

**PROPERTY OWNERS ASSOCIATION
LAWS FOR SUBDIVISIONS AND CONDOMINIUMS**

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- *Property Owners and Condominium Associations Overview*: Real Estate Law 101 at the Advanced Real Estate Drafting Course, 2018-present
- *From Declarant to Property Owners Association: A Checklist for the Seamless Transition of a Development*: Advanced Real Estate Drafting Course, 2019
- *A Basic Overview of Laws Affecting Property Owners Associations and Condominiums*: Real Estate Law 101, 2018
- *Governing Documents for POAs: Distinguishing Roles for Declarations, Rules, and Bylaws*: Advanced Real Estate Law Course, 2016
- *Fair Housing Issues*: Advanced Real Estate Law Course, 2015
- *Architectural Guidelines for Property Owners Associations*: Advanced Real Estate Drafting Course, 2015
- *Drafting Covenants, Conditions and Restrictions Under the New Laws for Property Owners Associations*: Advanced Real Estate Drafting Course, 2013
- *Property Owners' Association Foreclosures and The New Expedited Foreclosure Process* (with Marc Markel): State Bar of Texas Webcast, October 25, 2012

- *Expedited Foreclosure for Property Owners Associations* (with Marc Markel): State Bar of Texas Webcast, January 19, 2012
- *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
- *Property Code Chapter 209 - Implementing the New Law*: Advanced Real Estate Law Course, 2002
- *A Primer for Representing Condominium and Property Owners Association (v.2)*: Advanced Real Estate Law Course, 2001
- *Premises Liability Issues*: Advanced Real Estate Law Course, 2000
- *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

Articles and Presentations for the Houston Bar Association Real Estate Section

- *From Declarant to POA: A Guide to a Smooth Transition of Residential Subdivisions*, 2018
- *Property Owners Association "Reform Laws" – An Overview of the 2011 Texas Legislative Session*, 2011

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PROPERTY OWNERS ASSOCIATION LAWS FOR SUBDIVISIONS AND CONDOMINIUMS

I. INTRODUCTION

By this point in time, nearly everyone attending State Bar real estate courses has some exposure to property owners and condominium associations law, even if only by virtue of living in a place that is governed by one of these entities. This overview includes the basic laws and principals you may refer to in preparation of representing *any party* in connection with a POA matter, not just the associations. There is also anecdotal information derived from the author's own experiences and updates to include significant events that have transpired in the association world since last year (2018-19).

II. COMPARE AND CONTRAST

Historically, there has been a misperception that Property Owners Associations ("POA") and Condominium Counsel of Co-owners (pre-1994) or Unit Owners Associations (post-1994) are guided by the same body of law because they are usually lumped together as companions in references. There is a treacherous downside to continuing this practice because it has the effect of perpetuating the myth and fails to disabuse non-experts of the notion that the statutes governing each are not interchangeable. Keep this in mind as you are representing a community association in litigation, as this practitioner has had the unfortunate experience more than once of appearing before a Court that does not understand the difference. They are cousins but not siblings.

For this reason, in this article the two basic forms of ownership in a community association that are subject to restrictions or provisions in a Declaration that authorize the association to collect regular and special assessments on all or a majority of the property/units (a/k/a mandatory associations) are distinguished as: 1) subdivision, which includes forms of ownership by one owner of a single-family residential unit (attached or detached), including the building foundation and the ground beneath, and; 2) condominium, whereby each owner has exclusive ownership of the interior air space and an undivided percentage interest in the land, buildings and other common elements. In Texas a co-operative ownership structure is allowable by separate statute, but it is uncommon and will not be addressed here.

Each of these two forms of ownership is governed by a distinct set of statewide statutes contained in the TEX. PROP. CODE: Chapters 207 and 209 for subdivisions and Chapters 81 and TEX. PROP. CODE §209.0591(a-1).82 for condominiums. There are also

adjunct statutes that apply to both. For example, Property Owners Associations (including condominiums), if organized as corporations, are Texas non-profits under TEX. BUS. ORG. CODE Chapter 22; however, there are provisions in the TEX. PROP. CODE that pre-empt the corporate laws respectively for the two basic association categories which are discussed in the article. Further, TEX. PROP. CODE Chapter 202, Construction & Enforcement of Restrictive Covenants, applies to both subdivisions and condominiums.

This article is written for the practitioner who has not represented subdivision/condominium-related parties on a regular basis (but may like to); and further provides an overview of basic statutes and concepts in drafting subdivision and condominium documents, representing associations as general counsel, or assisting an owner in a transaction to purchase or who is already living in a community association environment.

III. SUBDIVISIONS

"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. TEX. PROP. CODE §209.002(3).

A. Declarant Control/Development Periods

"Development Period" means 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).

