

**GOVERNING DOCUMENTS FOR  
PROPERTY OWNERS ASSOCIATIONS:  
DISTINGUISHING ROLES FOR DECLARATIONS,  
RULES AND BYLAWS**

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  - Established Subdivisions Without Mandatory HOAs – Adding HOAs “After the Fact”: Advanced Real Estate Law Course, 2011
  - Dispute Resolution and Litigation in POA Context: Advanced Real Estate Law Course, 2004
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  - Drafting for Premises Liability: Advanced Real Estate Drafting Course, 1999
  - A Primer for Representing Condominium and Property Owners Associations: Advanced Real Estate Drafting Course, 1998
  - Master Restrictive Covenants and Homeowners Associations: Advanced Real Estate Drafting Course, 1997
  - Property Owners Associations Selected Issues: Advanced Real Estate Drafting Course, 1994
- Property Owners Association “Reform Laws” – An Overview of the 2011 Texas Legislative Session: Houston Bar Association, 2011
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# **GOVERNING DOCUMENTS FOR PROPERTY OWNERS ASSOCIATION: DISTINGUISHING ROLES FOR DECLARATIONS, RULES AND BYLAWS**

## **I. INTRODUCTION**

A growing popularity of residential planned community lifestyle in the past several decades has led to a developing and evolving body of law addressing their creation and the organization of entities governing them. Nearly every subdivision which has been established since the 1980s has some form of commonly owned property and amenity which is available for use and enjoyment by all owners, supported by a mandatory contribution of assessments and managed by a community association. Many subdivisions are a hybrid of residential and resort communities, built alongside or within golf courses, marinas, aircraft runways, and facilities for other leisure activities.

Creation of these communities begins with the real estate developer recording a set of documents containing the plan for development and essentials of ownership and operation, often referred to collectively as governing documents or dedicatory instruments. There are many commonalities within these documents, in that they create servitudes which encumber the included properties to covenants of use, which run with the land, and bind every person in succession of ownership. When a property owners association is created to assume responsibility for oversight of the common lands and regulate the use of the individual owners of property, a vehicle for regulatory authority must also be included.

Generally in formulating the initial governing documents, the drafter should be concerned with the vision of the developer, anticipation of inevitable changes in the course of the development, flexibility in implementation, concise language, and pride of authorship; all of which are integral to the undertaking. Of course, skillful drafting entails a knowledge of real estate and community association law, and a library of state-of-the-art forms is helpful; however, each document should be tailored to the project at hand.

Traditionally the basic document in the set is the "Declaration of Covenants, Conditions, and Restrictions," sometimes known as a "Master Deed," which generally sets forth the specific servitudes and requires the owners to contribute to the maintenance of the commonly held properties by sharing financial responsibility. This is followed by a set of "Rules" or "Regulations" which contain the fine points of community living. On the lower hierarchical level is a

set of "Bylaws" for the representative governance business entity formed to control the maintenance operations, dispense a business-like order to the community, and provide other governmental services of management and enforcement.

Now, with legislative restraints such as codified use restrictions (*e.g.* prohibitions regarding religious and flag displays) and policies regarding POA operations, such as open meetings and document retention guidelines, it is often difficult to make a determination as to which provisions should be placed in each document to insure that the purpose of the dedicatory instrument is achieved. Further, as placement of provisions affect the enforceability of the entire set of governing documents, it is important that all necessary aspects are included respectively, to render them viable and enforceable collectively.

The objective of this article is to assist the drafter in defining the roles of the basic dedicatory instruments by drawing from available resources, including the interpretations by courts in cited case law, the test of viability obtained for developer and association clients, and the level of cooperation achieved from individual owners in application.

## **II. SCOPE OF ARTICLE**

There are a number of real property development species which require governing documents and community association regulation. In Texas the most common are the planned unit development (PUD), the standard single-family dwelling subdivision, townhomes, condominiums, mixed-use, and master planned communities. Some forms are sub-species of them, depending on their physical characteristics and ownership interests.

This article is written with a focus on the standard subdivision format with a mandatory membership POA that is a non-profit corporation, which is the most widespread. Neither condominiums nor master mixed-use developments are specifically addressed, as they have their own bodies of law in TEX. PROP. CODE, Chapters 81, 82 and 215; however the principles discussed may be applied to other structures of residential development.

The material is intended to furnish a guide in the creation of original documents, or in restatements, revisions, and re-drafts of existing instruments. The categories may be used as a makeshift checklist, and statutes are identified and case law annotated to support the placement of provisions in the appropriate governing document.

Each legislative session introduces more statutory regulation of POA operation and authority; and the new laws often conflict with existing statutes governing nonprofit corporations, therefore they must be harmonized. Because the POA statutes prevail over

those governing nonprofit corporations, only provisions currently applicable to those entities are included.

### **III. GENERAL PROVISIONS**

Before discussing specific provisions of creating a set of governing documents for a POA, a brief overview of relevant statutes, salient definitions, and basic rules of contract construction is helpful.

#### **A. Applicable Statutes**

The following statutes apply statewide to governing documents for POAs:

- **TEX. PROP. CODE Chapter 202. Construction and Enforcement of Restrictive Covenants**

This chapter applies to all restrictive covenants regardless of the date on which they were created.

- **TEX. PROP. CODE Chapter 207. Disclosure of Information by Property Owners Association**

A POA that is entitled to levy regular or special assessments must comply with this Chapter.

- **TEX. PROP. CODE Chapter 209. Texas Residential Property Owners Act**

Residential subdivisions that are subject to restrictions or provisions in a declaration that authorize the property owners association to collect regular or special assessments on all or a majority of the property in the subdivision, and that require mandatory membership in the association for all or a majority of the owners of property within the subdivision subject to the association's dedicatory instruments, are bound by this Chapter.

- **TEX. BUS. ORG. CODE Chapter 22. Nonprofit Corporations**

POAs are not required to be incorporated by any state law; however, a point in favor of incorporation may be to avail the association of this Chapter. The provisions of the Texas Property Code do not cover all of the aspects of association governance, and those not addressed may be controlled by this Chapter.

#### **B. Definitions**

The definitions contained In TEX. PROP. CODE §209.002 are adopted by reference, and the following definitions are included or devised for use in this article.

#### **1. Community Association**

The term "community association" encompasses all mandatory membership associations comprised of owners of residential real property.

Traditionally, "**Homeowners Association**" or "**HOA**" was the generic term ascribed to a community association of any form of ownership. Today it infers an entity which holds title to community property and is made up of individual owners of finished structures rather than lot owners. This term is not used in the Texas Property Code, except in § 204.004(a) which currently only applies to Harris and certain surrounding counties, and includes the phrase: [that a POA] "may be referred to as a 'homeowners association,' 'civic association,' 'civic club,' 'association,' 'committee,' or similar term contained in the restrictions."

"**Property Owners Association**" or "**POA**" is the term used and defined in TEX. PROP. CODE §209.002(7), and means an incorporated or unincorporated association that: (A) is designated as the representative of the owners of property in a residential subdivision; (B) has a membership primarily consisting of the owners of the property covered by the dedicatory instrument for the residential subdivision; and (C) manages or regulates the residential subdivision for the benefit of the owners of property in the residential subdivision.

TEX. PROP. CODE §202.001(2) defines a property owners association slightly differently because Chapter 202 also applies to PUDs, condominium or townhouse regimes, or similar planned developments.

For the purposes of this article, "POA," "association," or "community association" refer to a mandatory membership nonprofit corporation, designated to represent the interests of all or some of the owners of property in a Texas residential development or subdivision, that is collectively or individually encumbered by restrictive covenants contained in a dedicatory instrument or "Declaration."

#### **2. Dedicatory Instrument**

"**Dedicatory instrument**" means each governing instrument covering the establishment, maintenance, or operation of a residential subdivision. The term includes restrictions or similar instrument subjecting real property to, restrictive covenants, bylaws, or similar instruments governing the administration or operation of a property owners' association, properly adopted rules and regulations of the property owners' association, and all lawful amendments to the covenants, bylaws, instruments, rules, or regulations. TEX. PROP. CODE § 209.002(4).

The Texarkana Court of Appeals disagreed that the definition of dedicatory instruments in the Property Code was intended to establish a definitive list of documents to be considered dedicatory instruments.

They interpreted the phrase “subjecting property to” as modifying “restrictions or similar instruments.” The court stated: “[T]he list of various instruments in the statute is included in the definition to indicate the types of documents that make restrictions or similar instruments into dedicatory instruments. So, for example, an instrument which subjects property to bylaws is a dedicatory instrument, although the bylaws may not fall within this category.” They concluded that the instrument containing an association's bylaws is not a dedicatory instrument as defined by Section 209.002(4) of the Property Code. *Stork v. Tres Lagos Prop. Owners Ass'n*, 442 S.W.3d 730, 738 (Tex.App-Texarkana 2014, pet denied).

3. Declaration

**"Declaration"** means an instrument filed in the real property records of a county that includes restrictive covenants governing a residential subdivision. TEX. PROP. CODE §209.002(3).

But, the definition of "dedicatory instrument" suggests that the interpretation of the *Tres Lagos* court is correct, in that it is the Declaration that subjects the property to the other listed instruments.

4. Bylaws

**"Bylaws"** means the rules adopted to regulate or manage the (nonprofit) corporation, regardless of the name used to designate the rules. Tex. BUS. ORG. CODE §22.001(2).

5. Rules

**"Rules"** or **"Rules and Regulations"** are not defined in the Texas Property Code: however, in a residential real estate subdivision located in Harris County and certain surrounding counties, a POA is empowered by statute to "regulate the use, maintenance, repair, replacement, modification, and appearance of the subdivision." TEX. PROP. CODE §§204.010(6).

These powers of a POA granted in this section are not applied statewide, but the spirit of the definition is adopted for the purposes of this article. As discussed below, rule-making authority for POAs in other areas of the state must be granted in the other governing documents of the subdivision.

6. Restrictions

**"Restrictions"** means one or more restrictive covenants contained or incorporated by reference in a properly recorded map, plat, replat, declaration, or other instrument filed in the real property records or map or plat records. The term includes any amendment or extension of the restrictions. TEX. PROP. CODE §209.002(10).

7. Restrictive Covenant

**"Restrictive covenant"** means any covenant, condition, or restriction contained in a dedicatory instrument, whether mandatory, prohibitive, permissive, or administrative. In TEX. PROP. CODE §209.002(11).

8. Subdivision

**"Residential subdivision"** or **"subdivision"** means a subdivision, planned unit development, townhouse regime, or similar planned development in which all land has been divided in two or more parts and is subject to restrictions that: (A) limit a majority of the land subject to the dedicatory instruments, excluding streets, common areas, and public areas, to residential use for single-family homes, townhomes, or duplexes only; (B) are recorded in the real property records of the county in which the residential subdivision is located; and (C) require membership in a property owners association that has authority to impose regular or special assessments on the property in the subdivision.

**C. Recording and Notice Requirements**

1. Real Property Records

A property owners association shall file all dedicatory instruments in the real property records of each county in which the property to which the dedicatory instruments relate is located. A dedicatory instrument has no effect until the instrument is filed in accordance with this section. TEX. PROP. CODE §202.006(a) & (b).

Because the definition of "dedicatory instrument" contained in section B. 2. above includes descriptions of the Declaration, Rules and Bylaws, they should all be recorded; however, the certificate of formation of the POA may also be recorded as “a similar instrument governing the administration of a property owners association,” especially because it controls over the Bylaws. BUS. ORG. CODE §22.103(a).

2. Management Certificate

A POA shall record in each county in which any portion of the residential subdivision is located a management certificate, signed and acknowledged by an officer or the managing agent of the association, stating: (1) the name of the subdivision; (2) the name of the association; (3) the recording data for the subdivision; (4) the recording data for the Declaration; (5) the name and mailing address of the association; (6) the name and mailing address of the person managing the association or the association's designated representative; and (7) other information the association considers important. TEX. PROP. CODE §209.004(a).

3. Online Subdivision Information

A POA shall make dedicatory instruments relating to the association or subdivision and filed in the county deed records available on a website if the association has, or a management company on behalf of the association maintains, a publicly accessible website. TEX. PROP. CODE §207.006.

**D. Rules of Construction**

Restrictive covenants are subject to general rules of construction. *Pliarcik v. Emmon*, 966 S.W.2d 474, 478 (Tex. 1998). Restrictive covenants are interpreted according to the rules that govern contract construction. *Air Park--Dallas Zoning Comm. v. Crow Billingsley Airpark, Ltd.*, 109 S.W.3d 900, 909 (Tex.App.-Dallas 2003, no pet.).

