations were 'so great as to lead the mind of the average man to reasonably conclude that the restriction…had been abandoned and its enforcement waived.'" *Oilfield v. City of Houston*, 15 S.W.3d 219, 226-27 (Tex.App.-Houston [14th Dist] 2000, pet. denied). Three property owners testified that no property was being used for purposes other than residential. The appellate court concluded there was no abandonment.

B. Implied Negative Reciprocal Covenants

1. ***Ski Masters of Tex. v. Heinemeyer*, 269 S.W.3d 662 (Tex.App.–San Antonio 2008, no pet.)**

If the restrictions are not contained in the deed, then the basis for standing comes from the doctrine of implied negative reciprocal easements. Refer to Section II.A.1 for discussion.

C. Personal Covenants or Covenants Running with the Land

1. ***Veterans Land Bd. of the State of Tex.v. Lesley*, 281 S.W.3d 602 (Tex.App.-Eastland 2009, pet. denied)**

In 1952, Wyatt and Mildred Hedrick, owners of about 4,100 acres of land now known as the Mountain Lakes Development (Mountain Lakes), sold and conveyed to H.S. Foster full interest in the surface estate of Mountain Lakes Development and a one-half interest in the mineral estate reserving the other one-half interest for themselves. The deed to Foster conveyed the executive estate to Foster providing that Foster "shall have full complete and sole right to execute oil, gas and mineral leases covering all the oil, gas and other minerals in the following described land."

Betty Yvon Lesley, Kenneth Lesley and Bobby John Foster, heirs and devisees of H.S. Foster acquired interest to the entire surface estate and one-half interest in and to the mineral estate of Mountain Lakes. In 1998, the Lesleys and Foster sold and conveyed the surface estate to Mountain Lakes to Bluff Dale, a developer whose intent was to either develop the property as a residential neighborhood or sell the property to another developer. The Lesleys and Foster retained a one-fourth interest in the mineral estate and granted to Bluff Dale the right to execute all future oil, gas,

sulphur and other mineral leases (Executive Estate). Bluff Dale later conveyed the property to Properties of the Southwest, L.P. (who later changed its name to Bluegreen) subject to "any prior reservations or conveyances of oil, gas and other minerals, restrictions, covenants, conditions, rights-of-way and easements of record."

Bluegreen then developed the property as a residential subdivision known as the Mountain Lakes Development. Bluegreen subsequently recorded a declaration of covenants, conditions and restrictions (Declaration) and established a property owners association. One of the restrictions contained in the Declaration was one prohibiting any "commercial oil drilling, oil development operations, oil refining, quarrying or mining operations of any kind..."

Appellees, (1) Betty Yvon Lesley and Kenneth Lesley and (2) Kenneth Lesley and Perry Elliot (as independent executors of the Estate of Bobby John Foster) filed suit against Bluff Dale, Bluegreen, the association and numerous individual lot owners and the Veterans Land Board of the State of Texas alleging among other things that the defendants, as the executive estate owners owed a duty of utmost good faith to them as non-executive mineral interest owners, that the duty was fiduciary and that they breached the duty. They argue specifically that Bluegreen and the association breached this duty by creating and recording the restriction that prohibited mineral development. Appellees sought a declaration from the court regarding ownership of the mineral interests, ownership of the executive rights, breach of the alleged duty owed to the non-executive mineral interest owner, and that Declaration was void and unenforceable.

The trial court granted the association's no-evidence partial summary judgment only with regard to the issue of breach of contract and breach of fiduciary duty, holding that the association "was not liable to appellees for breach of any duty associated with ownership of the executive rights because the [association] did not own, and had not owned, the executive rights. The association did not appeal.

In its judgment, the trial court determined that Bluegreen was the owner of the executive rights and thus breached the duty owed to appellees as non-executive mineral interest owners. The court further ruled that "Bluegreen breached the contractual requirements of the Lesley/Foster to Bluff Dale deed and the Lesley to Bluff Dale Deed by failing to give requisite notice of the filing of the Declaration of Covenants," and determined that the declaration was unenforceable and could not be used to restrict or prohibit mineral development.

The court of appeals held that there was no affirmative duty to lease the minerals. The court analyzed *In re Bass*, which "establishes that no breach of fiduciary duty can occur until the executive exercises the executive rights" and "a breach occurs if (1) the executive exercises the executive rights, (2) the executive acquires benefits from the minerals for himself by exercising the executive rights, and (3) the executive fails to acquire every benefit for the non-executive mineral owners that he acquired for himself." The court further held that Bluegreen did not exercise the executive rights by creating and recording the declaration. In fact, the court states that the recording of restrictions prohibiting mineral development shows that Bluegreen was not intending to exercise the executive rights and thus no duty arose.

Appellees argued that Bluegreen breached the notice requirements in the deeds when it didn't notify them of the recording of the declaration. The court noted that Bluegreen was not a party to the original deeds to Bluff Dale and would thus only be bound by its notice requirement if the covenant was one that ran with the land. Because the court determined that the notice requirement did not burden the land and it was a personal covenant and did not run with the land. The appellate court reversed the judgment of the trial court in its entirety.

D. Constructive Knowledge

1. ***Rakowski v. Comm. to Protect Clear Creek Village Homeowners' Rights*, 252 S.W. 3d 673 (Tex.App.-Houston [14th] 2008, pet denied)**

The committee sued the Clear Creek Civic Association and Rakowski because the association was trying to sell a park that Rakowski, the buyer, intended to use for commercial purposes. The trial court granted separate motions for summary judgment. One stated that the association was the owner of the park. The other stated that the restrictions applied to the park, prohibiting commercial use and requiring the association to maintain it for recreational purposes. Rakowski and the association appealed.

Since both parties moved for summary judgment, the appellate court reviewed all of the summary judgment evidence, questions presented and rendered judgment. Interpretations of restrictive covenants are reviewed *de novo* and liberally construed pursuant to Tex. Prop. Code §202.003(a), "to give effect to their purposes and intent and to harmonize all provisions so that none are rendered meaningless."

Appellants first argued that the park was not within the platted boundaries of the subdivision, so the restrictions did not apply. The restrictions specifically referenced the park as a "Recreational Area," and the plat has a portion labeled as "Recreation Area." As subsequent sections were added to the neighborhood, their restrictions also referenced the park as a "Recreational Area." These restrictions and the plat put parties on notice. The lack of a metes and bounds description is immaterial.

Appellants second contention was that the restrictions were not recited in the deed. Restrictions could apply to a property in a number of ways other than a recitation in the deed, including constructive knowledge.

In their third argument, the appellants contended that the restrictions only applied to the lots in the subdivision. The appellate court noted that this interpretation ignores the provisions of the restrictions that specifically refer to the park, thereby failing to give meaning to every provision.

In their fourth argument, the appellants stated that the restrictions allowed future owners to take the park free and clear of restrictions. However, this provision only applied

when the park is sold at a foreclosure sale in the event of a default on a loan that was used to improve the park.

The Committee then argued that the association did not have the right to convey the property because there was a defect in the transfer of the park to the association. The appellants countered that the Committee did not have standing because it does not have any claim to ownership. The court first determined that the Committee did have standing by virtue of being composed of homeowners and, additionally, by the restrictions that provided an owner the right to prosecute deed restriction violations. Then, the court overruled the Committee's argument about ownership since it would render the Committee without standing if the association did not own the park on behalf of the homeowners.

The court of appeals affirmed the decision of the trial court.

III. CREATION OF ASSOCIATIONS

B. Condominiums – Conveyance of Property Before Incorporated

1. ***Plano Parkway Office Condo. v. Beaver Properties*, LLC; 246 S.W.3d 188 (Tex.App.-Dallas 2007; no pet.)**

Bever Properties, LLC and Jesse M. Taylor, DDS, PA sued the Plano Parkway Office Condominiums seeking a declaration that the condominium declaration did not apply to the unit it purchased because the unit was conveyed by the developer after the condominium declaration was filed in the real property records, but prior to the association filing its articles of incorporation and because the articles of incorporation provided that the association had no members. The trial court granted a partial summary judgment against the association based on §82.101 of the Texas Uniform Condominium Act (TUCA) which requires a certificate of incorporation to be issued for a corporation with members prior to conveying units. The association appealed. The appellate court reversed and remanded.

The appellate court looked at the intent of the legislature when drafting the provisions of the Act, and based on the purpose of the Act and the lack of specified consequences for failure to comply with these particular provisions. The court cites to comment 1 of §3-101 of TUCA which provides that "'the first purchaser of a unit is entitled to have in place the legal structure of the unit owners' association' in order to clarify the relationship between the unit owners and the developer/declarant and to allow unit owners a say in governance during the initial period of developer/declarant control." In its opinion, the court determined that because there are no consequences provided in the statutes for a defect in the articles of incorporation, the legislature's intent was not to defeat the entire condominium regime, but rather to allow the owner to pursue appropriate relief under §82.161. "Adopting Beaver Properties' interpretation could create uncertainty and undermine the very unit owners' rights the Act was intended to protect. The court held that §82.101 of TUCA should be interpreted as directory rather than mandatory.

C. Tex. Prop. Code §204.006

1. ***Gillebaard v. Bayview Acres Ass'n, Inc.*, 263 S.W.3d 342 (Tex.App.-Houston [1st Dist.] 2007, no pet.)**

In 1995 the Gillebaards purchased five lots within Bayview Acres, a deed restricted subdivision. Later, in 1999, owners in Bayview Acres circulated a petition to amend the neighborhood's restrictions in accordance with Chapter 201 of the Tex. Prop. Code. One of the amendments was to include a residential-use restriction. Several years later, in July 2004, the Gillebaards contracted to sell their property to a condominium developer. The following month, relying on §204.006, the individual appellees formed a property owners association petition committee for the purpose of creating a property owner's association and to further amend the deed restrictions, relying on §204.005, to include a modification to the residential-use restriction to require all property within Bayview Acres to be used for single-family, residential purposes. The appellees also simultaneously filed articles of incorporation for Bayview Acres Association, Inc. The amended restrictions were ultimately approved and the Gillebaards sought to have their property excluded from the amended restrictions.