Prior to 2011, Declarants could maintain control over a subdivision indefinitely by designating an expiration date far into the future or measuring it against a contingency over which he or she had absolute power. But now, TEX. PROP. CODE §209.00591(c) limits the Declarant Control Period. 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.

Creation of the subdivision community begins with the real estate developer's plan of development and essentials of ownership and operation. Representing the Declarant in the sale and marketing of the development is outside the scope this article; however, the following are laws, agencies, parties and regulations with which the POA attorney should be acquainted:

1. Interstate Land Sales Full Disclosure Act

The Interstate Land Sales Full Disclosure Act ("ILSFDA") is a federal law designed to protect consumers against fraudulent land sales by requiring a developer to make full disclosure of certain characteristics of the land through the Act's disclosure provisions and by prohibiting the developer from making certain fraudulent or deceitful representations to purchasers through the Act's anti-fraud provisions. ILSFDA makes it unlawful for a developer or its agents directly or indirectly use interstate commerce, such as the mail, telephone, or publication, to sell or lease any lot not otherwise exempt unless the developer: (i) files a "Statement of Record" with the Secretary of the Department of Housing and Urban Development ("HUD") and (ii) gives prospective purchasers or lessees of a lot a copy of a "Property Report" prior to the execution of a contract or lease for a lot. Unless a project qualifies for an exemption, a developer must register the project with HUD or it may face civil and criminal penalties, as well as the rescission of executed contracts and closed sales.

ILSFDA and its regulations provide for a number of exemptions if the project meets certain criteria. Some exemptions provide that ILSFDA is inapplicable to the project in its entirety. Other exemptions will allow the developer to avoid registration under ILSFDA but will still require the developer to comply with its anti-fraud provisions.

HUD administers ILSFDA and influences the drafting of project documents by requiring an attorney's opinion letter stating that all the project documents have been properly filed or recorded and are consistent with legal policies set out in HUD Handbook and comply with all state and local laws.

2. Platting

The plats show the layout of the subdivision, and display which areas are to be common areas and those which are to be individually owned lots. It is a blueprint or map, showing easements, boundaries, infrastructure and dedications. Even though the plats are the instruments that establish the existence of the development scheme of the subdivision in that they create the individual lots that are sold to builders or homebuyers, the Declarant's attorney is not normally directly involved in the platting process, unless there are issues with the plat approval authority. Regulation of subdivision platting in municipalities is governed by

TEX. LOC. GOV'T. CODE, Chapter 212, and in counties by TEX. LOC. GOV'T. CODE, Chapter 232.

"**Lot**" means any designated parcel of land located in a residential subdivision, including any improvements on the designated parcel. TEX. PROP. CODE §209.002(5).

A plat dedication may also convey property from a developer to the association. See *Raman Chandler Props., L.C. v. Caldwell's Creek Homeowners Ass'n, Inc.*, 178 S.W.3d 384, 394 (Tex. App.-Fort Worth 2005, pet. denied) (recognizing plat dedication of open space common areas to be maintained for benefit of homeowners' association).

3. Lenders

Subdivision construction lenders prefer that the developer maintains development rights for as long as possible, typically until the majority of units are sold to individuals and proper management is underway. But, because of the statutory Declarant Control Period prescribed in TEX. PROP. CODE §209.00591(c), the lenders are bound by that time frame; however, they are free to retain their security interest in the recreational facilities, greenbelts and private streets, etc. until there is a comfort level of financial success in the project.

Lenders also require being co-insured and loss payees on insurance policies covering assets of the subdivision so long as they maintain a financial interest.

In all construction loan documents, the lender's lien for purchase money or refinancing, is made expressly superior to any association, POA or HOA lien. Also, lenders prefer that the restrictive covenants expressly indicate that assessments incurred prior to a foreclosure and any assessment liens filed of record prior to such foreclosure and after the lender's lien is filed of record, do not survive the foreclosure. In another words, the lender's lien is always superior to the rights of the POA.

4. Development Rights

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

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 in and that option provided for in the Declaration.

B. Declaration of Covenants, Conditions and Restrictions

“**Declaration**” as 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).

The subdivision form of a community officially begins with the drafting and recording of the governing document usually called a Declaration of Covenants, Conditions and Restrictions (“**Declaration**”). Essentially the Declaration is the instrument through which all characteristics of a community and its private government flow; and is the enabling instrument combining elements and characteristics of a constitution, corporate charter, municipal charter, and conveyance and lien contract. It dictates the appearance, uses, zoning and ordinances through restrictive covenants, which run with title to the property and bind future owners, and is at the top of the hierarchy of the governing documents for the subdivision and the POA.