The following is a brief overview of the general rules of construction to which to refer when drafting governing documents, or when you find yourself in the unenviable position of having to enforce the provisions of your governing documents in litigation:

1. Objective Intent

It is the duty of the Court to review the wording of the restrictive language and determine therefrom the intent of the drafter. *Wilmoth v. Wilcox*, 734 S.W.2d 656, 658 (Tex. 1987). The court must try to determine the parties' intentions as expressed in the contract. *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 464 (Tex. 1998). In order to determine the parties' intentions, the court must review the entire agreement in order to give meaning to all of the provisions and to avoid rendering any as meaningless. *MCI Telecoms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 652 (Tex. 1999). It is the objective, not the subjective, intent of the parties that must be ascertained. The intent that is expressed or apparent in the writing controls. *Travis Heights Imp. Ass'n v. Small*, 662 S.W.2d 406, 409 (Tex.App.—Austin 1983, no writ). In ascertaining the intent of the parties, the entire instrument should be considered, so that none of its provisions is rendered meaningless. *Imperial Interplaza II v. Corrections Corp.*, 717 S.W.2d 422, 424 (Tex.App.--Houston [14th Dist.] 1986, ref. n.r.e.).

2. Plain Meaning

Words used in a restriction may not be enlarged, extended, stretched, or changed by construction, but will be given their commonly accepted meaning. *Wilmoth*, 734 S.W.2d at 657. A restriction must be given its "plain grammatical meaning unless doing so would defeat the parties' intentions as evidenced clearly in other parts of the document. *Moore v. Smith*, 443 S.W.2d 552, 555 (Tex. 1969). When construing an undefined term in a restrictive covenant, the court must determine the parties' intent by giving the term its

plain, everyday meaning unless the contract shows the parties used the term in a technical or different sense. Under this standard, this court turned to Webster's Third International Dictionary, Webster's Third New International Dictionary, and The New Oxford American Dictionary for the plain meaning of the word "gable." *Jamison v. Allen*, 377 S.W.3d 819, 822 (Tex.App.—Dallas 2012, no pet.).

The language used to create restrictions will be given the meaning by which words are ordinarily understood and interpreted and that upholds and enforces the contract as it was understood and intended by the parties. *Village of Pheasant Run Homeowners Association, Inc. v. Kastor*, 47 S.W.3d 747, 752 (Tex.App.—Houston [14<sup>th</sup> Dist.] 2001, pet. denied; *Green v. Gerner*, 283 S.W. 615, 616 (Tex. Civ. App.—Galveston 1926, writ granted) aff'd, 289 S.W. 999 (Tex. Com. App. 1927).

The meaning of the words used must be determined as of the date the covenant was written, not as of the date it is being enforced. *Wilmoth*, 734 S.W.2d at 657-658.

3. Ambiguity

A] covenant is unambiguous if, after appropriate of rules of construction have been applied, and the covenant can be given a definite or certain meaning. But, if after application of the construction rules, "a covenant is susceptible of more than one meaning, the covenant is ambiguous. Mere disagreement of a restrictive covenant's meaning does not necessarily render the covenant ambiguous. *Uptegraph v. Sandalwood Civic Club*, 312 S.W.3d 918, 925-926 (Tex.App.--Houston [1st Dist.] 2010, no pet.). When the protective covenants are unambiguous, the court of appeals must interpret it as a matter of law. *Patel v. Wofford*, 349 S.W.3d 50 (Tex.App.—El Paso 2010, no pet.). If there are ambiguities, the circumstances and conditions surrounding the parties and the property must also be considered, together with the clear goals of the restrictive grant, so that the intent of the parties governs. *York v. Howard*, 521 S.W.2d 344, 347 (Tex.Civ.App.—Waco 1975, no writ). In the alternative, if there is no ambiguity, the intentions of the parties must be determined from the language of the covenant itself, construed in connection with the surrounding circumstances. *Hoye v. Shepherds Glen Land Co., Inc.*, 753 S.W.2d 226, 229 (Tex.App.--Dallas 1988, writ denied).

4. Secondary Rules

If interpretation of a restrictive covenant remains in irreconcilable conflict after a court has applied the above rules of construction, it may apply the secondary rules of construction:

- Ambiguities are to be construed against the drafter. *Republic National Bank of Dallas v. Northwest National Bank of Ft. Worth*, 578 S.W.2d 109, 115 (Tex. 1978).
- Specific language will overcome and control general provisions. *Guadalupe-Blanco River Authority v. City of San Antonio*, 200 S.W.2d 989, 1001 (Tex. 1947).
- The first of two or more conflicting provisions prevails over later provisions. *Southland Royalty Co. v. Pan American Petroleum Corp.*, 378 S.W.2d 50, 57 (Tex. 1964).

#### 5. Statutory

A restrictive covenant shall be liberally construed to give effect to its purposes and intent. TEX. PROP. CODE §202.003(a).

A discussion of the application of this section of the Texas Property Code and the courts' reconciliation of it with the traditional rules of construction can be found in *Uptegraph*, 312 S.W.3d at 927-928.

#### 6. Defined Terms

Definitions should always be included and used consistently throughout the Declaration, Bylaws and Rules, and be consistent with the Texas Property Code terminology wherever possible for clarity. Use upper case to distinguish throughout the documents that a term has a defined meaning.

### **IV. DECLARATION OF COVENANTS, CONDITIONS, AND RESTRICTIONS**

Essentially the Declaration of Covenants, Conditions and Restrictions ("Declaration") is the document that creates, and through which all characteristics of a community and its private government flow. It is the enabling instrument combining elements and characteristics of a constitution, corporate charter, municipal charter, and conveyance and lien contract. It dictates the development rights, zoning and ordinances through restrictive covenants, which run with title to the property comprising the development and binding on future owners, and is at the top of the hierarchy of the governing documents for the subdivision and the POA. Following is an overview of provisions which should be included in the Declaration.

#### **A. Servitudes**

When determining whether a provision should be included in the Declaration or in another governing document, consider whether you intend it to be an actual servitude imposed upon the restricted land in the subdivision. Examples are those which imprint and impose a scheme on the development in its entirety,

e.g. architectural standards, landscaping and infrastructure.

It must be the intent of the original covenanting parties that the covenant run with the land. There must be either an express statement that the restrictive covenant will bind the heirs and assigns, or language in the deed to reflect that this was the intent of the parties. *Billington v. Riffe*, 492 S.W.2d 343, 346 (Tex.App.--Amarillo 1973, no writ).

Texas Courts continue to adhere to the "touch and concern" requirement, and do not follow the Restatement (Third) of Property<sup>1</sup>, as indicated in *Inwood North Homeowners Ass'n v. Harris*, 736 S.W.2d 632, 635 (Tex. 1987).

#### 1. Notice

A person who buys land is deemed to have notice of all recorded instruments connected to the conveyance. TEX. PROP. CODE §13.002.

Restrictive covenants can run with the land with notice of the restriction or with knowledge of the general plan (constructive notice). *Selected Lands Corp. v. Speich*, 702 S.W.2d 197, 199 (Tex.App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.). Covenants bind only the actual parties to the covenant and those who purchase the land with notice of the restrictive covenant, if the restrictions concern land or its use. *Frey v. DeCordova Bend Estates Owners Ass'n*, 632 S.W.2d 877, 879 (Tex.App.--Fort Worth 1982), aff'd, 647 S.W.2d 246 (Tex.1983).

#### 2. General Plan or Scheme

Restrictions create a general plan and scheme, and govern the use for the restricted property under the doctrine of implied reciprocal negative easement. *Evans v. Pollock*, 796 S.W.2d 465, 466 (Tex. 1990).

The preamble and recitations of the Declaration should describe all plats, plans, and prerecorded instruments and set the tone for the vision of the developer and can be used to introduce the community standard and describe the scheme of development. For example, "Declarant seeks to establish a subdivision in a manner of the highest standard for structural integrity, homogeneity, quality constructions, and community cohesiveness." Then state reasons why, avoiding precatory language such as "maintenance of property values," "high class," and other statements which are elitist puffery. Describe the various proposed plan as shown on the subdivision plats, with a general statement of reservations for expansion so that it is

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<sup>1</sup>"Neither the burden nor the benefit of a covenant is required to touch or concern land in order for the covenant to be valid as a servitude." See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.2 cmt. b (2000).

consistent with later references to size and location. Because the definitions of dedicatory instrument indicate that the Declaration subjects the subdivision to the other governing documents, a statement referring to and subjecting the property to those other documents should be included as well.

Regardless of ownership, lots compromising common area are subject to the restrictive covenants created by the original dedication and restrictions as well as any amendment to them. Once a POA shows that a plan or scheme exists for the benefit of all lot owners, it has shown a right to enforcement of covenants and restrictions. *Raman Chandler Properties, L.C. v. Caldwell's Creek Homeowners Association, Inc.*, 178 S.W.3d 384, 394 (Tex.App.--Fort Worth 2005, pet. denied).

### 3. Duration

Restrictions may be of perpetual in duration. Provisions for extensions for a period of years by vote of the owners or automatic renewals to avoid expiration are no longer necessary.

### 4. Description and Plats

Areas shown on plats as common areas in a subdivision, showing parks, walkways, nature trails, and private open spaces, become part of the subdivision and subject to the control and maintenance of the POA. The fact that the common area park was not described in detail by metes and bounds was held immaterial, and delineating some of the areas as "area reserved for recreation and roadway" was sufficient. *Anderson v. McRae*, 495 S.W.2d 351, 359 (Tex.App.-Texarkana 1973, no writ.) An easement or other appurtenant right is conveyed when shown or referred to on a plat, and all of the appurtenances ascertainable by the map are conveyed. *Id.* at 359.

When lots are conveyed with reference to a plat, the designation of any recreational area for exclusive use of lot owners becomes part of the deed by incorporation by reference. *Raman Chandler Properties*, 178 S.W.3d at 394.

But, when deed restrictions do not expressly incorporate the applicable plat, and acknowledge that the plat is "subject to" the restrictions and covenants and that minor changes may be made for the efficient installment of improvements, it demonstrates an intent that the property lines found in the plat could change within the limitations set forth in the deed restrictions. *Tanglewood Homes Association, Inc. v. Feldman*, 436 S.W.3d 48, 67 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2014, pet. denied).

Thus, even though conveyance of common areas may be achieved by a showing of a general plan or scheme, a designation on the plats, or an inclusion in the deeds to lot owners, it is clearly a better practice to

clearly identify common areas subject to the restrictions and POA control in the Declaration.

## **B. Declarant Provisions**

Because development rights and declarant controls are in the nature of real property interests, which are vested at the time of the creation of the development and the property of which it is comprised, they are servitudes and should always be included and specifically set forth in the Declaration, to parallel to the general scheme and provide requisite notice to purchasers of lots.

### 1. Development Period

The Declaration should include the various and specific reserved rights with regard to development and administration of the subdivision that the declarant may exercise.

The "Development Period" is defined as "a period stated in a declaration during which a declarant reserves: (A) a right to facilitate the development, construction and marketing of the subdivision; or (B) a right to direct the size, shape, and composition of the subdivision." TEX. PROP. CODE §209.002(4-a)(A)-(B).

In the past, developers have retained development rights for as long as possible, often years after they no longer own property in the subdivision. Clearly the declarant needs a sufficient level of control to protect its rights and freedom to develop in accordance with the development plan. And, if the development rights are contemplated to be assigned to a builder or other successor entity, temporarily or throughout the remainder of the development period, that intent should be disclosed and that option provided for in the Declaration.

If there are private streets and amenities, often there are advantages to assignment of the ownership to the POA before the completion of the development process. This can be accomplished within the Declaration or by reference to a separate instrument, contemplating the present time or within a date or event certain.

The transition process begins when the Declaration is drafted, and provisions concerning the passage to the owners as set forth in the Declaration may cause to avoid many of the pitfalls and controversies surrounding the process. The Declaration sets the stage for successful transition, and comprehensive disclosures are key adjuncts to the process. Mapping out an exit strategy in the Declaration is a valuable step in creating a smooth succession from the developer to the community association. Dissatisfaction over the manner in which the passage of control is accomplished is the subject of much litigation.