On September 27, 2004, the Gillebaards filed suit against the individual appellees and the association seeking a declaration that the amended restrictions were (1) invalid and unenforceable because appellees did not comply with Chapter 204, or alternatively (2) that the amended restrictions didn't apply to the Gillebaards' property because they opted out under Tex. Prop. Code, Chapter 201, or alternatively (3) that the amended restrictions were invalid and unenforceable because of the changed character of Bayview Acres. Both sides moved for summary judgment. The trial court denied the Gillebaards' motion and granted the appellees' summary judgment finding that the amended restrictions were valid and enforceable.

On appeal, the issue for the court is whether the 1999 restrictions were properly amended. The court looked at §204.006(a), which provides, in pertinent part:

> If existing restrictions applicable to a subdivision do not provide for a property owner's association and require approval of more than sixty percent of owners to add or modify the original dedicating instrument, a petition to add 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.

§204.005 provides, in pertinent part:

"A property owners' association has authority to approve and circulate a petition relating to the extension of, addition to, or modification of existing restrictions."

After reviewing the applicable provisions of §204.006, the court of appeals held that per the plain language, the owners must first seek to amend the existing restrictions for the "sole" purpose to provide for the creation and operation of a property owners' association before said association may circulate a new petition to add or modify the deed restrictions in any other way. The amendments to create a property owners' association under §204.006 and to amend existing restrictions per §204.005 may not be done simultaneously.

IV. ARCHITECTURAL/USE RESTRICTIONS

B. Single Family

1. ***Meehl v. Wise*, 285 S.W.3d 561 (Tex.App.-Houston [14th Dist.] 2009, no pet.)**

Deborah and Mark Meehl bought two adjacent lots in January 2006. They began building a 3800 square-foot home with the intention of running a bed-and-breakfast-style retreat for people with bipolar disorder. The neighbors sought a temporary restraining order and injunction to stop the promotion and construction of the retreat center against the Maureen J. Meehl Bipolar/BPD Foundation, Inc. and the Meehls, individually and as officers of the foundation. The Meehls counterclaimed for declaratory judgment and a permanent injunction. A bench trial resulted in a permanent injunction against the Meehls in November 2007. The Meehls appealed, asking the court to consider whether the trial court erred in enforcing a 1965 deed restriction (which prohibited any lot from being used "for any purpose other than that of a single family residence") to prevent homeowners from allowing a nonprofit corporation to operate a community home for persons with bipolar disorder in the homeowners' residence.

The appellate court determined that Tex. Hum. Res. Code §123.003(a) did not apply, since it pertained to zoning regulations rather than private restrictive covenants. Subsection (b) made unenforceable restrictive covenants adopted on or after September 1, 1985 that restricted the use of property as a community home. However, Tex. Prop. Code §202.003(b) was adopted in 1987 and applied to all restrictive covenants. This section requires the use of the property as a community home to conform to the Hum. Res. Code. The trial court had erred by not applying the correct law, so the permanent injunction was dissolved as an abuse of discretion.

The appellate court determined, through uncontroverted evidence, that Mark Meehl is handicapped, as defined by the Fair Housing Act (FHA). Debra Meehl and the Foundation did not present any evidence to establish that they were part of a protected class under the FHA. Regardless, "membership in a protected class is not a prerequisite for standing to assert a claim under the Fair Housing Act." With respect to the FHA, the only provision that applied was §3604(c) about advertising for sale or rental a preference or limitation based on membership in a protected class. The appellants failed to show that the neighbors had violated that provision.

The appellate court also reviewed whether the Meehls and the Foundation were entitled to a declaratory judgment and a permanent injunction against the neighbors. It determined the Meehls and the Foundation were entitled to declaratory relief that the restrictive covenant does not prohibit the operation of a community home. Since the trial court had not applied the Community Homes Act, the case was remanded so the trial court could consider injunctive relief there under.

C. Trailers/Mobile Homes

1. ***Letkeman v. Reyes*, 299 S.W.3d 482 (Tex.App.-Amarillo 2009, no pet.)**

The Letkemans owned a house, cut it in half, and moved it to a lot they intended to buy. Before the project was completed, neighbors complained to the Letkemans that moving a pre-existing house onto the land violated the deed restrictions. The Letkemans continued with their project, and the neighbors sued for and were granted injunctive relief. The appellate court affirmed. On appeal, the definition of "pre-fabricated" is at issue.

In its analysis, the court looked to Tex. Prop. Code §202.003(a), which provides that restrictive covenants must be "liberally construed to give effect to their purposes and intent." The court further stated that when interpreting such restrictive covenants, the court is required to apply the general rules of contract construction and is obligated to apply the common meaning of words, such as "pre-fabricated" in this case. The Letkemans argued that the term "pre-fabricated" applies only to factory-built structures. Testimony from one of the drafters of the declarations clarified that the intent of the deed restrictions was that all of the homes would be new, site-built construction. The Letkemans acknowledged this intent in a document addressed to the property owners on April 17, 2008. The court found that the term applied to structures that were "already or previously made (whether it is made as a whole or in parts for later assembly) as opposed to something that is erected from scratch."

The appellate court also found that the trial court had properly issued the permanent injunction. Moving a house onto the property was a substantial breach of the deed restrictions, and the trial court did not abuse its discretion. The other owners did not have to prove any actual harm.

2. ***Jennings v. Bindseil*, 258 S.W.3d 190 (Tex.App.-Austin 2008, no pet.)**

Jennings installed a modular home on his property. Neighbors (Bindseil Landowners) sued and filed a traditional motion for summary judgment. Jennings filed a traditional motion for summary judgment and a no-evidence motion for summary judgment. The trial court granted summary judgment in favor of the Bindseil Landowners. The issue on

appeal was whether the modular home violated 1978 deed restrictions against "mobile homes." Jennings appealed.

On appeal, the court examined the construction of the restriction prohibiting "mobile homes" stating that the courts generally do not favor covenants restricting the free use of land; however, if the covenants are "clearly worded and confined to a lawful purpose," the courts will enforce them. In its analysis, citing to Tex. Prop. Code §202.003(a), the court restated the rule which provides as follows:

> When the language of a restrictive covenant is unambiguous, the Tex. Prop. Code requires that the restrictive covenant be liberally construed to give effect to its purpose and intent. However, if the language is found to be ambiguous, the restrictive covenant is construed strictly against the party seeking to enforce the restriction, and all doubts must be resolved in favor of the free and unrestricted use of the property.

Jennings argued that his property was exempt from the deed restrictions based on regulatory, statutory and various other differences between his modular home and other "factory-built" houses. The court analyzed the differences between "modular" and "manufactured" homes, recognizing that they are regulated by different authorities. Nevertheless, the court found the differences to be "technical and minor." Looking at the "common and ordinary meaning," the appellate court determined that the term "mobile home" described factory-built structures, despite the fact that mobile homes are regulated differently from modular homes, which, in turn, are subject to the same regulations as site-built housing. The court examined the meaning of "mobile home" at the time the declaration was written, when the drafters could not have contemplated the emergence of modular housing. In its opinion, the court held that "the covenant is unambiguous in its prohibition of mobile homes and any generic successors, regardless of minor changes in construction technology, design, or regulation." The court instructed the trial court to determine "whether Jennings's home constitutes a mobile home or a generic successor of a mobile home as prohibited by the deed restriction, giving effect to the liberal construction required for unambiguous deed restrictions."

While Jennings concedes that he had notice of the deed restrictions, whether he had notice that his actions in placing a modular home on his property violated deed restrictions is another issue that was sent back to the trial court. The issues of whether Jennings substantially breached the covenant, thereby allowing a permanent injunction, and the award of attorney's fees to the Bindseil Landowners were also remanded.

E. Architectural Control Committees

1. ***Hourani v. Katzen*, 305 S.W.3d 239 (Tex.App.-Houston [1st Dist.] 2009, pet. denied)**

Carlton Park and the Carlton Park Owner's Association were created and the declaration was filed in 1984. The development consisted of 11 acres, divided into 9 lots. The association disclaimed rights to the lake on Lots 7 and 8. However, in 1989, Carlton Park Owner's Association forfeited existence for failure to pay its franchise tax to the Secretary of State.

In 1993, Katzen bought Lot 7 "subject to any and all restrictions, liens, covenants, conditions and easements, if any, relating to [the property], but only to the extent they are still in effect." Lot 7 was bordered by property owned by other people on the sides and the rear of the lot. The lake extended across the front of the lot except for 15 feet on the eastern side of the lake. There was a 15' setback line from the eastern side boundary that was near to or touches the lake. There was also a 15' setback line from the edge of the lake according to the Restrictions, Section 2.4(o). Later, in 2004, Katzen contracted with Sprouse House Custom Homes to build a single-family residence on Lot 7. The City of Piney Point Village granted a special variance to Katzen to build an engineered driveway/bridge within the setbacks. Katzen submitted his plans to the other property owners since there was no association in existence. Two of the homeowners responded with letters of disapproval for the plans. Hourani responded with a letter that threatened to sue if Katzen proceeded with his plans.

In 2005, Katzen sued the other homeowners, seeking declaratory relief alleging that the restrictions prevented access to his property. He requested a special master with a background in engineering. In 2006, Hourani reinstated the association with the Secretary of State. In 2007, the trial court granted summary judgment in favor of Katzen, invalidating part of the restriction and allowing construction of a driveway in compliance with the special master's report. It also awarded attorney's fees to Katzen to be paid by Hourani.

The appellate court found that the trial court did not abuse its discretion in appointing a special master. It was an "exceptional case" and "good cause" existed for a master with a background in engineering to assist the court with complex issues of soil stability and lake retention. The appellate court reviewed the summary (declaratory) judgment *de novo*.

Hourani contended the trial court erred by requiring that plans be submitted to the special master, rather than the board under section 2.2 of the Restrictions. The association had failed to pay its franchise taxes and forfeited existence in 1989. Katzen could not have complied with Section 2.2 in 2004, and nothing in the Restrictions required submission to or written approval from individual property owners in lieu of the board. Even though the association was restored at the time the judgment was rendered, the judge did not require Katzen to resubmit his plans to the owners whose opinions were already known. Additionally, Tex. Prop. Code §204.011 (b) and (c) provided "that the authority of an architectural control committee, that is, as here, vested by virtue of the Restrictions in the property owners' association, will expire when, inter alia, the property owners' association 'ceases to exist.'"