There are many forms for Declarations readily available, but if used they should always be honed to the specific characteristics of the subdivision for present and future use, *i.e.* the drafter should be concerned with the vision of the Declarant and anticipate inevitable changes in the course of the development of the subdivision. There are many commonalities among Declarations, 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 of the properties in the subdivision. When a property owners association is necessary to assume responsibility for oversight of the common lands and regulate the use and sharing of financial responsibility by the individual owners of property, the genesis of that control must also be included in the Declaration. Unlike condominiums, subdivision Declarations do not have a statutory requirements checklist for what must be contained to be valid; however, the following components should always (or in the case of statutory prohibitions, should not) be included in the Declaration by virtue of statutes, case law, and experience:

1. Declarant Voting Rights

As stated above, the Declaration must include the various and specific reserved rights with regard to development and administration of the subdivision that the Declarant may exercise.

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 individual lot owner class. This occurs by attrition or until a date certain, whichever occurs first. TEX. PROP. CODE §209.00591(c).

2. 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).

3. Restrictive Covenants

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

4. Residential Purpose

“**Residential purpose**” with respect to the use of a Lot:

- (1) means the location on the Lot of any building, structure, or other improvement customarily appurtenant to a residence as opposed to use for a business or commercial purpose; and
- (2) includes the location on the Lot of a garage, sidewalk, driveway, parking area, children’s swing or playscape, fence, septic system, swimming pool, utility line, or water well and, if otherwise specifically permitted by the dedicatory instrument, the parking or storage of a recreational vehicle.

TEX. PROP. CODE §209.015(2)(A)-(B).

The phrase “residential purpose” focuses on the owner’s use of the property or upon the activity that actually takes place on the land. “The court looked to prior case law and American jurisprudence finding that a residence requires a use of a dwelling for living purposes and activities generally associated with a personal dwelling.” *Tarr v. Timberwood Park Owners Ass’n*, 556 S.W.3d 278, 289 (Tex. 2018).

5. Statutory Prohibitions Against Certain Restrictions

a. Family Homes, Green Systems, and Signs

TEX. PROP. CODE Chapter 202 contains prohibitions against certain restrictions which may not be included or adopted into 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;
- §202.010(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;
- §202.018 - displaying or affixing religious items on the entry to a dwelling, the display of which is motivated by the owner's or resident's sincere religious belief;
- §202.0019 - an owner from owning, operating, installing, or maintaining a permanently installed electric standby generator;
- §202.020 - any person who is otherwise authorized from lawfully possessing, transporting, or storing a firearm, any part of a firearm, or firearm ammunition, as well as otherwise lawful discharge of a firearm; or
- §202.020(a) - including by requiring a permit or fee, the occasional sale of lemonade or other nonalcoholic beverages from a stand or property located in the subdivision by an individual younger than 18 years of age who has the permission of a property owner in the subdivision for the sale.¹

Previous §202.009(a) - displaying one or more signs advertising a political candidate or ballot item for an election has been re-designated as Election Code §259.002, but is still applicable.

b. Easements, Adjacent Lots, and Leasing

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 §209.015; 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.

c. OTARD Rule

The Telecommunications Act of 1996, a/k/a Federal Communications Commission §207 Over-the-Air Reception Devices or "OTARD" Rule:

Telecommunications equipment (antennas) covered by the Rule are DBS antennas one meter or less in diameter, broadband radio services antennas one meter or less in diameter, and television broadcast antennas regardless of size. Antennas may be installed on individually owned property in subdivisions and limited common elements in condominiums (i.e. balconies, patios). POA restrictions may prohibit antenna if the restrictions are based on clearly defined safety objectives within the restriction or in another document referenced by the restriction. If there is another way to accomplish the objective, the POA must use the least restrictive method.

POA restrictions may regulate antenna and satellite dishes if the regulations do not: (1) prevent or unreasonably delay installation, maintenance, or use of antennas (total bans on antennas and drawn out application and permit processes); (2) unreasonably increase the cost of installation, maintenance, or use of antennas (requiring expensive fencing and landscaping to screen antenna); or (3) preclude an acceptable quality

¹ 202.020(b) further states that the POA (1) does not owe a duty of care to persons participating in a beverage sale described by Subsection (a); and (2) is not liable for any

injury to persons participating in a beverage sale described by Subsection (a), except for wilful or wanton acts or gross negligence of the POA.

signal (a requirement to place an antenna in the backyard, which faces the wrong direction to obtain reception). POAs may be permitted to have restrictions that require compliance with building and safety codes, and manufacturer's instructions on installation of antennas.

6. Creation of the Association

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

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. 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. TEX. PROP. CODE §209.002(6).

A mandatory POA is one that requires membership in the association for all or a majority of the owners of residential property within the subdivision subject to the association's dedicatory instruments. TEX. PROP. CODE §209.003(b).

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).