2. Declarant Control Period

Regardless of the he period of control provided by the Declaration, on or before the 120th day after 75% of the lots that may be created and made subject to the Declaration are conveyed to owners other than a declarant or builder, at least 1/3rd of the board members must be elected by owners other than the declarant. If the Declaration does not include the number of lots that may be created and made subject to the Declaration, at least 1/3rd of the board members must be elected by owners other than the declarant not later than the 10th anniversary of the date the Declaration was recorded. TEX. PROP. CODE §209.00591(e).

The Declarant Control Period as set forth in the Declaration may be shortened to less than 10 years from the date of recording, but not lengthened to contravene the statute.

a. Annexation of Additional Property

It may be possible to extend the Declarant Control Period beyond the sale of the original 75 percent of the number of lots that may be created and subject to the Declaration, if annexation powers are reserved by the declarant, and additional property is annexed into the subdivision at a later date.

b. Architectural and Builder Controls

The declarant may retain certain approval rights, such as architectural and builder approvals, for periods beyond the power to appoint the board of the POA. These rights can be reserved for the purpose of preserving the general scheme and for ensuring homogeneity within the original development and additional acreage which may be annexed under the Declaration.

The developer may reserve the right to review all new construction in the subdivision while assigning the right to approve any modifications to improvements to the POA or a committee serving under the auspices of the POA. If this mechanism is used, there should be included an event or date certain by which these functions merge into a single committee controlled by the POA. Developers characteristically do not want this responsibility indefinitely, and if continuity is not established, gaps may be created in the succession process leaving the subdivision without a vehicle for architectural review.

Architectural approval rights must be assigned by declarant by showing a clear intent to convey and transfer the right to an architectural control committee. *Anderson v. New Property Owners Association of Newport, Inc.*, 122 S.W.3d 378, 389 (Tex.App.—Texarkana 2003, pet. denied).

c. Partial and Temporary Assignments

If there are multiple sections of the subdivision which are not slated to be developed at one time or are to be developed for different community uses (e.g. condominium or mixed-use), the declarant may assign development rights in "phases" or to multiple successor developers. Successor developers receive development rights only as to the property that was specifically conveyed to them, and can only alter the designation of the reservations conveyed to them, not reservations conveyed to anyone else. If an assignment of rights is partial or temporary, the declarant can retain an option in the Declaration to reacquire all rights necessary to complete the subdivision.

3. Reservation of Easements

Easements should be reserved by the declarant in the Declaration for utilities and other infrastructure, to serve additional property, ingress and egress of owners, guests, and emergency vehicles (especially in gated communities), drainage and retention ponds, and irrigation.

If a declarant desires to create easements on or across the subdivision for the purpose of further or future development of adjacent tracts, they should be reserved in the Declaration, stating the purpose and duration. Thereafter, only if the developer follows the specific procedure for amending the restrictions or the plat as set forth in the covenants could it have the right to create an easement for the benefit of an entity other than the POA or the lot owners. *Raman Chandler Properties*, 178 S.W.3d at 394. There are no implied easements in this situation. *See Miller v. Elliott*, 94 S.W.3d 38, 43 (Tex.App.—Tyler 2002, pet. denied).

Additionally, a title search should be obtained to ascertain existing easements previously reserved that are identified in the Declaration.

**C. Designation of POA**

The POA is created by filing a certificate of formation with the Secretary of State; however, its designation as a POA is conferred by the Declaration.

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

1. Authority to Collect Assessments

Allowing that a POA is a designated representative with the capacity to enforce the requirement that owners pay the assessment obligation imposed in the Declaration, if the POA does not have any authorization to collect assessments for itself, it is

not a valid property owners association. *Summers v. Highland Composite Property Owners Association*, 363 S.W.3d 214, 215 (Tex.App. Houston [14th Dist.] 2011, no pet.).

Again, Chapter 209 applies only to a residential subdivision that is subject to restrictions or provisions in a Declaration that authorize the POA to collect regular and special assessments on all or a majority of the property in a subdivision. TEX. PROP. CODE §209.003(a).

## 2. Management and Regulation

Even though the association had the capacity and right to enforce covenants and deed restrictions as a designated representative of owners within a subdivision, if there is nothing of record to reflect that the association manages or regulates the residential subdivision for the benefit of the owners, it is not a 'property owners association under TEX. PROP. CODE §209.002(7). "The Legislature contemplates that a property owners association may be formed by: 1) a designation in the deed restrictions; 2) by approval of the percentage of homeowners designated in the original restrictions; or 3) by percentage designated in the statute. In this case, the association filed articles of incorporation and had individual owners designate them as their representative in separate instruments. So, designation and enumeration of powers in an instrument other than the actual restrictions does not make a mandatory POA." *Id.* at 215.

A POA's right to regulate the subdivision and use of amenities should be set forth in the Declaration in that this is a right which must be expressly reserved. *Pinebrook Props., Ltd. v. Brookhaven Lake Prop. Owners Ass'n*, 77 S.W.3d 487, 502 (Tex. App.—Texarkana 2002, pet. denied).

## 3. Powers and Duties

The broad and specific powers and duties of the POA should be clearly set forth in the Declaration. There is no statewide statutory grant of power to POAs; however, TEX. PROP. CODE §204.010 (which applies to Harris County and certain surrounding counties) and TEX. PROP. CODE §215.005 (which applies to Las Colinas) contain comprehensive lists which may be used as templates, and may be modified to accommodate any subdivision.

The enumerated powers in the Declaration may be broad, but should not conflict with provisions in other dedicatory instruments, and should be specific in application to the characteristics of the subdivision.

## 4. Succession of Interest

The procedure for the succession of interest and assignment of rights and duties must be followed for a POA to become legitimately empowered to assert its

authority over owners and the subdivision. TEX. PROP. CODE §209.0591(c); *Simms v. Lakewood Village Prop. Owners Ass'n, Inc.*, 895 S.W.2d 779 (Tex.App.—Corpus Christi 1995, no writ).

## D. Membership

Membership in the POA is tied to ownership and therefore must be set forth in the Declaration as it is a real property right coupled with the obligation to pay assessments, and therefore a servitude. The member of the POA is the holder of record title, including joint tenants, and contract purchasers. Owner means the person who holds record title in the subdivision. *Webb v. Voga*, 316 S.W.3d 809, 814 (Tex.App.—Dallas 2010, no pet.); TEX. PROP. CODE §209.002(6).

### 1. Classes

Usually governing documents contain classes of membership to be in existence during the Declarant Control Period, with different voting rights ascribed to each class. Most commonly these classes are set forth in the Declaration as follows:

#### a. Declarant

The declarant will often be designated as a separate class of ownership with multiple voting rights based on ownership of lot, acreage, title to common areas, or tied to a date certain as described in the statutory Declarant Control Period. By its own terms, this class of membership will expire and merge with the lot owner class. This occurs by attrition of ownership of lots or until a date certain, whichever occurs first. TEX. PROP. CODE §209.00591(c).

#### b. Builder

An entity in the business of constructing homes who purchased the lots from the declarant for the purpose of selling completed homes built on the lots may be structured to have a separate class of membership, be included in the class with the declarant, or belong to the owner class; however, builders are in the class with the declarant for the purposes of termination of the Declarant Control Period. TEX. PROP. CODE §209.00591(c).

#### c. Lot Owner

When an individual purchases a lot for residential use, he or she becomes a member of the class of owners, traditionally with one vote per lot owned. This may be varied in the Declaration; for example, membership based on taxable value of improvements or pro rata share based on percentage of association expense divided by square footage of lots owned by members. *Waterford Harbor Master Association v. Landolt*, No. 14-13-00817-CV, 2015 WL 293262

(Tex.App.—Houston [14<sup>th</sup> Dist.] January 22, 2015) pet. denied.

2. Voting Rights

The Declaration is the key document which controls membership, but the certificate of formation and Bylaws may contain essential aspects of voting rights. When the Declaration broadly allowed voting rights, and the Bylaws narrowly allowed one vote per member if the member paid the annual assessment, the Bylaws' more restrictive language controlled. *Nelson v. Big Woods Springs Improvement Association, Inc.*, 322 S.W.3d 678, 682 (Tex.App.—Texarkana 2010, pet.denied).

**E. Common Areas and Amenities**

All of the properties and facilities for which the POA has responsibility or agrees to assume responsibility are "Common Area," no matter who owns them. Further, there may be areas within the subdivision that are to be used by one group of owners but not all, especially if there are multi-use designations or divergent ownership structures. Regardless, all such properties should be identified in the Declaration.

Recreational facilities, golf courses, water features and other amenities should be clearly identified, along with grant of use in the Declaration. If a condition of use is that assessment obligations are met, that should be included as well. As mentioned above, the right of owners to use common property and facilities is an included benefit of ownership; if the right of enjoyment of the common areas may be suspended by the POA upon an owner's failure to meet certain conditions of use, it must be set forth in the Declaration.

**F. Architectural Committees and Guidelines**

The responsibility of carrying out architectural control functions and interpreting restrictive covenants is usually delegated to a committee, most commonly known as architectural control or architectural review committees. These bodies have the responsibility of reviewing construction plans for the erection of new improvements or modification of existing residences, accessory buildings, and landscaping plans. There is no statutory basis creating these committees; they are appointed and act by assignment by the declarant, or appointment by the POA, if provided in the Declaration. Provisions empowering the architectural function should always be included in the Declaration, or no such power exists.

Approval covenants are valid insofar as they furnish adequate notice to the property owner of the specific restriction sought to be enforced. *Davis v. Huey*, 620 S.W.2d 561, 566 (Tex.1981). Even though

the language in the approval covenant contained in a Declaration of covenants and restrictions is broad, if the Declaration also contains specific limitations on the design of homes permitted in the neighborhood and the architectural committee referenced the proposed plans' violation of the restriction, that was sufficient to support denial of the plan and ensuing injunction. Approval covenants are valid to the extent they furnish adequate notice to the property owner of the specific restriction sought to be enforced. *See Whiteco Metrocom, Inc. v. Indus. Props. Corp.*, 711 S.W.2d 81, 82 (Tex.App.-Dallas 1986, writ ref'd n.r.e.).

The details of architectural interpretation of restrictive covenants need not be set forth in the Declaration. If architectural control and review provisions are granted to a committee in a Declaration, or properly assigned by the declarant, it is implied that it is given the power to adopt architectural guidelines that interpret the provisions of the deed restrictions. As a result of a showing that a committee exists, the committee may establish standards independent from those articulated in the deed restrictions to effectuate the grantors intent, and that the homeowners had notice of the guidelines as well as the deed restrictions and should have complied with the provisions. *Village of Pheasant Run* 47 S.W.3d at 752.

When providing for architectural approval powers and standards, if separate architectural guidelines are anticipated to supplement the use restrictions contained in the Declaration and to compliment the community standard, it would be the better practice to include and incorporate a provision for the adoption of the guidelines.

**G. Monetary Obligations**

Since the 1987 Texas Supreme Court decision in *Inwood North*, 736 S.W.2d 632, establishing that a POA lien can be foreclosed against lots encumbered by a Declaration imposing assessments and other charges, regardless of homestead designation, thousands of POAs have availed themselves of this remedy, subjecting them to endless debate, controversy and unpopularity.

As discussed below, TEX. PROP. CODE §209.0092 dispenses with the need to describe the manner and means by which a POA may foreclose its lien or grant a power of sale in the Declaration. The POA's lien for assessments is not statutory; however, TEX. PROP. CODE §209.0093 indicates that the language establishing a POA lien must still be included in the Declaration.

Customary assessments and charges for which a POA may levy in the Declaration and secure by its lien are:

1. Regular Assessment

"Regular Assessment" means an assessment, a charge, a fee, or dues that each owner of property within a residential subdivision is required to pay to the property owners association on a regular basis and that is designated for use by the property owners association for the benefit of the residential subdivision as provided by the restrictions. TEX. PROP. CODE §209.002(8).

Methods of determining and setting regular assessments should be set forth clearly in the Declaration. If an increase in assessments is permitted as determined by the board of directors (or other means such as CPI increases), but a stated limit is included, that limit may not be exceeded unless by an amendment to the Declaration by the owners. *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 168 (Tex. 2004); *Jakab v. Gran Villa Townhouses Homeowners Ass'n, Inc.*, 149 S.W.3d 863 (Tex.App.—Dallas 2004, no pet.).

The applicable portion of the restrictions regarding the general purpose of the maintenance fund must be followed closely when a POA attempts to legitimize its use. For example, purchase of real property was not on the list of permitted uses for the maintenance fund and was not allowed. *Candlelight Hills Civic Ass'n, Inc. v. Goodwin*, 763 S.W.2d 474 (Tex.App.—Houston [14<sup>th</sup> Dist.] 1988, writ denied).