2. ***Indian Beach Prop. Owners' Ass'n v. Linden*, 222 S.W.3d 682 (Tex.App.-Houston [1st Dist.] 2007, pet. denied)**

Linden submitted an ACC application to construct a chain-link fence around the perimeter of her lot. An agent of the association, called the Lindens to inform them that the application had been denied. A setback provision was cited as the reason. The Lindens believed that the setback provision did not apply to the lot, and wrote a letter to the ACC to that effect. The association's agent had said that a letter would be sufficient and would give the ACC another forty-five days to consider the application. The association's agent received the letter on March 15, 2004. The association did not take action in the following forty-five days. The Lindens sent a letter to the association on May 5, 2004 stating that they would begin construction on the fence immediately, pursuant to paragraph 3 of the deed restrictions which presumptively approved the fence since the ACC did not take any action on the application in the 45 days following March 15, 2004.

The association sued on the basis of a deed restriction violation, seeking a permanent injunction, an order to remove the fence and attorney's fees. The Lindens counterclaimed for declaratory judgment that their fence was compliant and attorney's fees. During the trial, the Lindens also asked for a declaratory judgment regarding whether the chain-link was an allowable fencing material and whether it was in harmony with other existing structures. The jury found in favor of the Lindens. The association appealed.

The association alleged the trial court abused its discretion in failure to grant a permanent injunction mandating removal of fence, erred in ordering the association take-nothing, and in finding the equities weighed in favor of Linden and that equitable relief for the association was not expedient, necessary, or proper. The elements for injunctive relief include the existence of a wrongful act, imminent harm, irreparable injury and an absence of an adequate remedy at law. "A party must substantially violate a deed restriction before the trial court may issue a permanent injunction."

A trial court abuses its discretion when it acts arbitrarily and unreasonably, without reference to guiding rules or principles, or misapplies the law to the established facts. The jury found that the construction of the fence was not a wrongful act, because the Lindens complied with the approval process. The association failed to act on the application within 45 days which resulted in a presumptive approval. Therefore, the association failed to satisfy the first element required for injunctive relief.

The association argued the evidence was legally insufficient to support the finding that Linden's construction of the fence was not a wrongful act and that the association proved that it indeed was a wrongful act. For legal sufficiency, the appellate court examined the evidence that supported the finding, ignoring all evidence to the contrary. The appellate court found that the evidence was legally sufficient to support the jury's conclusion that the construction of the fence was not a wrongful act. Linden complied with the instructions she was given by the association's agent by sending a letter to the ACC. The association failed to act on it within 45 days, and paragraph 3 of the restrictions created a presumptive approval.

On question one of the jury charge, the jury found that the Lindens had not received written approval from the ACC to build the fence. In its fifth issue, the association asserted that this showed that the Lindens had violated substantive law, thus allowing for an injunction. The court overruled this issue because the restrictions provided a presumptive approval 45 days after the submission of an application.

The association challenged the legal and factual sufficiency of the evidence that the Lindens did not violate the deed restrictions in building the fence. In its review of legal sufficiency, the appellate court examined the evidence that supported the finding and ignored all evidence to the contrary. For factual sufficiency, the appellate court will review all of the evidence and will set aside a verdict only if the finding is so contrary to the evidence that it is clearly the wrong verdict. The association's agent testified that the letter was not viewed as an application, so the committee did not act. The jury is the ultimate judge of witness credibility. The record did not show that the evidence overwhelmingly countered the verdict.

The association contended that the evidence was factually insufficient to support the jury's finding that the construction of the fence was not a wrongful act in its seventh issue. The court again reviewed all of the evidence. The Lindens complied with the approval process and the association's agent's suggestion for reapplication. Even though the committee did not consider the letter a reapplication, the construction took place after the 45-day review period. There was nothing in the review of the evidence that indicates that the jury's finding on this issue was clearly wrong.

The association asserted there was a conflict in the jury's findings. In question one, the jury found that the fence was constructed without written approval from the ACC. In question two, the jury found that the fence was not wrongfully constructed. In question five, the jury found the Lindens did not violate the deed restrictions when they constructed the fence. The court reviewed the issue *de novo*. The jury questions did not address the same material facts, so they were not in fatal conflict. The court overruled the appellant's issues.

The association argued that the trial court erred when it made the applied findings that the March 15 letter constituted a reapplication; a second 45 day review period started on March 15 because of the letter; and the association's failure to act presumed approval of the chain-link fence. It was not the trial court, but the jury who made these necessary findings.

The association argued it should have been awarded its attorney's fees under Tex. Prop. Code §5.006(a). However, the association was not the prevailing party in this action, so it was not entitled to attorney's fees under §5.006(a).

The association claimed the trial court did not have jurisdiction to grant a declaratory judgment because not all of the homeowners were joined in the suit. Precedent in *Brooks v. Northglen*, *Simpson v. Afton Oaks*, and *Wilchester West LDEF, Inc. v. Wilchester West Fund, Inc.* determined that there was nothing that prevented the trial court from granting complete relief without the joinder of all of the homeowners. Additionally, the association could have asked the trial court to abate the case, join the homeowners or grant special exceptions. The association did not.

The association claimed that there was no legal basis for a declaratory judgment, so the trial court abused its discretion. A purely factual dispute that does not determine rights, statutes or other legal relations is not an appropriate matter for a declaratory judgment. So, the court did err when it rendered declaratory judgment regarding whether the deed restrictions prohibit chain-link fencing and whether the chain-link fence is in harmony with surrounding structures because these were purely fact issues. However, the declaratory judgment stating the fence construction complied with the restrictions was appropriate because it defined the relationship between the Lindens and the association under the deed restrictions.

The association argued the trial court erred because the jury was required to make a conclusion of law regarding the deed restrictions. The appellate court reviewed this issue for abuse of discretion, and the error only rises to the level requiring reversal if an improper judgment was rendered. It concluded that the trial court did submit a question of law to the jury regarding an unambiguous deed restriction, thereby abusing its discretion. However, the jury reached the same conclusion the trial court should have reached, so there was no harm. The association did not allege any harm in its brief, either.

The association contested the award of attorney's fees to the Lindens. Whether a party is entitled to an award of attorney's fees under a particular statute is reviewed *de novo*. The award of attorney's fees under the Declaratory Judgment Act was reviewed for abuse of discretion. The appellate court could not find a reason to reverse the declaratory judgment, so the Declaratory Judgment Act was a reasonable basis for awarding attorney's fees to the Lindens.

J. Nuisance

1. ***Webb v. Glenbrook Owners Ass'n, Inc.*, 298 S.W.3d 374 (Tex.App.-Dallas 2009, no pet.)**

The association sued the Webbs for breach of the association's restrictive covenants. In its lawsuit, the association sought statutory damages pursuant to §202.004(c) of the Tex. Prop. Code as well as attorneys' fees and an injunction to prevent the Webbs from constructing a shed on their property for which no proposal had been submitted. The association also sued for various allegations of nuisance. The parties agreed to a temporary injunction preventing the building of the unapproved shed. Following the trial, the jury returned a verdict for the association awarding $55,000 in damages and $40,400 in attorneys' fees. The Webbs appealed and the appellate court reversed and remanded.

On appeal with regard to the alleged violation of architectural standards, the Webbs argued that the court erred with regard to the submission of jury question twenty as it referenced violations of architectural standards and the association's petition only addressed the alleged failure to get approval for the shed, making no mention of an alleged violation of architectural standards or the existence of such standards.

In its analysis, the court noted that all jury questions must be supported by the pleadings. However, the court analyzed circumstances where issues not contained in the pleadings may be included, considering whether or not any issues of this case had been tried by consent. In its opinion, the court stated that "although issues may be tried by consent, 'written pleadings, before the time of submission shall be necessary to the submission of questions…,'" however, "trial by consent is precluded where proper objection is made on the record before submission to the jury." The court found that the Webbs' attorney made repeated objections with regard to the issue of approval of the structure and the trial court overruled all of the objections. The association never sought to amend its pleadings nor did it argue trial by consent.

The association argued that the Webbs waived their complaint about the pleadings based on the agreed temporary injunction that the parties entered. The agreed temporary injunction recited the violation of the restrictive covenants. The association pled in its petition that "if the Webbs were allowed to continue construction the 'architectural and aesthetic appearances of the neighborhood will be compromised'", however, the court found that the association did not plead any violations or even the existence of architectural standards.

Additionally, with regard to the nuisance claims, the Webbs contested the legal sufficiency of the evidence to support the jury's findings as to "(1) operation of security cameras, (2) taking photographs of Glenbrook members and of the neighbors' property, (3) placing animal feces on a neighbor's property, (4) placing a dead rodent on a neighbor's property and (5) the totality of circumstances." According to the trial court's record, the Webbs failed to object to the legal sufficiency with regard to these matters therefore they waived challenges to legal sufficiency.

Finally, with regard to the permanent injunctions rendered by the trial court, the Webbs argued on appeal that the injunctions were vague, overbroad and unsupported by the jury's findings.

The injunctions rendered by the trial court required the Webbs to (1) refrain from making "any improvements, changes or substantial repairs on or to the exterior of the property without first submitting a written application for architectural approval…;" (2) refrain from "yelling obscenities at all members and other people within the boundaries of Glenbrook…;" (3) refrain from "yelling obscenities at members, wherever located"; (4) "immediately remove the

cameras located on the exterior of the dwelling…and to refrain from installation or operation of any surveillance cameras anywhere on the exterior of the Property…;" (5) refrain from "playing excessively loud music that can be heard from outside the dwelling located on the property;" (6) refrain from "playing obscene music that can be heard outside of the dwelling located on the property;" (7) refrain from "making obscene gestures…to any member, wherever located and to other people while publicly visible anywhere within the Glenbrook boundaries;" (8) refrain from "taking any photographs, audiotapes and/or video tapes of any property within Glenbrook, or persons on any premises within Glenbrook, other than the Property or persons who reside therein or who are guests thereon;" (9) refrain from "disposing of dead rodents or creatures of any species, by placing them on the property of any other member of Glenbrook;" (10) refrain from "disposing of animal feces or any other form of excrement or trash…on the property of another member of Glenbrook;" (11) refrain from "driving vehicles up and down the property lines of the Property nearer than forty feet to the Property's boundaries…and to refrain from driving any vehicles on the Property at a speed faster than 10 miles per hour."