7. Authority to Impose 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 a POA is not designated as the entity to collect assessments for itself and manage and regulate the subdivision for the benefit of the owners, 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).

a. *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).

b. *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).

8. Other Powers

Recognized but not statutory powers of a POA must be included in the Declaration so that they become servitudes and are enforceable, and should include:

a. *Rule-making*

Rule-making authority for POAs must be granted in the governing documents of the subdivision. 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 again 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).

b. Foreclosure

In *Inwood North Homeowners Ass'n v. Harris*, 736 S.W.2d 632, 635 (Tex. 1987), the Texas Supreme Court established that a POA lien can be foreclosed against lots encumbered by a Declaration imposing assessments and other charges, regardless of homestead designation. For years Texas POAs enjoyed the benefits of non-judicial foreclosure of its lien if a power of sale was included in the Declaration, until cases of abuse of power (most misreported) became urban legend and “reforms” were made to the POA foreclosure process. 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 (“Expedited Foreclosure”).

Under 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, Expedited Foreclosure is not required if the owner of the property that is subject to the foreclosure agrees in writing to waive it 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, but also permits the POA to forego expedited Foreclosure and judicially foreclose its lien.

Nevertheless, a provision reserving a lien and granting the POA the right to foreclose on real property for unpaid amounts due to a POA must be included in the Declaration. Further, such a provision 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.

c. 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).

d. 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 [14th Dist.] August 11, 2011) no pet.

9. Lien Priority

As discussed above, Declarant’s construction lender’s lien secured by any Lot subject to assessment is superior to the POA’s assessment lien. Similarly, purchase money deed of trust liens on individual owner’s lots 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.

a. 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 an 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.

b. 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).

A POA may be 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.).(mem. op.).

c. 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.

10. Amendment

a. During Development Period

A dedicatory instrument created by a developer of a residential subdivision or by a POA in which the developer has a majority of the voting rights or that the developer otherwise controls under the terms of the dedicatory instrument may not be amended during the period between the time the developer loses the majority of the voting rights or other form of control of the POA and the time a new Board of directors of the association assumes office following the loss of the majority of the voting rights or other form of control. A provision in a dedicatory instrument that violates this section is void and unenforceable. TEX. PROP. CODE §209.013.

b. By Vote of Owners

All Declarations, regardless of when created, may be amended by 67 percent of the total votes allocated to property owners entitled to vote on the amendment to the Declaration, in addition to any governmental approval required by law. If the Declaration contains a lower percentage, the percentage in the Declaration controls. This section does not apply to an amendment of a Declaration during a development period. TEX. PROP. CODE §209.0041.

c. "Bracketed" Statutes

TEX. PROP. CODE Chapter 201 applies to residential real estate subdivisions in most urban areas of the state. It was enacted in 1985 to assist Houston-area subdivisions that had deed restrictions lacking procedures for extension and modification, or which required unanimous or nearly unanimous approvals. It now includes other metropolitan areas if the restrictions may be amended by more than 75 percent of the owners. The amendment process requires the appointment of a Petition Committee the members of which must file a notice in the real property records that a petition is being circulated, including a description of the documents being amended. The amendment must be accomplished within one year from the filing of the notice to file the actual petition, and no other committee can be formed during that year.

TEX. PROP. CODE Chapter 205 provides a procedure for counties with a population of 65,000 or more whereby the board can amend the restrictions to come into compliance with HUD or VA requirements.

Also, the "bracketed" TEX. PROP. CODE Chapters 204, 206, 208, 210, 211, 212, and 213 provide procedures for modification, extension or amendment to certain restrictions in the counties to which they apply.

11. Architectural Review

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 construction 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 review function should always be included in the Declaration, or no such power exists.

a. Design Guidelines

In their providence, developers are vested in a vision for a community by dedication in the plats and governing documents. To ensure this vision is carried out in a homogeneous manner at the initial stages of planning and construction, developers retain for themselves and entities they control the master design functions that determine the aesthetics of the subdivision. Usually these powers are reserved until such time as they are transferred by the terms of the Declaration to a POA. The plan can be memorialized in implementing architectural or design guidelines within the declaration or in separate instruments to uphold minimum standards requiring prior approval for construction and modification to existing improvements.

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 design guidelines that interpret the provisions of the Declaration.

b. Assignment of Aesthetic Review Function

The Declaration may retain certain approval rights (such as architectural and builder approvals) into the Declarant for periods beyond the time he or she no longer has the power to appoint the board of the POA. These rights can be reserved for the purposes of preserving the general scheme and ensuring homogeneity within the original development, and for annexing additional acreage if permitted by 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 can only be effectively assigned by Declarant by showing a clear intent to convey and transfer the right to an architectural control committee. The right to delegate this authority must be reserved by the Declarant to appoint within his or her period of control, or may come into play later on when a property owners association has assumed a majority or all of the positions on the Board of directors. *Anderson v. New Property Owners Association of Newport, Inc.*, 122 S.W.3d 378, 389 (Tex.App.—Texarkana 2003, pet. denied).