The power and means to increase an assessment should be clearly stated in the Declaration, which may be by resolution of the board of directors or by a vote of a set percentage of the owners.

2. Special Assessment

"Special Assessment" means an assessment, a charge, a fee, or dues, other than regular assessments, that each owner of property located in a residential subdivision is required to pay to the property owners association, according to procedures required by the dedicatory instruments, for: (A) defraying in whole or in part, the cost, whether incurred before or after the assessment, of any construction or reconstruction, unexpected repair or replacement of a capital improvement in common areas owned by the property owners association, including the necessary fixtures and personal property related to the common areas; (B) maintenance and improvement of common areas owned by the property owners association; or (C) other purposes of the property owners association as stated in its articles of incorporation or the dedicatory instrument for the residential subdivision. TEX. PROP. CODE §209.002(12).

The Declaration must clearly state the purpose and use of a special assessment, distinguish it from an annual or general assessment, and set forth the manner of approval and collection. Usually a special

assessment allows a POA to undertake large capital improvement projects that might otherwise be financially impossible. If a special assessment is only effective for the year in which it is assessed, it should be so stated in the Declaration. Otherwise, a POA may not be able to contract for certain capital improvement projects that might be necessary for the health and safety of the subdivision that cannot be completed in one year. *Hodas v. Scenic Oaks Property Ass'n*, 21 S.W.3d 524, 531 (Tex.App.—San Antonio, 2000, pet. denied). However, a special assessment earmarked in the restrictions for "emergencies" will not stand if it is passed to fund projects set to be complete for a period of years. *Bankler v. Vale*, 75 S.W.3d 29, 37 (Tex.App.—San Antonio 2001, pet. denied). The wording in the Declaration regarding a special assessment will control.

An amendment to a dedicatory instrument assessing a special charge for use of the association's services and facilities was held to be reasonable when more than 2/3rds of the members present at a meeting voted to approve. *Frey*, 632 S.W.2d at 880.

3. Late Charges

In the areas of the state where TEX. PROP. CODE §204.010 is applicable, a POA may impose interest and late charges on delinquent assessments without specific authority in the Declaration; but in other jurisdictions the Declaration must contain a provision allowing those charges to be added to an assessment indebtedness and become part of the POA's lien. There is no statewide statutory vehicle for the imposition of late charges or interest by a POA.

A rate of interest of 10 percent was upheld, when it was contained in the Declaration, because owners agreed to a higher than statutory rate of interest when it purchased their lots. *Lee v. Braeburn Valley W. Civic Ass'n*, 794 S.W.2d 44 (Tex. App.—Eastland 1990, writ denied).

4. Fines

The power of a POA to impose fines is not statutory and must be included in the enumerated powers of the POA in the Declaration. If the Declaration does not authorize the imposition of monetary fines, and the POA only has the right to establish and collect assessments, fines may not be imposed in other dedicatory instruments. The fines attempted to be charged against the owners in the architectural guidelines were "arbitrary and punitive" and not fixed or established as required by the Declaration. *Duncan v. Dominion Estates Homeowners Association*, No. 01-09-01086-CV, 2011 WL 3505298, at \*5 (Tex.App.—Houston [14<sup>th</sup> Dist.] August 11, 2011) no pet.

If authorized by the Declaration, fines may be applied to an owner's assessment debt and collected in the manner of priority as prescribed, but a fine assessed by an association may not be given priority over any other amount owed the association. TEX. PROP. CODE §209.0063(a)(5) &(b)(2).

A POA may not foreclose an assessment lien if the debt securing the lien consists solely of fines assessed by the POA, or attorney's fees incurred by the POA solely associated with fines assessed by the POA. TEX. PROP. CODE §209.009(1)&(2).

#### 5. Use of Recreational Facilities

As with any assessment, the Declaration may provide for a lien against owners securing the POA's right to charge for the use of recreational facilities, if the POA is so empowered. Use of the recreational areas is not a condition precedent to any obligation by the owners to pay fees or assessments regarding the recreational areas. *Epernay Community Association, Inc. v. Saad Shaar*, 349 S.W.3d 738, 745 (Tex.App.--Houston [14th Dist.] 2011, no pet.).

#### 6. Club Dues

A Declaration may impose additional "athletic and social membership dues," when the owners in the subdivision are given membership in a country club. *American Golf Corp. v. Colburn*, 65 S.W.3d 277 (Tex.App.—Houston [14<sup>th</sup> Dist.] 2001, pet. denied).

#### 7. Airstrips

In a residential subdivision adjacent to an airstrip located on its remaining undivided acreage, lot owners accept obligation to pay fees by accepting an easement to use the runway; however, this does not stand for the proposition that the POA can, without judicial intervention, withhold the lot owners' access to the airstrip when fees are unpaid. *Smith v. Huston*, 251 S.W.3d 808, 829 (Tex.App.--Fort Worth 2008, pet. denied).

#### 8. Transfer Fees

A transfer fee is dues, a fee, a charge, an assessment, a fine, a contribution, or another type of payment under a Declaration or other covenant or under law, including a fee or charge payable for a change of ownership entered in the records of an association to which a subdivision applies or an estoppel letter or resale certificate issued by an association or its designated representative or managing agent which may be charged by a POA;<sup>2</sup> provided that no portion of the fee or charge is required to be passed through to a third party designated or identifiable in the Declaration or other covenant or law or in a document referenced in the Declaration or other

covenant or law, unless paid to the POA or its agents. TEX. PROP. CODE §5.202(b)(7).

If permitted by the Declaration, transfer fees may be used to contribute to the establishment of an initial reserve fund.

#### 9. Attorney's Fees

Attorney's fees may be made part of an assessment and lien against an owner's lot, if provided in the Declaration. They are also available in enforcement actions, pursuant to TEX. PROP. CODE §5.006. POAs are not required to comply with the notice prerequisite of TEX. PROP. CODE §§209.006 and 209.008(a) to recover attorney's fees for collection of delinquent assessments and attorney's fees. *Haas v. Ashford Hollow Cmty. Improv. Ass'n*, 209 S.W.3d 875, 885 (Tex.App.--Houston [14th Dist.] 2006, no pet.).<sup>2</sup>

#### H. Foreclosure

With passage of TEX. PROP. CODE §209.0092, it is no longer necessary to include in a Declaration the manner and means by which a foreclosure sale must be conducted to foreclose a POA's lien for assessments and other allowable charges, or to include the right of a power of sale. Under the statute, any other foreclosure method is prohibited, unless expressly waived by the owner at the time the foreclosure is sought. That section indicates that the Declaration must still include a grant of right to foreclose the POA's assessment lien.

In conjunction with TEX. PROP. CODE §209.0092, on December 12, 2011, the Texas Supreme Court published its Order Adopting Proposed Amendments to Texas Rules of Civil Procedure 735 and 736. These Rules now apply the same procedural rules for enforcement of a POA lien for assessments as those of home equity, reverse mortgage, home equity lines of credit, and transferred or property tax loans.

Nevertheless, a provision granting the right to foreclose a lien on real property for unpaid amounts due to a POA may be removed or adopted in a dedicatory instrument by a vote of at least 67 percent of the total votes allocated to the owners in the POA. Owners holding at least 10 percent of all voting interests in the POA may petition the association and require a special meeting to be called for the purposes of taking a vote for the purposes of this section. TEX. PROP. CODE §209.0093.

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<sup>2</sup> This case was decided before the effective date of TEX. PROP. CODE §209.0064; however it is still authority for the non-applicability of TEX. PROP. CODE §§209.006 and 209.008(a) to assessment collection.

## **I. Lien Priority**

Purchase money deed of trust liens should always have priority over POA assessment liens, or no one would be able to obtain a mortgage to purchase a property in the subdivision. But what about other liens such as mechanic's liens, home equity loans and reverse mortgages? The priority of these liens depends on how the Declaration is worded and the order of time in which the lien was perfected.

Many older declarations and restrictive covenants subordinate the POA lien to the security instruments used in acquiring and making improvements to the real property; however, before the enforceability of a home equity loan was established in Texas, this subordination would have only applied to a mechanic's lien.

### **1. Deeds of Trust**

When a Declaration states that the monthly assessments unpaid by an owner shall constitute a lien superior to all liens *except* for any prior recorded deed of trust, a court found that this meant assessment liens were inferior to deed of trust liens so long as the deed of trust was recorded prior to the owner's default in the payment of assessments.

In determining whether the equity loan was a deed of trust, the court gave the term its ordinary meaning and used Black's Law Dictionary to define "deed of trust." Using the dictionary definition and case law, the court found that a deed of trust is simply a "mortgage with power to sell on default." In reviewing the equity loan, the court noted it named a trustee and granted the trustee the power of sale. The equity loan gave the trustee the power to sell and convey the property at the foreclosure sale. The court was not persuaded that the equity loan failed as a deed of trust because it required a court order (*i.e.* litigation) before the lien could be foreclosed. The court found the equity loan to be a deed of trust in the ordinary meaning of the term. Because the equity loan was a deed of trust, and it was recorded more than a year before the default in payment of assessments, the home equity lien was superior to the assessment lien. *Riner v. Neumann*, 353 S.W.3d 312 (Tex.App.—Dallas 2011, no pet.).

This case would have most likely turned out differently if the POA had filed a delinquent assessment lien affidavit in the real property records. TEX. PROP. CODE §209.0094.

If you desire to prioritize the assessment lien over deeds of trust for home equity mortgages, carefully word your priority provision to describe these types of deeds of trust, making sure to follow the language of Section 50, Article XVI, Texas Constitution.

### **2. Taxes**

Property tax liens take priority over any lien held by a POA under a restrictive covenant, condominium declaration, master deed, or similar instrument that secures regular or special assessments, fees, dues, interest, fines, costs, attorney's fees, or other monetary charges against a property, whether or not it is expressed in the Declaration. TEX. TAX CODE §32.05(2).

But, if a POA has recorded an affidavit of delinquent assessment or similar instrument evidencing its lien against a property in the real property records (in addition to the Declaration, and pursuant to TEX. PROP. CODE §209.0094), it becomes a necessary party to a delinquent tax suit. TEX. TAX CODE §32.05(d).

Further, a POA was able to file and establish a claim for excess proceeds after a tax foreclosure sale. *Belt v. Point Venture Property Owners' Association*, No. 03-07-00701-CV, 2008 WL 2938879, at \*4 (Tex.App.—Austin July 30, 2008), no pet.

### **3. Mechanic's Liens**

A mechanic's lien does not affect any lien, encumbrance, or mortgage on the land or improvement at the time of the inception of the mechanic's lien, and the holder of the lien, encumbrance, or mortgage need not be made a party to a suit to foreclose a mechanic's lien. TEX. PROP. CODE §53.123(b).

Generally, the lien of a materialman, properly perfected, is superior and has priority over any other lien that has not actually attached prior to the inception of the materialman's lien. *MBank ElPaso v. Featherlite Corp.*, 792 S.W.2d 472, 475 (Tex.App.—El Paso 1990, writ denied).

There is no statutory priority of a mechanic's lien over a POA lien, the latter which almost always attaches prior in time by virtue of the Declaration. Further, you can use explicit language to ensure that the POA lien is superior to mechanic's lien when drafting the Declaration.

### **4. Prerequisites to Foreclosure**

A POA may not file an application for an expedited foreclosure of its assessment lien without first giving holders of inferior or subordinate liens a 61 day notice and opportunity to cure. TEX. PROP. CODE §209.0091.

## **J. Use, Maintenance, and Occupancy Restrictions**

Owner use, owner maintenance, and occupancy restrictions are the embodiment of servitudes, and should always be included in the Declaration. Specific aesthetic and use restrictions are too numerous to mention here, and are a topic for an entire article. For an overview of commonly used architectural restrictions and their treatment by the courts, please

see: "Architectural Guidelines for Property Owners Associations," State Bar of Texas Advanced Real Estate Drafting Course, 2015.