The appellate court reversed and remanded injunctions numbered 1, 3, 4, 6, 7 and 8; reversed and rendered judgment dissolving the injunctions on 9, 10 and 11; and affirmed injunctions numbered 2 and 5.

Specifically, the appellate court found with regard to injunctions numbered 1, 3, and 4, 6, 7 and 8, that the relief granted exceeded the relief requested and was not supported by the evidence. These injunctions were reversed and remanded to the trial court.

With regard to injunction number 2 above, the Webbs argued that it was vague and indefinite and that a description of the land was required. Because the Webbs described the boundaries of the association in detail in their statement of facts on appeal, the appellate court overruled this objection.

With regard to injunction number 5, the appellate court looked to the plain meaning of the word "loud" and determined that this restriction is similar to the "reasonable person standard and therefore is not so vague or overly broad as to render it unenforceable."

For injunctions numbered 9 and 10, the appellate court found that the association never alleged in its petition that the Webbs disposed of dead rodents or animal feces on other members' properties nor did it request relief related to same. Because these injunctions were not supported by pleadings, evidence or requested relief, the appellate court reversed and rendered a judgment dissolving these injunctions.

Finally, for injunction numbered 11 above, the appellate court found that while the association's pleadings did allege that the Webbs would drive vehicles on their property "in an unsafe and annoying manner" creating a nuisance and requested relief for same, no question on this issue was presented to the jury. On appeal, the association didn't respond to the Webbs' argument regarding this injunction. Because there was no jury support for this injunction, the appellate court reversed and rendered a judgment dissolving this injunction.

2. ***Tex. S. Univ. v. Cape Conroe Prop. Owners Ass'n, Inc.*, 245 S.W.3d 626 (Tex.App.-Beaumont 2008, no pet.)**

Cape Conroe filed suit against TSU for non-payment of annual assessments on thirteen lots acquired by the university and for damages for TSU's "taking of its property interest." TSU responded with a plea to the jurisdiction.

TSU asserted that Cape Conroe's pleadings do not demonstrate that TSU waived immunity nor allege a taking. TSU further asserts that it is protected from foreclosure as the lots are real property owned by a university, a political subdivision of the State.

The court examined the difference between immunity from suit and immunity from liability. Under the principle of immunity from liability, the State is protected "from judgment even if the Legislature has expressly consented to the suit," however the court may still have jurisdiction to hear the case. Under immunity from suit, the State must expressly consent to the suit, otherwise the action is barred and the court will not have jurisdiction to hear the case.

TSU challenged the sufficiency of Cape Conroe's pleadings, however the Court overruled this challenge finding that Cape Conroe's pleadings were sufficient "to put TSU on notice that Cape Conroe sought to hold TSU liable for the taking of Cape Conroe's entitlement to annual maintenance fees." The Court found that Cape Conroe notified TSU of its claim and that TSU refused to pay the annual maintenance fee; that Cape Conroe alleged in its pleadings that TSU acquired the lots for a public purpose and alleged a violation of Article I, Section 17 of the Texas Constitution. Specifically, Cape Conroe alleged that TSU "failed to hold formal condemnation proceedings for the purpose of compensating Cape Conroe for taking its property interest for public use."

TSU further argued that its failure to comply with the deed restrictions does not constitute a taking and that TSU never owed assessments because such property restrictions cannot be enforced against the state. The Court, however, noted (citing *Harris County Flood Control District v. Glenbrook Patiohome Owners Ass'n*) that the "First Court of Appeals concluded that the governmental taking of property burdened with such restrictive covenants, when taken for public use, allowed a property owners' association to recover damages."

In its pleadings, Cape Conroe also alleged a nuisance claim against TSU for TSU's refusal on multiple occasions to mow "severely overgrown grass and weeds on the property." The Court noted that Article I, Section 17 of the Texas Constitution recognizes a nuisance claim as an alternative theory for a taking under certain circumstances.

The court examined §43.002 of the Tex. Prop. Code with regard to TSU's contention that the trial court erred in

denying its plea to the jurisdiction with regard to foreclosure of the properties owned by TSU. §43.002 provides in pertinent part:

"The real property of the state, including…the real property of a political subdivision of the state is exempt from attachment, execution, and forced sale…"

The court in affirming the judgment of the trial court found that while it does invalidate a lien and void a judgment, the terms of this provision, "do not divest the trial court of jurisdiction over the creditor's claims" and "does not create immunity from a takings claim."

R. Setbacks

1. ***Schroeder v. Ranch Escondido Cmty. Improvement Ass'n*, 248 S.W.3d 415 (Tex.App.-Beaumont 2008, no pet.)**

The Schroeders filed suit for a declaratory judgment that the association could not impose a requirement of a "Harmonious Sight Line" in addition to the 30-foot building setback in the deed restrictions. The trial court granted summary judgment in favor of the association.

On appeal, the Schroeders argued that the matter is ripe, and the association should be enjoined from amending the deed restrictions. The court determined that the case was not ripe because it was not certain as to whether the deed restrictions would be amended.

The Schroeders also argued that a request for injunction should not be subject to the doctrine of ripeness. The appellate court disagreed holding that relief cannot be granted based on a situation that may or may not arise in the future.

The appellate court affirmed the judgment of the trial court.

V. ASSESSMENTS

A. Judicial Foreclosure

1. ***Tex. S. Univ. v. Cape Conroe Prop. Owners Ass'n, Inc.*, 245 S.W.3d 626 (Tex.App.-Beaumont 2008, no pet.)**

TSU argued that the court erred in denying its plea to the jurisdiction with regard to foreclosure of the state-owned properties pursuant to §43.002 of the Tex. Prop. Code. §43.002 provides, in pertinent part, that "the real property of the state, including…the real property of a political subdivision of the state is exempt from attachment, execution, and forced sale…"

The court found that while this provision does invalidate a lien and void a judgment, the terms of this provision, "do not divest the trial court of jurisdiction over the creditor's claims" and "does not create immunity from a takings claim." Refer to Section IV.J.2 for discussion.

2. ***Goddard v. Northhampton Homeowners Ass'n, Inc.*, 229 S.W.3d 353 (Tex.App.-Amarillo 2007; no pet.)**

Northhampton Homeowners Association, Inc. filed suit against Goddard for nonpayment of annual assessments and for monetary damages. The trial court granted a summary judgment in favor of the association and Goddard appealed.

Goddard purchased property within the association's jurisdiction in 2003. In 2004, the board of directors for the association raised the annual assessment from $480.00 to $600.00 payable in monthly installments. Goddard refused to pay the increased monthly installment and continued to pay at the rate of the 2003 assessment, which was $40.00 per month, claiming the association did not have the authority to raise the assessment. The association rejected the deficient payments and filed suit seeking foreclosure of its lien. Goddard counterclaimed alleging violations of the declaration and sought declaratory relief to determine if a 2/3 affirmative vote of the owners was required in order to raise the assessment as per the declaration. The issue was whether or not the association was required to obtain an affirmative 2/3 vote of the owners prior to raising the annual assessment.

In a summary judgment motion, the association alleged that the assessment was proper and pursuant to the association's dedicatory instruments filed of record (specifically, the declaration and bylaws) and the lien was valid. The association alleged that its dedicatory instruments when read together provide that the board of directors for the association had the authority to set the annual assessments.

The declaration provided that, "the Board of Directors of the Association shall fix the date for the commencement of the assessment. The board is required to send notice of the annual assessment to each owner of a residential parcel located within the development." The association's bylaws provide that, "the Board of Directors has the power to establish, levy, assess and collect the assessments or charges provided in Article III…every person who is a record owner of a residential parcel subject to the declaration is a member of the Association. Further, the rights of membership are subject to payment of the annual and special assessments levied by the association."

After analyzing the declaration and bylaws for the association, the court determined that the requirement of a 2/3 affirmative vote provided for in the declaration was subject to the limitations of the preceding section three, which set the application period of that provision to expire on December 31, 1984. Because that provision had expired, the court then had to review the dedicatory instruments to determine how the association would have the authority to raise the assessments. The court explained that the association's bylaws provide that the board of directors has the power to "establish, levy, assess and collect the assessments or charges…" The bylaws and declaration were filed in the real property records and pursuant to Tex. Prop. Code, Chapter 202 are dedicatory instruments "that control the operation" of the association. The appellate court affirmed the judgment of the trial court.

3. ***Haas v. Ashford Hollow Cmty Improvement Ass'n, Inc.*, 209 S.W.3d 875 (Tex.App.– Houston [14th Dist.] 2006, no pet.)**

The association filed suit for collection of annual assessments (2003-$301.01; 2004-no amount given in the petition), foreclosure of a lien and recovery of attorney's fees and costs. Haas, the property owner, filed a plea to the jurisdiction. The trial court entered a judgment in favor of the association for annual assessments, attorney's fees, costs and post-judgment interest and ordered foreclosure on the lien.

Haas appealed with five issues: (1) trial court lacked jurisdiction to enforce the lien; (2) trial court lacked jurisdiction over the association's claim; (3) trial court erred in awarding 2004 assessments; (4) trial court erred in awarding attorney's fees; and (5) attorney's fees were excessive. The appellate court affirmed the judgment of the trial court.

Per Tex. Gov't. Code §25.1032(c)(3), the Harris County Civil Courts at Law have subject matter jurisdiction to hear a suit for the enforcement of a lien on real property, regardless of the amount in controversy.

Additionally, the amount in controversy met the minimum jurisdictional limit of $500, excluding interest, statutory or punitive damages and penalties, attorney's fees and costs. The court restated the rule as follows: "if one plaintiff asserts multiple claims against one defendant, the amounts of each separate claim are aggregated to determine the amount in controversy." Even though the association's claim to the 2004 annual assessments was not ripe at the time of the filing of the petition, the 2004 assessments would come due before the trial date. Haas did not proffer any evidence of bad faith on the part of the association. The association did not plead a specific amount as to the 2004 assessments, but this did not deprive the court of jurisdiction. The amount of the 2004 claim and the fact that it was delinquent was stipulated to at trial.