12. Transition from Developer

The transition process begins when the Declaration is drafted; and insightful provisions concerning the passage of control to the owners in the Declaration may prevent 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 POA. Dissatisfaction over the manner in which the passage of control is accomplished is the subject of much litigation.

The procedure for the succession of interest and assignment of rights and duties contained in the governing documents must be followed for a POA to become legitimately empowered to assert its authority over owners and the subdivision. *See Simms v. Lakewood Village Prop. Owners Ass'n, Inc.*, 895 S.W.2d 779 (Tex.App.—Corpus Christi 1995, no writ). TEX. PROP. CODE § 209.0591(c).

13. Conveyance of Common Areas

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.

A Declaration can effectively convey property from a Declarant to the Association by the use of dedicatory language in the Declaration. *Gray v. Key Ranch at the Polo Club Home Owners Ass'n, Inc.*, No. 03-09-00145-CV, 2010 WL 143421, at *4 (Tex. App.—Austin Jan. 12, 2010, no pet.) (mem. op.). *See also Simms v. Lakewood Vill. Prop. Owners Ass'n*, 895 S.W.2d 779, 783-84 (Tex. App.—Corpus Christi 1995, no writ) (construing covenant provision providing for mandatory transfer of common areas to association upon sale of all subdivision lots); *Scoville v. SpringPark*

Homeowner's Ass'n, 784 S.W.2d 498, 500 (Tex. App.—Dallas 1990, writ denied) (construing Master Declaration provisions providing for acquisition of common areas by homeowners' association). *SVT, L.L.C. v. Seaside Vill. Townhome Ass'n*, No. 14-17-00012-CV, 2018 Tex. App. LEXIS 4779 (Te. App.—Houston [14th Dist.] June 28, 2018, no pet.) (mem. op.).

C. Association Governance

When used in this article, "POA," "property owners association," "association," or "community association" refers 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."

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."

1. Governing Documents

"**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 POA, 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).

Traditionally the leading governing document in the set is the Declaration, usually entitled "Declaration of Covenants, Conditions, and Restrictions," also sometimes known as a "Master Deed." Also included is the Certificate of Formation of the POA, a set of "Rules" or Regulations" which contain the fine points of community living and the "Bylaws" that govern the representative business entity aspect of the POA.

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 TEX. PROP. CODE § 209.002(4). *Stork v. Tres Lagos Prop. Owners Ass'n*, 442 S.W.3d 730, 738 (Tex.App.—Texarkana 2014, pet denied).

2. Hierarchy of Authority

POA practitioners often disagree as to which documents carry more weight and authority. Regardless, 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).

3. Certificate of Formation

"**Certificate of Formation**" means: the document required to be filed with the filing officer under Chapter 3 (Formation & Governance) to form a filing entity; and if appropriate, a restated certificate of formation and all amendments of an original or restated certificate of formation. TEX. BUS. ORG. CODE §1.001(6)(A)&(B). The POA corporate entity is created by filing the Certificate of Formation with the Secretary of State; however, as discussed above, its designation as a POA is conferred by the Declaration.

a. *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 TEX. BUS. ORG. CODE Chapter 22. 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.

b. *Designated Representative*

A POA 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).

c. *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." *Summers*, 363 S.W.3d 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).

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.

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).

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 POAs Bylaws; however, unless indicated, the provisions of Code cited may not.

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

b. *Annual Meeting*

An example of the foregoing is within the annual meeting provisions: POA corporations 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, POAs must hold an annual meeting.

c. *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.

(1) *Qualification*

A provision in a dedicatory instrument that restricts a property owner's right to run for a position on the board is void. TEX. PROP. CODE §209.0591(a). 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 immediately ineligible to serve, automatically considered removed and prohibited from future service. TEX. PROP. CODE §209.0591(b).

A POA that governs a subdivision comprised of multiple sections may designate in an association

instrument governing the administration or operation of the association a specified number of positions on the board, each of which must be elected from a designated section of the subdivision. The instrument may require each board member representing a section to reside in that section. TEX. PROP. CODE §209.0591(a-1).

A person may not serve on the board of a POA if the person cohabits at the same primary residence with another board member of the association. This subsection does not apply: (1) to an association with fewer than 10 residences; or (2) during a subdivision's development period to affect the eligibility to serve on the board of: (A) a person who cohabits with a developer of the subdivision regulated by the association; or (B) the developer. TEX. PROP. CODE §209.0591(a-2).

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).

(2) Open Board Meetings

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).