**K. Statutory Prohibitions Against Certain Restrictions**

TEX. PROP. CODE, Chapters 202 and 209 now contain prohibitions against certain provisions which may not be included in a dedicatory instrument or enforced against a property owner, specifically, those that prohibit or restrict:

- §202.003(b) the use of property as a "family home" (now "community home" under the Homes for Disabled Persons Act);
- §202.007(1) measures promoting solid-waste composting of vegetation;
- §202.007(2) installing rain barrels or a rain harvesting systems;
- §202.007(3) implementing efficient irrigations systems;
- §202.007(4) using drought-resistant landscaping or water-conserving natural turf;
- §202.009(a) displaying one or more signs advertising a political candidate or ballot item for an election;
- §202.010(b) installing a solar energy device;
- §202.011(1)-(2) installing shingles that are designed to be primarily to be wind and hail resistant, provide heating and cooling efficiencies greater than those provided by customary composite shingles, or provide solar generation capabilities and when installed resemble the shingles used or otherwise authorized for use in the subdivision, are more durable than and are of equal or superior quality, and match the aesthetics of the property surrounding the owner's property;
- §202.012(1)-(3) the display of the flags of the United States, Texas, or branches of the military service.

A front porch is residential property in which an owner has a separate ownership interest or a right to exclusive possession or use; and flying a U.S. flag from a flagpole attached to a beam anchored but not affixed to a front porch or touching the ground in front of the porch is protected by the Freedom to Fly the American Flag Act, Public Law 109-243, 120 Stat. 572, and TEX. PROP. CODE §202.012(1)-(3). *Forrest Lake Townhouse Association, Inc. v. Martin*, No. 01-14-00281-CV, 2015 WL 452307, at \*2 (Tex.App.—Houston [1<sup>st</sup> Dist.] January 27, 2015), no pet.);

- §202.018 displaying or affixing on the entry to a dwelling religious items the display of which is motivated by the owner's or resident's sincere religious belief; or
- §202.0019 an owner from owning, operating, installing, or maintaining a permanently installed electric standby generator.

Similarly, TEX. PROP. CODE Chapter 209 contains provisions which prohibit a POA from:

- Amending a dedicatory instrument to grant the POA an easement through or over an owner's lot without the consent of an owner. This section does not prohibit a POA from adopting or enforcing a restriction in a dedicatory instrument that allows the POA to access an owner's lot to remedy a violation of the dedicatory instrument (self-help). TEX. PROP. CODE §209.012;
- Adopting or enforcing a provision in a dedicatory instrument that prohibits or restricts an owner of a lot on which a residence is located from using for residential purposes an adjacent lot owned by a property owner. TEX. PROP. CODE §209.014; and
- Adopting or enforcing a provision in a dedicatory instrument that:
  - requires a lease or rental applicant or a tenant to be submitted to and approved for tenancy by the POA; or
  - require the following information to be submitted to a POA regarding a lease or rental applicant or current tenant:
    - a consumer credit report; or
    - a lease or rental application submitted by the applicant, tenant, or that person's agent when applying for tenancy.

This section is not to be construed to prohibit the adoption or enforcement of a provision in a dedicatory instrument establishing a restriction relating to occupancy and leasing. TEX. PROP. CODE §209.016.

These statutory restrictions and prohibitions proliferate each legislative session. For this reason, most POAs have recorded separate instruments adopting policies with regard to these provisions rather than amending the Declaration to include them. Either way, because they are use restrictions rather than administrative mandates for the POA, they should be adopted and recorded in conjunction with the Declaration rather than as additional Bylaws. Of course, if you a drafting an original or revised and restated declaration, it would be judicious to include these policies.

Please note that these statutory prohibitions are not absolute bans, but are guidelines as to how these types of provisions may be written and enforced. Further, they apply whether or not they are contained in any of the POA's governing documents.

#### **L. Adoption of Amendments**

Provisions for amending the Declaration, and the manner in which it may be amended, must be set forth in the Declaration itself. Aside from the provisions with regard to percentage of approval of owners for amendment set forth below, the desired procedure should be explicitly described, for example if a meeting is required or that the requisite number of votes must be obtained within a prescribed period of time.

A Declaration may only be amended by 67 percent of the total votes allocated to property owners entitled to vote, in addition to any governmental approval required by law. TEX. PROP. CODE §209.0041(h).

If the Declaration contains a lower percentage than 67 percent, the percentage of the Declaration controls. TEX. PROP. CODE §209.0041(h-1).

If the Declaration is silent as to voting rights for an amendment, the Declaration may be amended by a vote of owners owning 67 percent of the lots subject to the Declaration. TEX. PROP. CODE §209.0041(h-2).

A Declaration cannot be amended between the time the declarant loses the majority of votes or other form of control and the time a board is elected with POA owner representation. A provision in contravention of this is void. TEX. PROP. CODE §209.013.

The amendment of a restrictive covenant must be in the precise manner authorized by the dedicating instrument. *Dyegard Land Partnership v. Hoover*, 39 S.W.3d 300, 313 (Tex. App.—Fort Worth 2001, no pet.); *Youssefzadeh v. Brown*, 131 S.W.3d 641, 644-45 (Tex.App.—Fort Worth 2004, no pet.).

In order for a subsequent instrument to amend the original restrictive covenants, three conditions must be met: (1) the instrument creating the original restrictions must establish both the right to amend and the method of amendment; (2) the right to amend such restrictions implies only those changes contemplating a correction, improvement or reformation of the agreement rather than a complete destruction of it; and (3) the amendment may not be illegal or against public policy. *Miller v. Sandvick*, 921 S.W.2d 517, 522-23 (Tex. App.—Amarillo 1996, writ denied).

The power to amend the covenants is controlled by the method, and in the manner, provided for in the amendment provision. *Norwood v. Davis*, 345 S.W.2d 944, 948 (Tex.Civ.App.—Austin 1961, no writ). “We construe the language of the covenants to mean what it

says, *i.e.*, ‘a majority of the then owners of the lots,’ not the owners of the majority of the lots.” *French v. Diamond Hill-Jarvis Civic League*, 724 S.W.2d 921, 923 (Tex.App.—Fort Worth 1987, writ ref'd n.r.e.).

In the counties in which TEX. PROP. CODE §204.003 applies, if the document creating the restrictions contains an express designation setting out procedures to follow in amending or modifying the existing restrictions, the document prevails over the Code. *Simpson v. Afton Oaks Civic Club, Inc.*, 155 S.W.3d 674 (Tex. App.—Texarkana 2005, pet. denied).

#### **M. Security**

POAs are often called upon to provide security services because the owners perceive themselves to be safer with than without. An association is hard pressed to ignore these requests, but the potential liability for providing these services becomes an issue.

The Declaration should contain conspicuous exculpatory clauses which disclaim the obligation to provide community services arrangements and effectiveness of the services if provided, and contain an appropriate hold harmless provision. The disclaimer should also contain a release from liability for the negligent hiring of the security services provider, issuance of policies and guidelines of the security services provider, and the functioning of mechanical gates and other security devices. Nevertheless, a well-drafted waiver is no substitute for adequate liability insurance.

In order to avoid imposition of a duty to protect owners and their guests from criminal attack, especially in gated communities where many owners perceive an added layer of personal security, the Declaration may contain a provision in which the high cost of security measures must be voted on and approved by at least a majority of the owners.

Putting owners and lessees on notice of the limitation and duty to provide security services, including but not limited to uniform guards and entrance gates should be conspicuous in the Declaration.

In *Centeq Realty, Inc. v. Sieglar*, 899 S.W.2d 195 (Tex. 1995), the Supreme Court held that the agent of the association was not liable for criminal acts of third parties, even though the agent had the power to elect the majority of the association's board of directors, because the power to elect a majority of the board was entirely distinct from the power to control security. The only "control" wielded by *Centeq* related to its majority vote in electing board members, not to the rendering of decisions affecting security measures. *Centeq* had no direct power to make security decisions, and consequently, its influence, if any, upon the association was too attenuated to constitute "specific

control over the safety and security of the premises." *Id.* at 198.

#### **N. Golf Course Communities**

A Declaration for a golf course subdivision community should contain a warning of the dangers of errant golf balls and other hazards relating to the sport of golf, including, pesticides, watering and landscaping and view impairment.

If the developer of the golf course and the residential community are or will at some point become the same person or entity, then the drafter should include disclaimers with regard to the continued existence, ownership or operation of the golf course.

#### **V. RULES AND REGULATIONS**

The power to adopt Rules and Regulations should be granted in the Declaration to refine and add detail to the regulation and use of the common area and amenities, and in the Bylaws if they pertain to the administration and activities of the POA. There is no statutory authority for imposition and enforcement of Rules by a POA, except for subdivisions located in the counties governed by TEX. PROP. CODE, Chapter 204 or condominiums under TEX. PROP. CODE, Chapter 82; however, the definitions contained in TEX. PROP. CODE, Chapter 209 acknowledge "properly adopted rules and regulations" and "all lawful amendments to the covenants, bylaws, rules, or regulation" within the definition of "dedicatory instrument." TEX. PROP. CODE §209.002(4).

Any governing document which grants the authority to promulgate Rules and Regulations should also contain the procedure by which they may be adopted. Generally, they are conceived and approved by the board with or without the assistance of a committee appointed for that purpose; but may also be subject to the adoption of a majority of the members. The drafter should be knowledgeable about the community to ensure that the procedure is realistic and attainable, but also not so simple that changes may be frequent and without an opportunity given to owners for their input.

The court confirmed that the POA had the authority to promulgate Rules and Regulations regarding the property it owned (even though owners had the exclusive right to use the property) due to the fact that such a right was reserved in the recorded restrictions, provided that the Rules and Regulations were to insure the safety, sanitation, and pleasure of the greatest number of lot owners as provided in the restrictions. *Pinebrook Props., Ltd*, 77 S.W.3d at 502.

Regardless of whether or not the power to pass and amend Rules and Regulations is vested in the board, management or a combination of the two, Rules and Regulations should never be used to impose

provisions which properly belong in other governing documents and require a vote of the membership.

Below are examples of provisions which may be appropriately included in the Rules, but they are certainly not exhaustive. More than any other governing document, the Rules provide a framework for the routine regulation of activities taking place in the subdivision.

#### **A. Notice Required Before Enforcement**

The 82<sup>nd</sup> Legislative Session passed provisions which characterize violations as "curable" and "uncurable" with regard to violations by owners for which notice must be given before a POA may suspend an owner's right to use a common area, file a suit other than to collect a regular or special assessment or foreclose its lien, charge an owner for property damage, or levy a fine for violation of the restrictions or bylaws or rules. Most of the types of violations cited are demonstrative of common provisions contained in Rules and Regulations rather than deed restrictions.

Fines and suspension penalty policies should be adopted within the Rules which set out a schedule of reasonable fines and periods of suspension of use of common areas. The policy should include the due process requirements of TEX. PROP. CODE §§209.006 and 209.007.

##### 1. Period to Cure

An owner is entitled to a reasonable period to cure the violation and avoid the fine or suspension if the violation is of a curable nature and does not pose a threat to public health or safety.

The following are examples of acts considered "curable" for purposes of this section:

- a parking violation;
- a maintenance violation;
- failure to construct improvements or modifications in accordance with approved plans and specifications; and
- an ongoing noise violation such as a barking dog.

TEX. PROP. CODE §209.006(i)(1)-(4).

##### 2. Uncurable Violations

Examples of acts considered "uncurable" for the purposes of this section are:

- shooting fireworks;
- an act constituting a threat to health or safety;
- a noise violation that is not ongoing;
- property damage, including the removal or alteration of landscape; and

- holding a garage sale or other event prohibited by a dedicatory instrument.

TEX. PROP. CODE §209.006(h)(1)-(5).

### **B. Pets**

In *Baugh v. Fleming*, No. 03-08-00321-CV, 2009 WL 5149928 (Tex.App.—Austin, December 31, 2009), no pet., the court discussed instances whether an activity falls within the scope of the term “spying” when videotapes were used to prove the violation of a dog barking restriction, and if it was an appropriate method to demonstrate the violation.

A specific prohibition against residents from keeping “pit bulldogs” was upheld when the evidence showed from veterinary records and police reports that described the dogs as “pitbulls” or “Staffordshire bull terriers,” when the owner argued that there were fact issues regarding the breed of his dogs, “Diamond” and “Kane.” *Thomas v. Lake Cove Community Association, Inc.*, No. 14-13-00173-CV, 2014 WL 1004525, at \*2 (Tex.App.—Houston [14<sup>th</sup> Dist.] March 13, 2014), no pet.

### **C. Short Term Rentals**

If leasing and renting of residences in the subdivision is permissible, the covenants themselves do not place any limit on the duration of the leasing of a residence, and the drafters were familiar with the concept of time limits with regard to uses that may be made of structures in the subdivision and did not impose any duration limits with regard to the leasing of homes, the Court would not rule in favor of a POA’s in the enforcement of a “single family residential purposes” restriction against short term rentals in the absence of a specific minimum duration for leasing provision. *Zgabay v. NBRC Property Owners Association*, No. 03-14-00660-CV, 2015 WL 5097116, at \*2 (Tex.App.—Austin August 28, 2015) pet. denied.