In his third issue, Haas complains that the trial court erred in awarding the 2004 assessments because the association did not amend its pleadings to include the amount of the 2004 assessments prior to trial. The claim was tried by consent when Haas stipulated to the amount of the 2004 assessments and that he was delinquent in paying that amount.

On the alleged error of the award of attorney's fees, Haas claims that the association did not comply with Tex. Prop. Code §209.008(a) by giving prior notice that the owner would be charged attorneys fees after a date certain. The court ruled that §209.008(a) does not apply when the suit is to "merely collect delinquent assessments or to enforce a lien due to nonpayment of the assessments."

As far as the reasonableness of the attorney's fees awarded, the court ruled them reasonable under the factors listed in Tex. Prop. Code §5.006(b) since it was unusual for a defendant to challenge jurisdiction and proceed to trial, especially when the defendant has admitted the assessments, interest, late charges and reasonable attorney's fees are secured by a lien on the property. The appellate court also noted that the matters about jurisdiction and §209.008(a) were unusual, and they had to perform extensive legal analysis on these issues.

B. Nonjudicial Foreclosure

1. ***Duarte v. Disanti*, 292 S.W.3d 733 (Tex.App.-Dallas 2009; no pet.)**

Homero Duarte's condominium unit was foreclosed upon by the condominium association at a non-judicial foreclosure sale for non-payment of assessments owed to the association. At the foreclosure sale, the property was purchased by Mark Disanti, a third party. Duarte wanted to redeem the property, but Disanti refused. Duarte brought suit seeking redemption of the foreclosed condominium. The trial court held that Chapter 209 of the Tex. Prop. Code did not apply to condominiums and rendered a judgment for Disanti. Duarte appealed.

The issue raised by Duarte is whether or not the redemption rights provided for in Chapter 209 apply to condominiums created prior to the enactment of TUCA. Under §209.011, the Code specifically states that Chapter 209 does not apply to condominiums governed by Chapter 82 of the Tex. Prop. Code. Duarte argued that because the condominium regime was created prior to the enactment of TUCA, it was not "governed" by Chapter 82 of the Tex. Prop. Code.

The court of appeals found that while the subject condominium regime was created prior to the enactment of the Act, certain provisions of Chapter 82 apply to all condominiums regardless of the date of creation. Specifically, §82.002, which provides the condominium association with a lien on the property for assessments and other charges due to the association, provides the authority for non-judicial foreclosure and gives a right of redemption for an association-foreclosed unit purchased by the association, applies to condominiums created prior to as well as after the enactment of Chapter 82 of the Code.

2. ***EMC Mortgage Corp. v. Window Box Ass'n, Inc.*, 264 S.W.3d 331 (Tex.App.-Waco 2008, pet. denied)**

Dolores Vande Veegaete, the owner of a condominium unit passed away in August 2001. Four months later, the note holder (Liberty Lending) sent a notice of default and intent to accelerate. The association filed a notice of lien for unpaid assessments during the same month. In January 2002, the note holder sent another letter to Vande Veegaete stating the mortgage was in default and in May 2002. The association posted the property for June 2002 foreclosure and acquired the property at the sale.

In February 2003, the note holder (now EMC Mortgage) filed suit to foreclose its lien, but subsequently dismissed its claims over three years later. EMC later sent notices, beginning in June 2006 to Vande Veegaete's estate and then posted the property for foreclosure in November 2006. The association then filed suit alleging that EMC is barred by

limitations and cannot proceed with foreclosure. The trial court granted a summary judgment in favor of the association and EMC appealed.

EMC contended that the association did not have standing to assert a statute of limitations defense as a junior lienholder. Specifically, EMC asserted that "(1) its lien (was) subordinate to EMC's lien' (2) it (had) an equitable right to surplus funds; (3) Vande Veegaete's statute of limitations defense (did) not run with the land, and (4) its ownership status provided no additional rights because it acquired property before the maturity date."

The court examined the general rule: "As a general rule, only the mortgagor or a party who is in privity with the mortgagor has standing to contest the validity of a foreclosure sale pursuant to the mortgagors deed of trust." The Court goes on to quote the exception, which states, "however, when the third party has a property interest, whether legal or equitable, that will be affected by such a sale, the third party has standing to challenge such a sale to the extent its rights will be affected by the sale."

As owner of the property, the association had an interest in the property and said interest would be affected by EMC's foreclosure, therefore the association had standing to challenge the foreclosure and to assert any applicable defenses.

Additionally, EMC contended the trial court erred by granting the summary judgment as the foreclosure was not barred by limitations.

EMC argued that the note was not accelerated and therefore pursuant to Tex. Civ. Prac. & Rem. Code Ann section 16.035(e), "the four-year limitations period does not begin to run until the maturity date of the last note, obligation or installment." The association argued that the note was accelerated thereby beginning the running of the limitations period.

In order to accelerate the note, the note must contain the option to accelerate and the note holder must send a notice of intent to accelerate and a notice of acceleration. While the note did contain the option to accelerate and the note holder did send a notice of intent to accelerate, the second letter sent in August 2002, the court determined could, "at most, be construed as a notice of intent to accelerate." In order to accelerate the note, the holder must "unequivocally advise the debtor that the debt is immediately due and payable."

D. Increasing Maintenance Fees

1. ***Goddard v. Northhampton Homeowners Ass'n, Inc.*, 229 S.W.3d 353 (Tex.App.-Amarillo 2007; no pet.)**

The declaration established that, in order to raise the annual assessment, there must be an affirmative vote of 2/3 of the owners. However, following section of the declaration set the 2/3 vote requirement to expire on December 31, 1984. Because the provision had expired, the court had to review the dedicatory instruments to determine how the association would have the authority to raise the assessments. The court explained that the association's bylaws provide that the board of directors has the power to "establish, levy, assess and collect the assessments or charges…" The bylaws and declaration were filed in the real property records and pursuant to Tex. Prop. Code Chapter 202 are dedicatory instruments "that control the operation" of the association. Refer to Section V.A.2 for discussion.

H. Inverse Condemnation

1. ***Tex. S. Univ. v. Cape Conroe Prop. Owners Ass'n, Inc.*, 245 S.W.3d 626 (Tex.App.-Beaumont 2008, no pet.)**

The court noted (citing *Harris County Flood Control District v. Glenbrook Patiohome Owners Ass'n*) that the "First Court of Appeals concluded that the governmental taking of property burdened with such restrictive covenants, when taken for public use, allowed a property owners' association to recover damages." Additionally, the court noted that Article I, Section 17 of the Texas Constitution recognizes a nuisance claim as an alternative theory for a taking under certain circumstances. Refer to Section IV.J.2 for discussion.

I. Developer Liability for Assessments

1. ***Priddy v. Rawson*, 282 S.W.3d 588 (Tex.App.-Houston [14th Dist.] 2009, pet. denied)**

In January 1981, Wolfe Airpark, Inc. filed declarations of covenants, conditions and restrictions for Wolfe Airpark Civic Club. The declaration provided authority for the board of directors to charge the declarant up to ten percent (10%) of the annual assessment rate applicable to regular lot owners and defines the "declarant" as Wolfe Airpark, Inc., its successors and assigns. In February 1991, Wolfe Airpark, Inc. conveyed one hundred (100) undeveloped lots to Manvel Aviation, Inc. with "all and singular the rights an appurtenances thereto in anywise belonging" to Wolfe Airpark, Inc.

In April 2003, the civic club sued former members of board and the former members of board counterclaimed, suing current members of board and declarant's successor, Manvel Aviation, Inc. as third-party defendants for fraud, breach of fiduciary duty, director liability for deed-restriction violation and non-payment of assessments. Current board members and successor were granted summary judgment on former board member's claims. Former board members' claims against current board members and successor were severed from the rest of the suit with the airpark. The court affirmed the summary judgment.

The main disputes with regard to the interpretation of the declaration were "(1) whether Manvel assumed the status of Declarant upon conveyance of the 100 undeveloped lots; (2) whether Manvel owes assessments; and (3) whether Manvel was entitled to a vote at the Civic Club's annual board elections." Appellants argued that Manvel did not assume the status of Declarant, therefore it owed assessments at the

higher rate and due to its failure to pay the higher rate, its voting rights were suspended.

Appellants argued that the issue as to whether or not Manvel assumed declarant status under the deed must be resolved before the court could consider application of the "safe harbor" provision because such resolution would also determine whether or not Manvel was delinquent on its assessments and entitled to vote at the board elections where appellees were elected.

The appellate court found that §2.28 of the Tex. Non-Profit Corp. Act, the "safe harbor" provision, is not an affirmative defense. Rather, "the statutory language makes clear that the party seeking to impose liability bears the burden of proof." Additionally, the appellate court found that appellants never argued that the declarancy issue must be resolved first for safe harbor to apply; therefore they failed to preserve this issue for appeal and waived the argument.

The current board of directors were charging declarant's successor a reduced rate of assessment, as prior boards of directors had done in the past (including boards that two of the appellants had served). The court found that the current board members had acted with ordinary care when they had, in good faith, relied on information prepared by previous boards to determine the rate of assessment for the declarant's successor.

With regard to appellants claim for breach of fiduciary duty, the appellate court analyzed the argument as it related to Dickinson, President of Manvel Aviation, Inc. and the required elements to be met in order to prevail on such a claim. For a breach of fiduciary duty claim, "a plaintiff must show (1) a fiduciary relationship between the plaintiff and the defendant; (2) a breach by the defendant of his fiduciary duty to the plaintiff, and (3) an injury to the plaintiff or benefit to the defendant as a result of defendant's breach." The court also acknowledged that there are circumstances under which a fiduciary duty arises without a formal relationship. Specifically, the court stated that in order to enforce a fiduciary duty that arose from an informal relationship, "the relationship of trust and confidence must exist prior to and apart from, the agreement that is the basis of the suit."

Appellees argued that there was no evidence supporting any fiduciary duty owed by Dickinson. Additionally, the court noted in its opinion, that the record does not reflect nor did appellants contend that Dickinson was ever a board member or establishing a relationship of trust that would give rise to an informal fiduciary duty. The appellate court found that the appellants failed to address the fiduciary duty issue and therefore waived any error.