(3) 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).

(4) 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 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).

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.

5. Statutory Administrative Policies

Certain procedures must be followed with regard to: a) owner accessibility of POA documents; b) records production and copying; c) document retention, and; d) alternative payment schedules for assessments, and some 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 are also entitled to obtain copies of information contained in the books and

records. 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). 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. TEX. BUS. ORG. CODE §22.351.

Exceptions are:

(1) 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(l)(1)-(2).

(2) Attorney's Files

Attorney's files and records relating to the POA, *excluding invoices requested by an owner under §209.008(d)* (incident to collection of assessments), are not records of the POA and not subject to inspection. TEX. PROP. CODE §209.005(d).

b. *Records Production and Copying*

Associations must 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). 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. 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).

(1) Remedies for Owners Denied Access to Records

Owners who are denied access to POA records may file a suit in the Justice Court in the precinct where the property is located, if they send a notice by certified mail at least 10 business days that they intend to bring the action and describe in detail the books and records requested.

(2) Owner Prevails

The justice may order a POA to release or allow access to the records, a grant a judgment against the POA for court costs and attorney's fees in connection with seeking the remedy, or a judgment authorizing the

owner or their assignee to deduct the amounts awarded from future assessments.

(3) Association Prevails

The POA is entitled to judgment for costs and attorney's fees against the non-prevailing owner. TEX. PROP. CODE §209.005(n)(1)-(3).

c. *Document Retention*

Associations composed of more than 14 lots must adopt and record written policies regarding document retention for the periods prescribed in this section. TEX. PROP. CODE §209.005(m)(1)-(6).

d. *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. No payment plan may be for a period shorter than three months or extend for more than eighteen months. The POA is not required to enter in to a plan with an owner who failed to honor a previous payment plan within two years following default under the plan. TEX. PROP. CODE §209.0062.

6. Delinquent Assessment Collection

Prior to referring an account to a collection agent, a POA is first required to provide written notice, by certified mail, that describes the options the owner has to avoid the referral, including payment plan options, and provides at least thirty days to cure the delinquency before further action is taken. TEX. PROP. CODE §209.0064(b)(1)-(3).

a. *Collection Fees*

Attorneys may be "debt collectors" under the federal Fair Debt Collection Practices Act, 15 U.S.C. §1692 ("FDCPA"), and TEX. FIN. CODE Chapter 392, Texas' Debt Collection Act. Collection procedures should be followed under these statutes.

Owners are not liable for costs dependent or contingent on amounts recovered, or under an agreement that does not require the POAs to pay all fees for the action taken. This provision was added because some attorneys were charging fees to owners which were not charged to the Association for which they were collecting assessments. TEX. PROP. CODE §209.0064(c)(1)-(2).

b. *Contact*

An agreement between a POA and a collection agent may not prohibit an owner from contacting the Board or managing agent regarding their delinquency. TEX. PROP. CODE §209.0064(d).

7. Enforcing the Association's Lien

Association foreclosures are the most hotly contested and publicly visible issues in all of POAdom, and are what gave the "reform" movement its head of steam in 2011. This is where the real horror stories are harvested, and like the lady spilling her hot coffee, the truth often becomes distorted and anecdotal. The Texas Residential Property Owners Protection Act, TEX. PROP. CODE Chapter 209 was the successful target of eliminating non-judicial foreclosures for POAs, regardless of whether authorized by their governing documents.

a. *Foreclosure Sale Prohibited in Certain Circumstances*

Since 2002, POAs could not foreclose an assessment lien for debts consisting solely of fines or attorney's fees associated with the fines assessed. It has now been added that the lien cannot also be foreclosed for copy charges under the open records policy of TEX. PROP. CODE §209.005. TEX. PROP. CODE §209.009(3).

b. *Prerequisites to Foreclosure*

Junior lien holders under a deed of trust must now be notified and given a 61-day opportunity to cure the owner's delinquency before a POA may exercise its foreclosure power. TEX. PROP. CODE §209.0091.

c. *Judicial Foreclosure Required*

As discussed above, on December 12, 2011, the Texas Supreme Court published its Order Adopting Proposed Amendments to Texas Rules of Civil Procedure 735 and 736. Under the statute, any other foreclosure method *except judicial foreclosure* is prohibited, unless expressly waived by the owner at the time the foreclosure is sought. These Rules now apply to foreclosures of home equity, reverse mortgage, home equity lines of credit, transferred or property tax loans and POA assessment liens. TEX. PROP. CODE §209.0092.

d. *Notice of Right of Redemption after Foreclosure Sale*

A POA that conducts a foreclosure sale must send the owners and lienholder of record a notice of the sale within 30 days, advising them of the right to redeem the property. TEX. PROP. CODE §209.010. Owners and lienholders of record have 180 days after the foreclosure sale to redeem. The method and amounts which must be paid to redeem is determined by whether it was the association or a third party who purchased at the sale. TEX. PROP. CODE §209.011.