When promulgating a Rule regarding leasing, be mindful of the recent regulation of residential leases or rental agreements described in section K above. TEX. PROP. CODE §209.016.

### **D. Swimming Pools**

Rules regarding “adult swims” in POA owned swimming pools, child supervision, swim diapers may violate fair housing laws on the basis of familial status. Be mindful of these potential pitfalls when drafting Rules regulating the use of pools and recreational facilities. 41 U.S.C.A Section 3601 *et seq.* (West 1988); TEX. PROP. CODE §301.004.

### **E. Satellite Dishes**

The Telecommunications Act of 1996 prevents POAs from adopting Rules deals with the placement of

satellite dishes if they interfere with reception. A rule or regulation may not unreasonably delay or add unreasonable costs to an owner’s right to receive a signal. Rules may only be adopted suggesting desired locations for satellite dishes. 47 C.F.R. Section 1.4000 a/k/a Over-the-Air Reception Devices Rule (OTARD).

In *Baugh*, 2009 WL 5149928, at \*2, the Court granted a permanent injunction prohibiting a owners form placing a dish at “a location that violates the recorded deed restrictions which are applicable to their residence.”

### **F. Parking**

Resident-only parking permits on public streets has been upheld by the U.S. Supreme Court. The court applied a rational-basis standard between residents and non-residents and found that abatement of air pollution and other adverse environmental effects of commuting justified the discrimination. *County Board of Arlington Virginia v. Richards*, 434 U.S. 5 (1977).

### **G. Concealed Weapons/Open Carry**

It is a violation of TEX. PEN. CODE §30.06 for a person to carry a concealed weapon on a premises when he or she has notice that it is forbidden. Notice may be oral or written and contain the following language: “Pursuant to Section 30.06, Penal Code (trespass by license holder with a concealed handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a concealed handgun.”

Similarly, the following language should be posted to ban openly carried handguns: “Pursuant to Section 30.07, Penal Code (trespass by license holder with an openly carried handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a handgun that is carried openly.”

Posters may be purchased at <https://www.laborlawcc.com/Texas-No-Firearms-30>, but should also be included in the POA’s Rules and Regulations.

### **H. Towing**

The Texas Towing and Booting Act, TEX. OCC. CODE §§2308.001-.595 (West 2012 & Supp. 2015) sets forth the prerequisites to allowable towing of vehicles from parking facilities and roadways. In *Sisavath v. Oates*, No. 05-15-00131-CV, 2016 WL 1010162, at \*5 (Tex.App—Dallas March 31, 2016), the Court upheld the POA’s right to avail itself of the statute, and hire a company to tow vehicles parked on grass, in fire lanes, blocking an entrance, exit, or driveway, were double parked, or were “heavy-duties.”

**I. Courtesy Patrol**

If security guards and patrol are provided by the POA, a provision such as the following may be included in the Rules and Regulations:

**THE ASSOCIATION SHALL NOT BE CONSIDERED TO HAVE A DUTY TO INSURE OR GUARANTEE THE SAFETY OF THE OWNERS IN THE SUBDIVISION OR TO BE A PROVIDER OF SECURITY SERVICES. WHETHER OR NOT THESE SERVICES ARE PROVIDED BY THE ASSOCIATION, THE ASSOCIATION SHALL NOT BE HELD LIABLE FOR ANY LOSS, DAMAGE OR INJURY BY REASON OF FAILURE TO PROVIDE ADEQUATE SECURITY OR INEFFECTIVENESS OF SECURITY MEASURES AND SERVICES TAKEN OR PROVIDED. EACH OWNER, TENANT, GUEST OR INVITEE ACKNOWLEDGES AND UNDERSTANDS THAT THE ASSOCIATION, ITS DIRECTORS, OFFICERS AND COMMITTEE MEMBERS HAVE MADE NO REPRESENTATIONS OR WARRANTIES, EXPRESSED OR IMPLIED, RELATIVE TO ANY SECURITY MEASURES UNDERTAKEN WITHIN THE SUBDIVISION.**

**J. Vehicle Storage**

A restriction against the "semi-permanent" storage was not sufficiently specific to support a rule disallowing a boat from being stored in excess of 24 hours. *Wiese v. Heathlake Community Ass'n, Inc.*, 384 S.W.3d 395 (Tex.App.--Houston [14th Dist.] 2012, no pet.).

**VI. BYLAWS**

Courts will not interfere with the association's right of internal management so long as the governing body does not substitute legislation for interpretation, overstep bounds of reason, common sense, or fairness, or contravene public policy or laws of the land in its interpretation and administration. *Frey*, 632 S.W.2d at 880.

**A. Community Administration**

The Bylaws are the Association's housekeeping rules, and govern the inner workings and affairs of the corporation. It defines membership and what policies are embraced and rights included in the concept. They should determine the election and activities of directors, administration of the organization, and standards applicable to governance actions.

The term 'Bylaws' has a popular meaning to include the entire set of governing documents; but this is inaccurate as Bylaws should not contain provisions

which are not consistent with statutory definitions, and/or that should be found in the Declaration.

Provisions contained in the Bylaws should be those which are addressed in the Business Organizations Code, because most provisions of the Code may be varied by the Association's Bylaws; however, unless indicated, the provisions of Code cited may not.

Many Bylaw provisions are now codified in Chapter 209 of the TEX. PROP. CODE, which were already addressed in Chapter 22 of the BUS. ORG. CODE (Nonprofit Corporations) and, in some case, appear to conflict. Further, many provisions of the Nonprofit corporations sections may be overridden by a POA's Bylaws. In these instances, Chapter 209 should be followed first, as it is specific to POAs. The Bylaws should follow the non-conflicting provisions of Chapter 22 as much as possible to ensure enforceability.

There are good reasons to include the following provisions in your Bylaws: some of them are required to be included by State Law, some State Laws may be varied by the Bylaws if that is what the board and members want, and to put the board and members on notice of what is required. If the Bylaws are not carefully drafted to comply with pertinent statutes, business transactions, voting and meetings may be conducted in contravention of these laws and policies, subjecting them to invalidation.

**B. Adoption and Amendment**

The Bylaws are adopted by the initial directors, and contain provisions for the regulation and management of the affairs of the corporation that are consistent with law and the certificate of formation. With a POA, the board may continue to amend or repeal Bylaws unless: i) that power is reserved exclusively to the members in the certificate of formation; or ii) the members amend, repeal, or adopt a bylaw which expressly provides that the directors may not amend or repeal a bylaw. Tex. BUS. ORG. CODE §22.102(a)-(c). An Action taken in violation of corporate bylaws is merely voidable rather than void. A voidable act may be subsequently ratified or confirmed. *City of Hughes Springs v. Hughes Springs Volunteer Ambulance Serv.*, 223 S.W.2d 707, 715 (Tex.App.--Texarkana 2007, no pet.).

**C. Nonprofit Corporation**

POAs are not required to be incorporated under the Texas Property Code; however, any POA which is incorporated is a Texas nonprofit corporation, pursuant to Chapter 22 of the Texas Business Organizations Code. They also may qualify for an exemption from state franchise tax under TEX. TAX CODE §171.082, and may qualify for nominal value property taxes on

common areas under TEX. TAX CODE §23.18. Dividends may not be paid to, and no part of income may be distributed to the corporation's members, directors, or officers. TEX. BUS. ORG. CODE §22.053.

If a POA is not incorporated, it becomes subject to TEX. BUS. ORG. CODE Chapter 252 entitled "Unincorporated Nonprofit Associations."

If incorporated, POAs are nonprofit corporations, but are not charitable organizations under IRS Code 501(c)(3).

An association's accumulated assets are corporate property and can become the property of members only in accordance with the law regulating nonprofit corporations. They are prohibited by law from paying a dividend, or distributing any income to members except in payment for services rendered. *Fulbright Grazing Ass'n v. Randolph*, 524 S.W.2d 798, 800 (Tex.App.--Texarkana 1975, no writ). A member of such an organization acquires not a severable right of any of its property or funds, but merely a right to joint use and enjoyment thereof so long as he continues to be a member. *Raulston v. Everett*, 531 S.W.2d 635, 638 (Tex.App.--Texarkana 1978, no writ).

#### **D. Hierarchy of Corporate Documents**

A provision of a certificate of formation that is inconsistent with a bylaw controls over the bylaw; except a change in the number of directors by amendment of the Bylaws controls over the number stated in the certificate of formation, unless the certificate of formation provides that a change in the number of directors may be made only by an amendment to the certificate. BUS. ORG. CODE §22.103(a)-(b).

A bylaw may not be amended to conflict with a declaration. TEX. PROP. CODE §209.0041(i).

#### **E. Membership**

During the Declarant Control Period, there are at least two classes of membership: the declarant and the owners. If the POA corporation has one or more classes of members, the certificate of formation *or* the Bylaws must include: i) a designation of each class; ii) the manner of the election or appointment of the members of each class; and iii) the qualifications and rights of the members of each class. BUS. ORG. CODE §22.151(b)(1)-(3).

#### **F. Method of Notice to Owners**

Most actions of the POA require notice to owners. POAs may adopt a method that may be used to provide a notice to an owner; but a new statute allows POAs adopt and use an alternative method of notice other than that prescribed by law if the property owner to whom the notice is provided affirmatively opted to allow the POA to use the alternative notice.

Nevertheless, the POA may not require an owner to use the alternative method. TEX. PROP. CODE §209.0042.

#### **G. Meetings**

The characterization of and notice provisions for meeting are among the most commonly misunderstood concepts of POA membership, so it is beneficial to clearly set them out within the Bylaws.

##### 1. Organizational

The organizational meeting must be called after certificate of formation is filed with the Secretary of State to adopt Bylaws and elect officers. A majority of the initial board members (named in the certificate of formation) or the organizers, must be given three days' notice of the meeting. TEX. BUS. ORG. CODE §22.104(a).

##### 2. Transitional

The first meeting of members is extremely significant because they it is usually called after the declarant has sold lots to individual owners. Often, the purpose of the meeting is to make the transition from developer to owner control and elect owner board members. The first meeting of the members may be held at the call of a majority of the directors with three days' notice which must state the purpose of the meeting. TEX. BUS. ORG. CODE §22.104(b); TEX. PROP. CODE §209.00591(e).

##### 3. Annual

A POA corporation must hold an annual meeting of the members at a time that is stated in or determined in accordance with the Bylaws. TEX. PROP. CODE §209.014. Even though TEX. BUS. ORG. CODE §22.153(b) states that if the Bylaws provide for more than one regular meeting of the members each year, an annual meeting is not required, a POA must hold an annual meeting.

##### 4. Failure to Call Annual Meeting

Any member of a POA can demand that an annual meeting be called within a reasonable time, if the directors fail to call one. It must be made in writing and sent by certified mail. If the annual meeting is not called by the 61<sup>st</sup> day after the demand, a member may compel the holding of the meeting by legal action. TEX. BUS. ORG. CODE §22.154.

Under TEX. PROP. CODE §209.014, however, if an annual meeting is not called, any owner may demand that one be called within 30 days. The demand must be sent certified mail, return receipt requested, to the POA's registered agent, to the association's mailing address as shown on the most recent Management Certificate, and to each member of the POA.

If the board still fails to call a meeting of the members, an election committee of 3 owners may be formed. After filing a notice with the county clerk that the committee was formed, it may call a meeting and elect directors. A committee that does not hold or conduct a successful election within four months after the date the notice is filed with the county clerk is dissolved by operation of law. Notice, quorum and voting provision contained in the Bylaws apply to any meeting called by an election committee.

It would be prudent to include this provision in the Bylaws to provide notice of the requirement and remedy.

#### 5. Special

Special meetings may be called by the president, board of directors members having one-tenth (1/10th) of the votes entitled to be cast at a meeting, or other officers or persons as provided by the certificate of formation or Bylaws. TEX. BUS. ORG. CODE §22.155.

#### 6. Notice of Election or Vote

Both TEX. PROP. CODE §209.0056 and TEX. BUS. ORG. CODE §22.156 require that notice of the place, date and time of a meeting of the members be given not later than the 10th day and not earlier than the 60th day before the date of an election or vote. For an election or vote not taken at a meeting, TEX. PROP. CODE §209.0056 requires that the notice be given not later than the 20th day before the latest date on which a ballot may be submitted to be counted. This section supersedes any contrary requirement in the governing documents.