VI. ENFORCEMENT OF RESTRICTIONS

A. Authority to Enforce

1. ***Rakowski v. Comm. to Protect Clear Creek Village Homeowners' Rights*, 252 S.W. 3d 673 (Tex.App.-Houston [14th] 2008, pet denied)**

The court determined that the Committee did have standing by virtue of being composed of homeowners and additionally, by the restrictions that provided an owner the right to prosecute deed restriction violations. Refer to Section II.D.1 for discussion.

2. ***Schindler v. Baumann*, 272 S.W.3d 795 (Tex.App.-Dallas 2008, pet. denied)**

The Schindlers sued Baumann for damages under breach of contract, negligence and violations of TUCA alleged to be a result of a water leak from Baumann's condominium unit above the Schindlers' unit.

For the breach of contract cause of action, the Schindlers relied only on the association's declaration of covenants, conditions and restrictions to evidence a contract between the Schindlers and Baumann. The court, however, rejected this evidence and explained that "nothing in (the) declarations…purport(ed) to create a contract between appellants and Baumann or (vest) appellants the right to sue to enforce the declaration" as this matter was between two owners rather than an owner or owners and the association.

The Schindlers also asserted a cause of action for negligence, however the only supporting evidence they submitted was an affidavit of David Schindler, which the court found to be insufficient as he had no personal knowledge making the affidavit conclusory.

Finally, the Schindlers asserted that they were entitled to damages under §82.117 of TUCA, which requires Baumann to pay for damage caused by negligent and willful misconduct. The court explained that "the fact that a person has suffered harm from an alleged violation of statute does not automatically give rise to a private cause of action," and the Schindlers presented no evidence supporting their contention of negligent and/or willful misconduct.

The appellate court affirmed the judgment of the trial court.

3. ***Girsh v. St. John*, 218 S.W.3d 921 (Tex.App.-Beaumont 2007, no pet.)**

St. John, sued her neighbors, the Girshes for putting a mobile home on their property in violation of the deed restrictions. The trial court ruled in favor of St. John. On appeal, the Girshes argued that St. John did not have standing to file suit and that the trial court failed to find that the Girshes established their defenses.

The court determined that St. John had standing to sue since she was "entitled to benefit under the terms of a restrictive covenant." Also, the restrictive covenants explicitly stated

that property owners in the subdivision may enforce the deed restrictions.

The court then turned to the issue of the statute of limitations. The statute of limitations in deed restriction cases is four years. The limit is measured from the time the breach of the restrictions occurred. The Girshes purchased and placed the mobile home on their property in 1984. St. John presented evidence that the mobile home was undiscoverable until 1998 or 1999 because another neighbor had not cleared brush from his property until then. The Girshes presented testimony at trial that indicated the trailer was visible well before the end of 1997. For the "discovery rule" to apply, "the nature of the injury must be inherently undiscoverable and that the injury itself must be objectively verifiable." The second prong was not in dispute. The court determined that the nature (or category, rather than this specific incident) of the injury was inherently discoverable with reasonable diligence. A full-sized, mobile home in a populated, residential subdivision would have been discovered with reasonable diligence, despite the "presence of indigenous flora spontaneously growing nearby."

The appellate court reversed the trial court's decision, and rendered a judgment that St. John take nothing.

B. Construction / Interpretation of Restrictive Covenants

1. ***Letkeman v. Reyes*, 299 S.W.3d 482 (Tex.App.-Amarillo 2009, no pet.)**

In its analysis, the court looked to Tex. Prop. Code §202.003(a), which provides that restrictive covenants must be "liberally construed to give effect to their purposes and intent." The court further stated that when interpreting such restrictive covenants, the court is required to apply the general rules of contract construction and is obligated to apply the common meaning of words. Refer to Section IV.C.1 for discussion.

2. ***Jennings v. Bindseil*, 258 S.W.3d 190 (Tex.App.-Austin 2008, no pet.)**

Courts generally do not favor covenants restricting the free use of land; however, if the covenants are "clearly worded and confined to a lawful purpose," the courts will enforce them. The words and phrases of the restrictive covenants are given their "common and ordinary meaning," at the time the declaration was written. Refer to Section II.B.1 for discussion.

3. ***Rakowski v. Comm. to Protect Clear Creek Village Homeowners' Rights*, 252 S.W. 3d 673 (Tex.App.-Houston [14th] 2008, pet denied)**

Interpretations of restrictive covenants are reviewed *de novo* and liberally construed pursuant to Tex. Prop. Code §202.003(a), "to give effect to their purposes and intent and to harmonize all provisions so that none are rendered meaningless." Refer to Section II.D.1 for discussion.

F. Injunctions

1. ***Webb v. Glenbrook Owners Ass'n, Inc.*, 298 S.W.3d 374 (Tex.App.-Dallas 2009, no pet.)**

The Webbs argued on appeal that the permanent injunctions rendered by the trial court were vague, overbroad and unsupported by the evidence. Several injunctions were ultimately overruled, reversed and remanded by the appellate court because the relief granted by the trial court was not supported by the evidence. Refer to IV.J.1 for discussion.

2. ***Letkeman v. Reyes*, 299 S.W.3d 482 (Tex.App.-Amarillo 2009, no pet.)**

The appellate court found that the trial court had properly issued the permanent injunction. Moving a house onto the property was a substantial breach of the deed restrictions, and the trial court did not abuse its discretion. The other owners did not have to prove any actual harm. Refer to IV.C.1 for discussion.

3. ***Indian Beach Prop. Owners' Ass'n v. Linden*, 222 S.W.3d 682 (Tex.App.-Houston [1st Dist.] 2007, pet. denied)**

The elements for injunctive relief include the existence of a wrongful act, imminent harm, irreparable injury and an absence of an adequate remedy at law. "A party must substantially violate a deed restriction before the trial court may issue a permanent injunction." Failure to grant an injunction is reviewed on an abuse of discretion standard. Refer to Section IV.E.2 for discussion.

I. Proper Parties to Litigation

1. ***Chen v. Breckenridge Estates Homeowners Ass'n., Inc.*, 227 S.W.3d 419 (Tex.App.-Dallas 2007, no pet.)**

Breckenridge Estates Homeowners Association, Inc. filed suit against Steven and Sherry Chen seeking an injunction from the court ordering the Chens to remove an "unapproved and non-conforming structure" from the property. In March of 2003, the trial court granted summary judgment in favor of the association and the Chens appealed.

In October 2004, Steven Chen filed articles of incorporation under the name of Breckenridge Estates Homeowners Association, Inc. and Chen was listed as president. In December 2005, the association filed a motion to enforce the prior summary judgment and the Chens responded claiming that at the time the judgment was rendered, there was no entity by the name of Breckenridge Estates Homeowners Association, Inc. in existence on record with the Secretary of State. In January 2006, the trial court entered an order for the association for costs, attorneys' fees and for the removal of the structure. The January 2006 order listed the association as "Breckenridge Park Estates No. 1 and No. 2 Homeowners Association" and the Chens argue that the trial court erred in substituting one plaintiff for another. Additionally the Chens argue that the court had lost plenary

power by that time and thus rendered the enforcement order void.

In its opinion, the court noted the difference between misnomer and misidentification. "A misnomer does not invalidate a judgment as between parties where the record and the judgment together point out with certainty, the persons and subject matter to be bound" and "the Chens never indicated that there was any confusion as to what entity was suing them and they never challenged the identity of the Breckenridge Estates Homeowners Association, Inc." The court found, at most, a misnomer occurred in this case.

The court affirmed the trial court's judgment.

2. ***Indian Beach Prop. Owners' Ass'n v. Linden*, 222 S.W.3d 682 (Tex.App.-Houston [1st Dist.] 2007, pet. denied)**

The association claimed the trial court did not have jurisdiction to grant a declaratory judgment because not all of the homeowners were joined in the suit. Precedent in *Brooks v. Northglen*, *Simpson v. Afton Oaks*, and *Wilchester West LDEF, Inc. v. Wilchester West Fund, Inc*. determined that there was nothing that prevented the trial court from granting complete relief without the joinder of all of the homeowners. Additionally, the association could have asked the trial court to abate the case, join the homeowners or grant special exceptions. The association did not. Refer to Section IV.E.2 for discussion.

3. ***Allegro Isle Condo. Ass'n. v. Casa Allegro Corp.*, 28 S.W.3d 676 (Tex.App.-Corpus Christi 2000, no pet.)**

The association sued Casa Allegro Corp. for erecting a fence across an alleged easement that allowed ingress and egress along a portion of a circular drive. The trial court refused to render a declaratory judgment in this case without joining the mortgagees of the owners of property in the association.

The appellate court found that the trial court had not abused its discretion when it refused to render judgment without the involvement of the mortgagees. The evidence presented showed the inability to exit was inconvenient and a safety hazard, and that this situation could affect property values. The court specifically stated it did not hold that it would have been reversible error for the trial court to proceed to judgment without the mortgagees. Rather, the evidence supported the trial court's decision, and the appellate court had no grounds by which to overrule it.

T. Rights of Mineral Owner After Estate Severed

1. ***Veterans Land Bd. of the State of Tex.v. Lesley*, 281 S.W.3d 602 (Tex.App.-Eastland 2009, pet. denied)**

In 1952, Wyatt and Mildred Hedrick, owners of about 4,100 acres of land now known as the Mountain Lakes Development (Mountain Lakes), sold and conveyed to H.S. Foster full interest in the surface estate of Mountain Lakes Development and a one-half interest in the mineral estate reserving the other one-half interest for themselves. The deed to Foster conveyed the executive estate to Foster providing that Foster "shall have full complete and sole right to execute oil, gas and mineral leases covering all the oil, gas and other minerals in the following described land."

Betty Yvon Lesley, Kenneth Lesley and Bobby John Foster, heirs and devisees of H.S. Foster acquired interest to the entire surface estate and one-half interest in and to the mineral estate of Mountain Lakes. In 1998, the Lesleys and Foster sold and conveyed the surface estate to Mountain Lakes to Bluff Dale, a developer whose intent was to either develop the property as a residential neighborhood or sell the property to another developer. The Lesleys and Foster retained a one-fourth interest in the mineral estate and granted to Bluff Dale the right to execute all future oil, gas, sulphur and other mineral leases (Executive Estate). Bluff Dale later conveyed the property to Properties of the Southwest, L.P. (who later changed its name to Bluegreen) subject to "any prior reservations or conveyances of oil, gas and other minerals, restrictions, covenants, conditions, rights-of-way and easements of record."