e. *Removal or Adoption of Foreclosure Authority*

Again, the right to foreclose a POA assessment lien may be removed from a dedicatory instrument by a vote of at least 67 percent of the total votes allocated to

owners. Conversely, the assessment lien foreclosure may also be adopted by the same percentage of votes. A special meeting of the POA called by 10 percent of all voting interests may petition the POA and require a special meeting to effect an amendment under this section. TEX. PROP. CODE §209.0093.

f. *Assessment Lien Affidavit Filing*

Lien affidavits, or other instrument evidencing the non-payment of assessments are legal instrument affecting title to real property and must be prepared by licensed attorneys. This has been a long-standing controversy in the industry as POAs do not want to pay attorneys to file these instruments, and either do it themselves or enlist their managing agent to prepare and record lien affidavits. TEX. PROP. CODE §209.0094.

8. Rules and Regulations

"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 above, rule-making authority for POAs in other areas of the state must be granted in the other governing documents of the subdivision. 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.

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.

More than any other governing document, the Rules provide a framework for the routine regulation of activities taking place in the subdivision.

9. Enforcement of Restrictions

Violations of restrictions, Bylaws, or Rules by owners are characterized as “curable” and “uncurable” 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. Most of the types of violations cited are demonstrative of common provisions contained in Rules and Regulations rather than deed restrictions contained in the declaration.

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, and should be recorded. The policy should include the due process requirements of TEX. PROP. CODE §§209.006 and 209.007.

a. 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.

(1) Hearing/ADR

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. The owner's presence is not required to hold a hearing. TEX. PROP. CODE §209.007.

(2) 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. TEX. PROP. CODE §209.008(b).

b. 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:

- Parking violations;
- Maintenance violations;
- Failure to construct improvements or modifications in accordance with approved plans and specifications; and
- Ongoing noise violations such as a barking dog.

TEX. PROP. CODE §209.006(i)(1)-(4).

c. 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;
- 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.

d. Military Notice

Notices of violations that are the bases for a suspension action, charge or fine must now include a military notice under the Service Members Civil Relief Act (50 U.S.C. 501 et seq.), that if the owner is serving on active military duty they may stay the action for 90 days. TCP §209.006(b)(2)(C).

10. 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).

11. 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.

12. 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).

D. Purchasers/Owners of Property in Subdivisions

1. Resale Certificates

Resale certificates may now be requested by an owner, purchaser, prospective purchaser agent, title company or seller, but the purchaser pays unless otherwise agreed. If the purchaser or its agent makes the request, the POA may require a copy of the contract or evidence to prove there is a transaction pending. POA may require payment before issuance but cannot process it until delivery.

a. *Disclosures*

POAs must now also include the purpose of special assessments, all lawsuits to which the POA is a party, except *ad valorem* tax suits against a member of the POA, and disclosure of all transfer fees, the amounts, and to whom paid, as well as the other information required by the statute.

b. *Time Frame*

The POA has 10 business days to process the resale certificate, and it is valid for 60 days. TEX. PROP. CODE §§207.003(a), (a-1), (3), (9), (15), (16), (c-1), & (f).

c. *Copies of Governing Documents*

POAs must also deliver, upon request by a seller of real property, his agent or title insurer, *inter alia*, a current copy of the restrictions, bylaws, and rules of the POA applying to the subdivision. TEX. PROP. CODE §207.003(a)(1).

d. *Statements Valid*

The POA may not deny the validity of any statement in the resale certificate. The lien to secure undisclosed amounts due the POA on the date the resale certificate is prepared shall automatically terminate as a lien securing the undisclosed amount. TEX. PROP. CODE §207.005.

e. *Failure to Provide*

If the POA fails to deliver the resale certificate before the seventh day after the second request for the information was mailed by certified mail, return receipt requested, or hand delivered, evidenced by receipt, the owner may seek one or any combination of the following: a court order directing the property owners' association to furnish the required information; a judgment against the property owners' association for not more than \$500; a judgment against the property owners' association for court costs and attorney's fees; or a judgment authorizing the owner or the owner's assignee to deduct the amounts awarded from any future regular or special assessments payable to the POA; and may provide a buyer under contract to purchase the owner's property an affidavit that states that the owner, owner's agent, or title insurance company or its agent acting on behalf of the owner made, in accordance with this chapter, two written requests to the property owners' association for the information described in Section 207.003 and that the association did not timely provide the information, and the POA's lien to secure the amounts due the property owners' association on the owner's property on the date the affidavit was prepared shall automatically terminate. TEX. PROP. CODE §207.004.