#### 7. Quorum of Members

An absentee or electronic ballot may be counted as an owner present and voting for the purpose of establishing a quorum only for items appearing on a ballot. TEX. PROP. CODE §209.0059. Unless otherwise provided by the certificate of formation or Bylaws, members holding one-tenth (1/10th) of the votes entitled to be cast, in person or by proxy, constitute a quorum. TEX. BUS. ORG. CODE §22.159(a).

The vote of a majority of the votes entitled to be cast by the members at a meeting at which a quorum is present is the act of the members, unless the vote of a greater number is required by law, the certificate of formation or the Bylaws. TEX. BUS. ORG. CODE §22.159(b). Following the plain language of the statute, this construction, in certain factual situations, would certainly be different from a majority of the votes cast. This is patently true because if a sufficient number of the voters, or delegates, although present, abstained, then to obtain a majority of the votes, the motion would have to carry by fifty percent (50%) plus one (1) of all the members entitled to vote and being

actually present, rather than merely fifty percent (50%) of the votes plus one (1) of the votes actually cast. *Governing Bd. v. Pannill*, 659 S.W.2 670, 675-76 (Tex.App.--Beaumont 1983, writ ref'd n.r.e.).

#### 8. Voting

The following provisions apply to voting and elections at all POA membership meetings:

##### a. Voting List and Record Date

After setting a record date for notice of a meeting, a POA must prepare an alphabetical list of the names of all voting members, including their addresses and number of votes. TEX. BUS. ORG. CODE §22.158. Therefore, the list of eligible voters would be the same as the owners of lots from a date certain and, if required, residents as well. Owners may not be excluded for any other reason, e.g. delinquent in payment of maintenance assessments.

The record date for "determining the owners or members" of a corporation is "the date on which: (1) notice of the meeting is given to the owners or members entitled to notice of the meeting" as provided by TEX. BUS. ORG. CODE §6.101(d).

It's standard practice in membership meetings in homeowners associations, or stockholders meetings in corporations, for there to be a cutoff date for people who are expecting to vote to have provided information necessary to people who are verifying it. *Nelson*, 322 S.W.3d at 682.

##### b. Right to Vote

A provision in a dedicatory instrument that would disqualify a property owner from voting in a POA election of board members or on any matter concerning the rights or responsibilities of the owner is void. TEX. PROP. CODE §209.0059. The record date for the determination of members entitled to notice of or to vote at a meeting is effective for an adjournment of the meeting unless the board of directors sets a new date for determining the right to notice of or to vote at the adjournment. TEX. BUS. ORG. CODE §22.163.

Each member is entitled to one vote, except to the extent voting rights are limited, enlarged, or denied by a certificate of formation or Bylaws. TEX. BUS. ORG. CODE §22.160.

##### c. Voting Method

Unless a dedicatory instrument provides otherwise, a POA is not required to provide an owner with more than one voting method. An owner must be allowed to vote by absentee ballot or proxy. An absentee or electronic ballot may not be counted if the owner appears at any meeting in person to vote or if a proposal was amended at the meeting to be different

from the exact language on the absentee or electronic ballot. TEX. PROP. CODE §209.00592.

If authorized by the certificate of formation or Bylaws, a member vote on any matter may be conducted by mail, by facsimile transmission, by electronic message, or by any combination of those methods. TEX. BUS. ORG. CODE §22.160(D).

d. Ballots

In the 84th Texas Legislative Session, there were enacted different versions of TEX. PROP. CODE §209.0058 regarding ballots, effective September 1, 2015, which must be harmonized. Generally, any vote cast in an election or vote must be in writing and signed by the member. Because it appears that it was anticipated that there could be a vote by acclamation at a meeting, the safer course would be to require all votes to be in writing. The matter of secret ballots is what poses a problem by this section. Subsection (a-1) requires that any ballot cast for a vote other than one cast outside a meeting, in an election to fill a position of the board, on a proposed adoption or amendment to a dedicatory instrument, on a proposed increase in assessment or adoption of a special assessment, or removal of a board member must be in writing and signed by the member and cast by secret ballot. Provisions adopted by POAs allowing voting by secret ballot must include measures that reasonably ensure that a member cannot cast more votes than he or she is eligible and that the association counts every vote cast. Further, in any election for the board, each candidate may name one person to observe the counting of the ballots, provided they don't see the name on the ballot and may be removed if they are disruptive. You can't make these things up.

(1) Absentee

Solicitation of absentee ballots must include:

- each proposed action and an opportunity to vote for or against;
- instructions for delivery, including delivery location; and
- the following language: "By casting your vote via absentee ballot you will forgo the opportunity to consider and vote on any action from the floor on these proposals, if a meeting is held. This means that if there are amendments to these proposals your votes will not be counted on the final vote on these measures. If you desire to retain this ability, please attend any meeting in person. You may submit an absentee ballot and later choose to attend any meeting in person, in which case any in-person vote will prevail."

A POA of more than 100 lots shall include on each absentee ballot or other ballot for a board member election the name of each eligible candidate from whom the POA received a request to be placed on the ballot. TEX. PROP. CODE §209.00593(a-3).

(2) Electronic

An electronic ballot is one given by e-mail, fax, or posting in Internet website, for which the identity of the property owner submitting can be confirmed and receive a receipt of transmission. If posted on a website, notice must be sent to each owner with instructions on obtaining access. TEX. PROP. CODE §209.0592(d) & (e).

9. Proxies

Proxy voting is permitted under TEX. BUS. ORG. CODE §22.160(b) and TEX. PROP. CODE §209.0592(a)(1). Unless otherwise provided by the proxy, it proxy is revocable and expires 11 months after the date of its execution. A proxy may not be irrevocable for longer than 11 months. TEX. BUS. ORG. CODE §22.160(c).

10. Election of Directors

A POA comprised of more than 100 lots must provide notice to the members soliciting candidates interested in running for the board at least 10 days before the POA disseminates absentee ballots or other ballots for use in electing a board. The POA must include the names of each eligible candidate from whom it received a request to be placed on the ballot. The notice must be mailed to each owner or posted in a conspicuous manner reasonably designed to provide notice to members on common property or private property (with the owner's permission) or on the POA website or other Internet media, and by e-mail to those who have registered their e-mail addresses with the POA. TEX. PROP. CODE §209.00593(a-1)&(a-2).

Notwithstanding any provision in a dedicatory instrument, any board member whose term has expired must be elected by the owners. A board member may be appointed by the board to fill a vacancy on the board. TEX. PROP. CODE §209.00593(a).

The board may amend the Bylaws to provide for elections as required by this section, and the statute supersedes the POA documents. This section does not apply to the appointment of a board member during a development period. TEX. PROP. CODE §209.00593(b) & (d).

11. Tabulation of and Access to Ballots

Board candidates in elections (or otherwise the subject of an association vote), or person related within the third degree of consanguinity, may not tabulate or

be given access to the ballots cast in that election. Persons who tabulate may not disclose how a member voted. Only tabulators allowed to recount may have access to ballots. TEX. PROP. CODE §209.0057.

12. Recount of Votes

Any owner may demand a recount of the votes not later than the 15th day after the later of the date of any meeting of owners at which the election or vote was held or the date of the announcement of the results of the election or vote. The demand must be submitted in writing by verified mail to the POAs mailing address as shown on the latest management certificate, or to the address to which absentee or proxy ballots are mailed. This section includes provisions for payment of costs.

a. Tabulator

The POA must hire a qualified person, at owner's expense, to tabulate the votes, who: is not a member of the POA or related to a board member within the third of sanguinity; and s a current or former county judge, county elections administrator; justice of the peace, or county voter registrar; or, a person agreed upon by the association and the requesting owner(s).

b. Results

The recount must be completed within thirty days of the receipt of payment, and the POA must provide each owner who requested the recount with notice of the results. If the recount changes the results of the election, the POA must reimburse the owner for the cost of the recount not later than 30days after the date the results of the recount are provided.

c. Interim Actions

Any action taken by the board in the period between the election and the recount is not affected. TEX. PROP. CODE §209.057.

**H. Board of Directors**

Perhaps the only subject that is more controversial in POAs than an increase in assessments, is the service of members on the board of directors.

1. Number of Directors

The number of directors must be set in the certificate of formation or Bylaws, but may not be fewer than three. The number of directors may be increased or decreased by an amendment to the certificate of formation or Bylaws, but a decrease may not shorten the term of an incumbent director. TEX. BUS. ORG. CODE §22.204.

2. Qualification

Except during the Development Period, a POA's Bylaws may require one or more board members to reside in the subdivision subject to the dedicatory

instruments, but may not require all board members to reside in the subdivision. TEX. PROP. CODE §209.0591(a-1). The certificate of formation or Bylaws may prescribe other qualifications for directors. TEX. BUS. ORG. CODE §22.203.

If a board is presented with written, documented evidence from a database or other governmental law enforcement authority that a board member was been convicted of a felony or crime involving moral turpitude not more than 20 years before the date the board is presented with the evidence, he or she is automatically considered removed and prohibited from future service. It appears to apply to anyone running for a position as well, as the statute uses the term "ineligible." TEX. PROP. CODE §209.0591(b).

3. Term of Office

Directors other than the initial directors are elected, appointed, or designated for the terms provided in the Bylaws. TEX. BUS. ORG. CODE §22.208. A director may be removed from office under any procedure provided by the certificate of formation or Bylaws. TEX. BUS. ORG. CODE §22.211(a).

4. Vacancy

A board member may be appointed by the board to fill a vacancy on the board. A board member appointed to fill a vacant position shall serve for the remainder of the unexpired term of the position. The appointment of a board member in violation of this section is void. TEX. PROP. CODE §209.00593(a) & (c). Unless otherwise provided in the Bylaws (or certificate of formation), a vacancy in the board shall be filled by the affirmative vote of the majority of the remaining directors, regardless of whether that majority is less than a quorum. TEX. BUS. ORG. CODE §22.212(a). A vacancy in the board occurring because of an increase in the number of directors shall be filled by election at an annual meeting or at a special meeting of members called for that purpose. TEX. BUS. ORG. CODE §22.212(b).

5. Removal

A director may be removed with or without cause by the persons entitled to elect, designate, or appoint the director, in the absence of a provision for removal in the Bylaws or certificate of formation. TEX. BUS. ORG. CODE §22.211(b).

If the association's governing documents do not create a duty to state the cause for removal [of a director], the bylaws only require there exist cause for removal. *Matzel v. Stonecrest Ranch Prop. Owners' Ass'n*, 305 S.W.3d 368 (Tex.App.—Houston [14th Dist.] 2010, no pet.).

6. Quorum of Directors

A quorum for the transaction of business by the board of directors is a majority of the number of directors set by the Bylaws or any number, not less than three, set as a quorum by the certificate of formation or Bylaws. A director present by proxy at a meeting may not be counted toward a quorum. TEX. BUS. ORG. CODE §22.213.

**7. Action by Directors**

The act of a majority of directors present in person or by proxy at a meeting at which a quorum is present is the act of the board of directors of a corporation, unless the act of a greater number is required by the certificate of formation or Bylaws. TEX. BUS. ORG. CODE §22.214.

**8. Directors' Meetings**

A meeting is defined as a deliberation between a quorum of the voting board, or between a quorum of the voting board and another person, during which POA business is considered and the board takes formal action. TEX. PROP. CODE §209.0051(a)(1).

**a. Open Meetings**

Regular and special meetings of a POA's board of directors must be open to owners, subject to the right of the board to adjourn and reconvene in closed executive session. TEX. PROP. CODE §209.0051(a)(2).

**b. Executive Session**

Closed sessions may be held to consider actions involving personnel, pending or threatened litigation, contract negotiations, enforcement actions, confidential communications with the POA attorney, matters involving the invasion of privacy of individual owners, or matters to remain confidential by request of the affected parties and agreement of the board. Any decision made in executive session must be summarized orally and placed in the minutes in general terms without breaching privacy, privilege or confidentiality. The summary must include a general explanation of expenditures approved. Tex. Prop. Code §209.0051(c).

**c. Notice to Directors**

Regular meeting of the board of directors may be held with or without notice to the directors as prescribed by the Bylaws. Special meetings shall be held with notice as prescribed by the Bylaws. Attendance of a director at a meeting constitutes a waiver of the notice, unless the director attends for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened. TEX. BUS. ORG. CODE §22.217(a) & (b).