Bluegreen then developed the property as a residential subdivision known as the Mountain Lakes Development. Bluegreen subsequently recorded a declaration of covenants, conditions and restrictions (Declaration) and established a property owners association. One of the restrictions contained in the Declaration was one prohibiting any "commercial oil drilling, oil development operations, oil refining, quarrying or mining operations of any kind..."

Appellees, (1) Betty Yvon Lesley and Kenneth Lesley and (2) Kenneth Lesley and Perry Elliot (as independent executors of the Estate of Bobby John Foster) filed suit against Bluff Dale, Bluegreen, the association and numerous individual lot owners and the Veterans Land Board of the State of Texas alleging among other things that the defendants, as the executive estate owners owed a duty of utmost good faith to them as non-executive mineral interest owners, that the duty was fiduciary and that they breached the duty. They argue specifically that Bluegreen and the association breached this duty by creating and recording the restriction that prohibited mineral development.

Appellees sought a declaration from the court regarding ownership of the mineral interests, ownership of the executive rights, breach of the alleged duty owed to the non-executive mineral interest owner, and that Declaration was void and unenforceable.

The trial court granted the association's no-evidence partial summary judgment only with regard to the issue of breach of contract and breach of fiduciary duty, holding that the association "was not liable to appellees for breach of any duty associated with ownership of the executive rights because the [association] did not own, and had not owned, the executive rights. The association did not appeal.

In its judgment, the trial court determined that Bluegreen was the owner of the executive rights and thus breached the duty owed to appellees as non-executive mineral interest owners. The court further ruled that "Bluegreen breached

the contractual requirements of the Lesley/Foster to Bluff Dale deed and the Lesley to Bluff Dale Deed by failing to give requisite notice of the filing of the Declaration of Covenants," and determined that the declaration was unenforceable and could not be used to restrict or prohibit mineral development.

The court of appeals held that there was no affirmative duty to lease the minerals. The court analyzed In re Bass, which "establishes that no breach of fiduciary duty can occur until the executive exercises the executive rights" and "a breach occurs if (1) the executive exercises the executive rights, (2) the executive acquires benefits from the minerals for himself by exercising the executive rights, and (3) the executive fails to acquire every benefit for the non-executive mineral owners that he acquired for himself."

The court further held that Bluegreen did not exercise the executive rights by creating and recording the declaration. In fact, the court states that the recording of restrictions prohibiting mineral development shows that Bluegreen was not intending to exercise the executive rights and thus no duty arose.

Appellees argued that Bluegreen breached the notice requirements in the deeds when it didn't notify them of the recording of the declaration. The court noted that Bluegreen was not a party to the original deeds to Bluff Dale and would thus only be bound by its notice requirement if the covenant was one that ran with the land. Because the court determined that the notice requirement did not burden the land and it was a personal covenant and did not run with the land.

The appellate court reversed the judgment of the trial court in its entirety.

VII. DEFENSES TO ENFORCEMENT OF RESTRICTIONS

A. Abandonment, Waiver and Laches

1. ***Ski Masters of Tex. v. Heinemeyer*, 269 S.W.3d 662 (Tex.App.–San Antonio 2008, no pet.)**

The court explained that "abandonment occurs when there are 'substantial violations within the restricted area.'" Ski Masters had the burden to prove that "the violations were 'so great as to lead the mind of the average man to reasonably conclude that the restriction…had been abandoned and its enforcement waived.'" *Oilfield v. City of Houston*, 15 S.W.3d 219, 226-27 (Tex.App.-Houston [14th Dist] 2000, pet. denied). Three property owners testified that no property was being used for purposes other than residential. Refer to Section II.A.1 for discussion.

C. Statute of Limitations

1. ***Girsh v. St. John*, 218 S.W.3d 921 (Tex.App.-Beaumont 2007, no pet.)**

The statute of limitations in deed restriction cases is four years. The limit is measured from the time the breach of the restrictions occurred. For the "discovery rule" to apply, "the nature of the injury must be inherently undiscoverable and that the injury itself must be objectively verifiable." The court determined that the nature (or category, rather than this specific incident) of the injury was inherently discoverable with reasonable diligence. A full-sized, mobile home in a populated, residential subdivision would have been discovered with reasonable diligence, despite the "presence of indigenous flora spontaneously growing nearby." Refer to Section II.A.3 for discussion.

VIII. ATTORNEY'S FEES

A. Trial Court's Abuse of Discretion

1. ***Indian Beach Prop. Owners' Ass'n v. Linden*, 222 S.W.3d 682 (Tex.App.-Houston [1st Dist.] 2007, pet. Denied)**

A trial court abuses its discretion when it acts arbitrarily and unreasonably, without reference to guiding rules or principles, or misapplies the law to the established facts. The award of attorney's fees under the Declaratory Judgment Act was reviewed for abuse of discretion. The appellate court could not find a reason to reverse the declaratory judgment, so the Declaratory Judgment Act was a reasonable basis for awarding attorney's fees to the Lindens. Refer to Section IV.E.2 for discussion.

B. Tex. Prop. Code §5.006

1. ***Haas v. Ashford Hollow Cmty Improvement Ass'n, Inc.*, 209 S.W.3d 875 (Tex.App.– Houston [14th Dist.] 2006, no pet.)**

As far as the reasonableness of the attorney's fees awarded, the court ruled them reasonable under the factors listed in Tex. Prop. Code §5.006(b) since it was unusual for a defendant to challenge jurisdiction and proceed to trial, especially when the defendant has admitted the assessments, interest, late charges and reasonable attorney's fees are secured by a lien on the property. The appellate court also noted that the matters about jurisdiction and §209.008(a) were unusual, and they had to perform extensive legal analysis on these issues.

C. Tex. Prop. Code §82.161(b)

1. ***Dilston House Condo. Ass'n. v. White*, 230 S.W.3d 714 (Tex.App.-Houston[14th Dist.] 2007, no pet.)**

White, a condominium owner, sued the association under breach of contract and negligence theories for violation of the declaration, by-laws and regulations. The association failed to designate an attorney as an expert on fees. The association cross-examined White's attorney regarding attorney's fees, but the association did not present any other evidence of attorney's fees. The trial court denied both White's claims and the association's claims for attorney's fees. The association moved for reconsideration and to modify the judgment arguing that it was entitled to reasonable attorney's fees and costs under §82.161(b) of the TUCA. The trial court denied the motion and the association appealed.

The court affirmed the trial court's judgment because the party requesting the fees must show that they are reasonable, even when the award of attorney's fees is mandatory under a statute. In this case, the association failed to meet the burden of proof.

The association also argued that the trial court may take judicial notice of the factors the court should consider when awarding attorney's fees. However, the association failed to ask the trial court to do so. Furthermore, the association cannot seek attorney's fees under §82.161(b) and invoke §§38.003 and 38.004 of the Tex. Civ. Prac. & Rem. Code for the court to take judicial notice of attorney's fees. These sections of the Tex. Civ. Prac. & Rem. Code only apply to causes of action listed in Tex. Civ. Prac. & Rem. Code §38.001.

G. Declaratory Judgment Act

1. ***Indian Beach Prop. Owners' Ass'n v. Linden*, 222 S.W.3d 682 (Tex.App.-Houston [1st Dist.] 2007, pet. Denied)**

Whether a party is entitled to an award of attorney's fees under a particular statute is reviewed *de novo*. The award of attorney's fees under the Declaratory Judgment Act was reviewed for abuse of discretion. The appellate court could not find a reason to reverse the declaratory judgment, so the Declaratory Judgment Act was a reasonable basis for awarding attorney's fees to the Lindens. Refer to Section IV.E.2 for discussion.

IX. AMENDMENT/TERMINATION OF RESTRICTIONS

C. Approval Necessary

1. ***Gillebaard v. Bayview Acres Ass'n, Inc.*, 263 S.W.3d 342 (Tex.App.-Houston [1st Dist.] 2007, no pet.)**

Amendments to existing an existing declaration to create a property owners' association under §204.006 and to amend existing restrictions under §204.005 may not be done simultaneously. The owners must first seek to amend the existing restrictions for the "sole" purpose of providing for the creation of a property owners' association before said association may circulate a new petition to add or modify the deed restrictions in any other way. Refer to Section III.C.1 for discussion.

X. ASSOCIATION AND DIRECTORS' LIABILITY

F. Fiduciary

1. ***Priddy v. Rawson*, 282 S.W.3d 588 (Tex.App.-Houston [14th Dist.] 2009, pet. denied)**

The court found that the current board members had acted with ordinary care when they had, in good faith, relied on information prepared by previous boards to determine the rate of assessment for the declarant's successor.

For a breach of fiduciary duty claim, "a plaintiff must show (1) a fiduciary relationship between the plaintiff and the defendant; (2) a breach by the defendant of his fiduciary duty to the plaintiff, and (3) an injury to the plaintiff or benefit to the defendant as a result of defendant's breach." The court also acknowledged that there are circumstances under which a fiduciary duty arises without a formal relationship. Specifically, the court stated that in order to enforce a fiduciary duty that arose from an informal relationship, "the relationship of trust and confidence must exist prior to and apart from, the agreement that is the basis of the suit." Refer to Section V.I.1 for discussion.

G. Smoke Detectors

1. ***Brown v. Hearthwood II Owners Ass'n, Inc.*, 201 S.W.3d 153 (Tex.App.-Houston [14th Dist.] 2006, pet. denied)**

Residents and/or guests of the Hearthwood II Condominiums (Appellants) brought suit against the association for injuries sustained as a result of evacuating the building during a fire. Appellants claimed that the association's negligence, breach of contract and malice were responsible for the injuries sustained and for exemplary damages, physical anguish, mental anguish and emotional distress. Specifically, the Appellants claimed that the faulty wiring in the breaker box for one of the units caused the fire and additionally the smoke detectors and fire alarm were not properly working to warn the residents of the fire.