**d. Voting in Person or by Proxy**

A director of a POA may vote in person, or if authorized by the Bylaws, by proxy executed by the director in writing. TEX. BUS. ORG. CODE §22.215.

A proxy expires three (3) months after the date the proxy is executed and is revocable. TEX. BUS. ORG. CODE §22.216(a) & (b).

**e. Location**

Meetings must be held in the county in which all or part of the subdivision is located or in an adjacent county, unless held electronically or by telephone. Tex. Prop. Code §209.0051(c-1).

**f. Electronic or Telephonic Meetings**

A board meeting may be held by electronic or telephonic means, provided that:

- each board member may hear and be heard by every other board member;
- except for any portion of the meeting conducted in executive session;
  - all owners in attendance at the meeting may hear all other board members;
  - owners are allowed to listen using any electronic or telephonic communication method used or expected to be used by a board member to participate; and
  - the notice of the meeting includes instructions for owners to access any communications method required to be accessible as described above.

TEX. PROP. CODE §209.0051(c-2)(1)-(3).

**g. Notice to Members**

Members must be given notice of the date, hour, place, and general subject of a regular or special board meeting, including a general description of any matter to be brought up for deliberation in executive session.

- The notice must be mailed to each owner no later than 10 or earlier than 60 days before the date of the meeting; or
- posted in a conspicuous manner in the common area or private property within the subdivision at least 72 hours before the meeting; or
- on the POA's website (if they have one); and
- by e-mail to each owner who has registered their e-mail with the association. Owners have a duty to keep their e-mail addresses updated.

Tex. Prop. Code §209.0051(e).

**h. Continued Meetings**

If a meeting is recessed to continue the next day, the board is not required to re-post notice if it is done in good faith and not to circumvent the open meeting requirements. Any subsequent recesses to the following day must have notice given within two hours after adjournment. Tex. Prop. Code §209.0051(g).

**i. Board Meetings Without Notice to Owners**

A board may take action outside of a meeting, including voting by electronic or telephonic means, without prior notice to owners under subsection (e), if each board member is given a reasonable opportunity to express the board member's opinion to all other board members and to vote. Any action taken without notice to owners must be summarized orally, including an explanation of any known actual or estimated expenditures approved at the meeting, and documented in the minutes of the next regular or special board meeting. Tex. Prop. Code §209.0051(h).

**j. Actions that Cannot be Taken Without Notice**

The following are actions that a board cannot take unless done in an open meeting for which prior notice was given to owners:

- assessing fines;
- damage assessments;
- initiation of foreclosure actions;
- initiation of enforcement actions, excluding TROs or threats to health and safety;
- increases in assessments;
- levying of special assessments;
- appeals from denial of ACC approval; or
- a suspension of a right of an owner before opportunity to be heard and defend.
- lending or borrowing money;
- the adoption or amendment of a dedicatory instrument;
- the approval of an annual budget or an amendment of an annual budget that increases the budget by more than 10 percent;
- the sale or purchase of real property;
- filling of a vacancy on the board
- construction of capital improvements other than the repair, replacement, or enhancement of existing capital improvements; or
- election of an officer.

This section only applies to a board meeting during the Development Period only if the meeting is conducted for the purpose of:

- adopting or amending the declaration, bylaws, rules, regulations, and other governing documents;
- increasing the amount of regular assessments or adopting or increasing a special assessment;
- electing non-developer board members or establishing a process by which they are elected; or
- changing the voting rights of members of the association.

TEX. PROP. CODE §209.00591(h).

**k. Minutes**

The board shall keep a record of each regular or special board meeting in the form of written minutes of the meeting. The board shall make meeting records, including approved minutes, available to a member for inspection and copying on the member's written request to the POA's managing agent at the address appearing on the most recently filed management certificate or, if there is not a managing agent, to the board. TEX. PROP. CODE §209.00591(d).

**9. Committees**

By resolution adopted at a meeting in which a quorum is present, or, if authorized by a similar resolution in the Bylaws, the board may designate and appoint one or more committees that do not have the authority of the board of directors in the management of the POA. TEX. BUS. ORG. CODE §22.219. For a POA, this may include the architectural committee; however, the architectural committee's powers must be conferred by the Declaration. See Section IV., Subsection F. above.

**10. General Standards for Directors**

This section should always be included in the Bylaws because there is a widespread misconception that a POA and its directors have a fiduciary duty to the members.

A director of a POA is not considered to have the duties of a trustee of a trust with respect to the corporation or with respect to the property held or administered by the corporation, including property subject to restrictions imposed by a donor or transferor of the property. TEX. BUS. ORG. CODE §22.223.

A director shall discharge its duties, including those as a committee member, in good faith, with ordinary care, and in a manner the director reasonably believes to be in the best interest of the corporation. A director is not liable to the corporation, a member, or another person for an action taken or not taken if the director acted in compliance with this standard. A person seeking to establish liability of a director must

prove that the director did not act within this standard. TEX. BUS. ORG. CODE §22.221(a)-(b).

11. Officers

Traditionally, the officers are elected by the directors amongst themselves, not by the members. If the certificate of formation or Bylaws do not include provisions for the election or appointment of officers, the officers shall be elected or appointed annually by the board of directors. TEX. BUS. ORG. CODE §22.232(b).

Officers are elected or appointed at the time, in the manner, and for the terms prescribed in the certificate of formation or Bylaws, but the term of an officer may not exceed three years. TEX. BUS. ORG. CODE §22.231(a).

The officers shall include a president and a secretary and may include one or more vice presidents, a treasurer, and other officers and assistant officers as considered necessary. Any two or more offices, other than the offices of the president and secretary may be held by the same person. TEX. BUS. ORG. CODE §22.231(a).

Officers have the same standard of care and liability as directors. TEX. BUS. ORG. CODE §22.235.

12. Statutory Administrative Policies

Certain procedure which must be followed with regard to owner accessibility of POA documents, records retention, collection of assessments and enforcement of restriction violations are now statutory, and POAs are required to adopt formal policies giving owners notice of their entitlements.

As these provisions are relatively recent additions to the POA body of law, many associations that already had governing documents in place have recorded them as separate instruments. As they can be characterized as administrative (for the most part) they also can be included in the Bylaws. This makes particular sense if the board of directors can amend the Bylaws, because any changes made by the legislature to the structure of these policies may be easily made by the board as they come to pass.

a. Open Records

Notwithstanding any provision in a dedicatory instrument, a POA shall make the books and records, including financial records, open to and reasonably available for examination by an owner, his agents, attorneys and CPAs. Owners may have access to POA records without first having to state a proper purpose and only being able to request books and records relevant to that purpose, as previously required by §22.351 of the Business Organizations Code.

An association must make all records available upon written request by the owner via certified mail,

indicating which records the owner wants to see. TEX. PROP. CODE §209.005(c).

b. Records Production and Copying

Associations must now adopt and record written policies regarding production and copying of records, including how much they will charge for the related administrative fees. If the association fails to comply, it may not charge an owner for the costs of providing copies of requested information. TEX. PROP. CODE §209.005(i).

(1) Costs

The POA may require payment in advance of estimated cost and may submit a final invoice within 30 business days after the information was provided. Owners are entitled to a refund if estimate exceeds actual cost.

(2) Owner's account

If additional amounts are owed, they may be added to owner's account as an assessment. However, the POA cannot foreclose on a debt consisting solely of fees for copies under TEX. PROP. CODE §209.009(3).

c. Confidential Records

POAs may keep confidential and are not required to release for inspection records pertaining to covenant violations and delinquent assessments of individual owners other than their address, or information relating to an employee of the association. This information is only obtainable if the owner gives express written approval or if a court orders their release. TEX. PROP. CODE §209.005(1)(1)-(2).

d. Document Retention

Associations composed of more than 14 lots must also now adopt and record written policies regarding document retention for the periods prescribed in this section.. TEX. PROP. CODE §209.005(m).

e. Alternative Payment Schedule

A POA composed of more than 14 lots is required to adopt and record reasonable guidelines to establish an alternative payment schedule by which an owner may make partial payments for delinquent regular or special assessments or any other amount owed to the POA, without accruing additional monetary penalties. TEX. PROP. CODE §209.0062.

f. Notice Before Enforcement

Before a POA may suspend and owner's right to use a common area, file a suit against an owner other than a suit to collect a regular or special assessment or foreclose under its lien, charge an owner for property

damage, or levy a fine for a violation of the restrictions or Bylaws or rules, the POA must give written notice to the owner by certified mail. TEX. PROP. CODE §209.006.

g. **Right to Hearing**

If an owner is entitled to an opportunity to cure a violation, the owner has the right to submit a written request to discuss and verify facts and resolve the matter in issue before a committee appointed by the board, or before the board if it does not appoint a committee. TEX. PROP. CODE §209.007.

h. **Attorney's Fees**

An owner is not liable for attorney's fees incurred by the POA relating to a matter in a notice under TEX. PROP. CODE §209.006 if the attorney's fees are incurred before the conclusion of the hearing under TEX. PROP. CODE §209.007; or, if the owner does not request a hearing under that section, before the date by which the owner must request a hearing. The owner's presence is not required to hold a hearing [under TEX. PROP. CODE §209.007]. TEX. PROP. CODE §209.008(b).

13. **Contracts**

A POA may enter into an enforceable contract with a current board member, a person related to a current board member within the third degree by consanguinity or affinity (defined in TEX. GOVT. CODE Chapter 573), a company in which a current board member (or a person related to a current board member within the third degree by consanguinity or affinity) has a financial interest in at least 51 percent of the profits, if:

- the board member, relative, or company bids on the proposed contract and the POA has received at least two other bids for the contract from other persons, if reasonably available in the community;
- the board member is not given access to other bids and does not participate in any board discussions regarding the contract and did not vote on the contract;
- the material facts regarding the relationship or interest with respect to the proposed contract are disclosed to or known by the board;
- the board, in good faith and with ordinary care, authorizes the contract by affirmative vote of the majority of board members who do not have an interest in the contract; and
- the board certifies that these requirements have been satisfied by a resolution approved by a majority of the board members who do not have an interest in the contract.

TEX. PROP. CODE §209.0052.

This section should be included in the Bylaws, because otherwise a board and members may not be aware of its provisions when entering into contracts.

TEX. BUS. ORG. CODE §22.230 has a similar provision, which is more detailed, but states that if the conditions precedent to contracts with interested parties are met, a member has no cause of action for breach of duty. TEX. BUS. ORG. CODE §22.230(e).

14. **Insurance**

Although not required by any statute, add provisions to the Bylaws which require the POA through the board of directors or the managing agent to routinely evaluate, purchase, and review adequate liability and insurance coverage of the common areas and other facilities of the subdivision. Additionally, the board should be covered by appropriate directors' and officers' errors and omissions policies.

**VII. CONCLUSION**

An attorney's knowledge and understanding of the law of servitudes is the fundamental groundwork for endeavoring to draft a Declaration, because it confers the easements and restrictive covenants that design the infrastructure, homogeneity and cohesiveness of the subdivision. The Rules should be used to fill in the gaps of the function of regulating use of property, activities and conduct. The Bylaws should be promulgated in a manner that fosters the effective management and enforcement powers of the POA.

Well drafted governing documents require a thorough analysis of the character of the subdivision and the persons who will make their homes in it. They should contain the essential elements of the characteristics of the lifestyle and participation in the community.

General premises to follow when determining in which document to include provisions regarding subdivision creation and viability and POA governance are:

- If the provision involves something the owners must adhere to as servitude, it should be included in the Declaration.
- If the provision governs routine activities in the subdivision or expands and refines the application of a servitude, it should be included in the Rules.
- If the provision governs an administrative subject or concern that the POA as a corporate entity should follow, it should be included in the Bylaws.

Other recommendations worth noting:

- Rules should enhance and clarify the Declaration, and avoid any conflict with other dedicatory instruments. They should be reasonable and not extend or exceed limitation of powers granted in the Declaration.
- A governing document which has a less onerous amendment procedure should not be used to impose provisions that would not otherwise be approved by a vote of the owners, and actually belong in another dedicatory instrument. For example: Expansion of an assessment obligation is an inappropriate provision in Bylaws which may be amended by the board of directors without a vote of the members. Such actions are subject to challenge.
- Even though there is a presumption of reasonableness in discretionary authority by a POA, care should be taken to draft provisions of a governing documents in a manner which lays a foundation for the POA to avoid arbitrary, capricious and discriminatory application.
- When deliberating amendments to a POA's governing documents, committees should be appointed and owner input solicited, even if the members are not required to vote on the changes.

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