The association moved for summary judgment on all claims because the Texas Smoke Detector Statute provides the "exclusive remedy for tenants who receive injuries resulting from a fire." Additionally, the association moved for summary judgment on the negligence and malice claims based on its argument that as a homeowners association it owed the residents no duty of care. The trial court granted the association's summary judgment and the residents appealed.

On appeal, the association argued that the Appellants' claims with regard to the smoke detectors were barred because Texas Smoke Detector Statute only applies to relationships between landlords and tenants. The appellate court found that the association presented no evidence as to whether or not the Appellants were residents and because this argument was an affirmative defense, the association bore the burden to produce this evidence. Therefore the appellate court could not sustain the summary judgment. Secondly, the association argued that as a homeowners association it owed no duty of care to the Appellants. Again, the appellate court found that the association presented no evidence supporting this argument. In its opinion, the appellate court said the association's "global, unsupported, conclusory statements" do not conclusively establish that no duty existed.

With regard to the breach of contract cause of action, the court found that association presented no evidence that there was no contract between the association and Appellants and did not conclusively negate any element of the claim. The appellate court affirmed the trial court's judgment as to Appellants' claims of malice, exemplary

damages, physical anguish, mental anguish and emotional distress as Appellants raised no argument as to the trial court's judgment and reversed and remanded this case for further proceedings on the remaining claims.

J. Premises Liability

1. ***Fort Brown Villas III Condo. Ass'n, Inc. v. Gillenwater*, 285 S.W.3d 879 (Tex. 2009)**

Coy Gillenwater, a renter of a condominium unit at Fort Brown Condoshares, sued the association under the theory of premises liability for injuries he sustained while visiting the association's pool. Gillenwater was lowering himself into a pool-side chair when the tip of his right ring finger was severed by an alleged broken weld on the frame of the chair. The trial court granted the association's no-evidence summary judgment and Gillenwater appealed. The court of appeals reversed and the Texas Supreme Court reversed the judgment of the appellate court and rendered a take-nothing judgment in favor of the association.

The deposition of the condominium's manager revealed that the condominium association was responsible for maintaining the outdoor lawn equipment in safe repair; that he was aware that the combination of salt water and chlorine in the air could have a corrosive effect on the chairs; that because of that knowledge, he had employees of the association inspect the chairs for damage six times a week; the condition of the chair that caused the injury after the injury occurred and the fact that hairline cracks were discovered in other chairs on the premises and subsequently repaired.

Gillenwater argues that this testimony proves the broken welds were visible to the naked eye and that it is "reasonable to infer the dangerous condition was present and seen by employees when the chairs were washed" due to the fact that the cracks did not appear overnight. The Court disagreed finding that the testimony had no bearing on whether or not broken welds were visible to the naked eye prior to injury.

Citing *CMH Homes, Inc. v. Daenen*, the Court noted that "an owner or occupier is not liable for deterioration of its premises unless it knew of or by reasonable inspection would have discovered the deterioration."

The Court held, reversing the judgment of the court of appeals, that Gillenwater presented no evidence indicating that the association actually knew the chair had become dangerous or that it failed to reasonably inspect the chairs.

2. ***Towers of Towne Lake Condo. Ass'n v. Rouhani*, 296 S.W.3d 290 (Tex.App.-Austin 2009, no pet.)**

Rouhani broke her right arm when she slipped on a stamped concrete pool deck that had six coats of latex enamel paint. Eventually, the bone died from a lack of blood supply, and she was unable to continue her dental practice. As an undisputed invitee, she sued the association on the basis of premises liability-the association had actual or constructive knowledge of the condition; the condition was an unreasonable risk; and the association failed to exercise ordinary care to reduce the risk; that failure was the proximate cause of her injury. A jury found for Rouhani and awarded over $1.6 million to her.

In a challenge to legal sufficiency of the evidence, the appellate court will review evidence in the light most favorable to the judgment and only sustain if there is a complete absence of evidence of a vital fact; the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; evidence offered to prove a vital fact is no more than a mere scintilla; or evidence conclusively establishes the opposite of a vital fact.

The association challenges the legal sufficiency of the evidence regarding duty because it claims there was no evidence of actual or constructive knowledge. It also challenges the legal sufficiency of the evidence regarding the injury alleging that there was no evidence that the condition of the pool deck caused the fall and, therefore, the injury. The court found the warnings on the label on the paint and the technical data sheet state, "Caution: All floor enamels may become slippery when wet." Clean sand or an anti-slip aggregate could have been added to the paint, according to the label and the data sheet, respectively. It is common knowledge that the deck around a pool will usually become wet when the pool is used. This counters the association's proposition that the deck, when dry, is not a dangerous condition and that Rouhani did not present evidence that the area she slipped on was wet. However, Rouhani testified at trial that she got up from her chair because she felt a splash of water. The appellate court determined it was reasonable to infer that some of the water fell on the pool deck. The appellate court also determined that the expert opinion regarding the paint was based on an inspection of the pool deck and a review of the paint that was used to coat the pool deck. The evidence is still sufficient, even without the expert testimony. In addition to Rouhani's testimony regarding the wet conditions near the pool, Rouhani's sister testified that she inspected the area the next day and found that it was slick.

The association challenges the expert witness's testimony regarding lost future earnings as legally insufficient to support damages because it was conclusory or speculative. The court reviewed the evidence in the light most favorable to the judgment. The association did not object at trial, so any complaint about the methods, technique or data was waived. The record showed that the expert's opinion on lost future earnings was based on a review of the evidence and reasonable economic assumptions.

The association also asserts that the trial court erred by refusing to submit jury instruction on unavoidable accident which is "an event not proximately caused by the negligence of any party to it." *Reinhart v. Young*, 906 S.W.2d 471, 472 (Tex.1995). The appellate court reviewed this issue for abuse of discretion. The trial court has more latitude with jury instructions than jury questions, but the jury instruction must be supported by the evidence. The court determined that the court did not abuse its discretion because the Supreme Court has ruled jury instructions are permissible, but not mandatory. Furthermore, the court determines that

even if the association had been entitled to a jury instruction, the lack of instruction did not cause any harm.

XI. CERTAIN ASSOCIATION CAUSES OF ACTION

A. Right to Institute, Defend, Intervene In, Settle or Compromise Litigation

1. ***Stanford Dev. Corp. v. Stanford Condo. Owners Ass'n*, 285 S.W.3d 45 (Tex.App.-Houston [1st Dist.] 2009, no pet.**)

The association brought suit on behalf of the homeowners against the developer, Stanford Development Corporation for breach of contract, deceptive trade practices, breach of warranty, fraud, and negligent design, construction and supervision. Stanford filed a motion to compel arbitration based on the arbitration clause in the owners' earnest money contracts. The trial court denied Stanford's motion holding that the association was not bound by the arbitration clause, and Stanford appealed.

The issue on appeal is whether or not the arbitration clause is binding on the association as a non-party and non-signatory to the contract. The court examined six theories that may bind non-signatories to arbitration agreements: "(1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel; and (6) third party beneficiary." Stanford argued under equitable estoppel that the non-signatory association is bound by the arbitration agreement based on the association's reliance on the earnest money contracts for its causes of action against Stanford. The court agreed with Stanford and explained, citing In re FirstMerit Bank, N.A., "when the nonsignatory asserts claims identical to the signatories' contract claims, all claims must be arbitrated."

The court held that because the association brought suit based on the owners' earnest money contracts and on the owners' behalf, it cannot escape the arbitration agreement of the same contract simply because it is a non-party. Additionally, the court held that because the other tort claims are intertwined with the contract claims and because the arbitration clause is broad enough to cover both, all claims must be arbitrated.

The association invoked authority under Tex. Prop. Code Chapters 81 and 82 to bring suit, however because it is bringing suit on behalf of the owners, it too, is bound to arbitration. The appellate court reversed and remanded.

2. ***Rakowski v. Comm. to Protect Clear Creek Village Homeowners' Rights*, 252 S.W. 3d 673 (Tex.App.-Houston [14th] 2008, pet denied)**

The court determined that the Committee did have standing by virtue of being composed of homeowners and, additionally, by the restrictions that provided an owner the right to prosecute deed restriction violations. Refer to Section II.D.1 for discussion.

3. ***Ski Masters of Tex. v. Heinemeyer*, 269 S.W.3d 662 (Tex.App.–San Antonio 2008, no pet.)**

Ordinarily, restrictive covenants are only enforceable by the contracting parties or those in direct privity. However, citing *Giles v. Cardenas*, the court's opinion stated "where many property owners are interested in a restrictive covenant, any one of them can enforce it." The appellate court noted that whether or not the Residents have standing to enforce the restrictive covenants depend on two factors, (1)"the existence of a general plan or scheme of development" and (2) "that was part of the inducement for purchasers to obtain land within the restricted are." Refer to Section II.A.1 for discussion.

4. ***EMC Mortgage Corp. v. Window Box Ass'n, Inc.*, 264 S.W.3d 331 (Tex.App.-Waco 2008, pet. denied)**

The court stated that the general rule is that "only the mortgagor or a party who is in privity with the mortgagor has standing to contest the validity of a foreclosure sale pursuant to the mortgagors deed of trust," however, "when the third party has a property interest, whether legal or equitable, that will be affected by such a sale, the third party has standing to challenge such a sale to the extent its rights will be affected by the sale." Refer to Section V.B.2 for discussion.

5. ***Girsh v. St. John*, 218 S.W.3d 921 (Tex.App.-Beaumont 2007, no pet.)**

The court determined that St. John had standing to sue since she was "entitled to benefit under the terms of a restrictive covenant." Also, the restrictive covenants explicitly stated that property owners in the subdivision may enforce the deed restrictions.

C. Condominiums

1. ***Stanford Dev. Corp. v. Stanford Condo. Owners Ass'n*, 285 S.W.3d 45 (Tex.App.-Houston [1st Dist.] 2009, no pet.)**

The association invoked authority under Tex. Prop. Code Chapters 81 and 82 to bring suit, however because it is bringing suit on behalf of the owners, it too, is bound to arbitration. Refer to Section XI.A.1 for discussion.

TABLE OF CASES

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