2. 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; 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.

3. Disclosure of Property Condition

A notice must be given to the purchaser by a seller of residential real property compromising not more than one dwelling unit that includes, *inter alia*, the following disclosures:

- Room additions, structural modifications, or other alterations or repairs made without necessary permits or not in compliance with building codes in effect at that time;
- POA maintenance fees or assessments.
- Any "common area" (facilities such as pools, tennis courts, walkways, or other areas) co-owned in undivided interest with others;
- Any notices of violations of deed restrictions or governmental ordinances affecting the condition of the Property;
- Any lawsuits directly or indirectly affecting the Property;
- Any condition on the Property which materially affects the physical health or safety of an individual;
- Any rainwater harvesting system located on the property that is larger than 500 gallons and that uses a public water supply as an auxiliary water source; and
- Any portion of the property located in a groundwater conservation district or a subsidence district.

TEX. PROP. CODE §5.008(b)6.

4. Obligations Related to Membership in a POA

Sellers must give notice to purchasers of residential real property if they shall become members of a property owners association, and there are restrictive covenants

governing the use and occupancy of the property. TEX. PROP. CODE §5.012.

5. Online Subdivision Information Required

A property owners association 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.

6. Right and Method 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.

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.

IV. CONDOMINIUMS

“**Condominium**” means a form of real property ownership with portions of the real property designated for separate ownership or occupancy, and the remainder of the real property designated for common ownership or occupancy solely by the owners of those portions. Real property is a condominium only if one or more common elements are directly owned in undivided interests by the unit owners. Real property is not a condominium if all the common elements are owned by a legal entity separate from the unit owners, such as a corporation, even if the separate legal entity is owned by the unit owners. TEX. PROP. CODE §82.003(A)(8). In other words, the condominium association does not own any of the common elements – not even the buildings. The common elements are owned as tenants in common by the owners according to their percentage interests.

A condominium is an estate in real property consisting of an undivided interest in a portion of a parcel of real property together with a separate fee simple interest in another portion of the same parcel. In essence, condominium ownership is the merger of two estates in land into one: the fee simple ownership of an apartment or unit in a condominium project and a tenancy in common with other co-owners in the common elements. *Dutcher v. Owens*, 647 S.W.2d 948, 949 (Tex. 1983).

A condominium can no longer be created in Texas under TEX. PROP. CODE Chapter 81, the

“Condominium Act”. TEX. PROP. CODE Chapter 82 (**“Texas Uniform Condominium Act”**) or (**“TUCA”**) applies only to a condominium regime created on or after January 1, 1994. TUCA applies to all commercial, industrial, residential, and other types of condominiums in this state for which the Declaration is recorded on or after January 1, 1994. A condominium for which the Declaration was recorded before January 1, 1994, may be governed exclusively under this chapter if either: the owners of units vote to amend the Declaration, in accordance with the amendment process authorized by the Declaration, to have this chapter apply and that amendment is filed for record in the condominium records in each county in which the condominium is located; or, a Declaration or amendment of Declaration was recorded before January 1, 1994, and the declaration or amendment states that this chapter will apply in its entirety on January 1, 1994.

The following sections apply to a condominium in this state for which the Declaration was recorded before January 1, 1994: Sections 82.005, 82.006, 82.007, 82.053, 82.054, 82.102(a)(1)-(7), (a)(12)-(21), (f), and (g), 82.108, 82.111, 82.113, 82.114, 82.116, 82.118, 82.121,² 82.157, and 82.161. The definitions prescribed by Section 82.003 apply to a condominium in this state for which the Declaration was recorded before January 1, 1994, to the extent the definitions do not conflict with the Declaration. The sections listed in this subsection apply only with respect to events and circumstances occurring on or after January 1, 1994, and do not invalidate existing provisions of the Declaration, bylaws, or plats or plans of a condominium for which the declaration was recorded before January 1, 1994.

Proviso: In this ‘condominium section’ of the article, only those sections of Chapter 81 (*i.e.* still apply) that are not superseded by Chapter 82 will be mentioned. This article does not discuss condominium conversions. Remember: TEX. PROP. CODE, Chapter 209 **does not apply to condominiums**. TEX. PROP. CODE §209.003(d).

A. Declarant Control of Condominiums

The Declaration may provide for a period of “Declarant Control” during which the Declarant or its designees may appoint or remove officers and members of the board. Declarant control must terminate no later than 120 days after the conveyance of 75 percent of the units that may be created. This provision also requires that no later 120 days after the conveyance of 50 percent of the units that may be created, not less than one third of the members of the board must be elected by unit owners. This is meant to create some transition between a Declarant operated association and an owner-controlled association. TEX. PROP. CODE §82.103(c), (d) & (e).

1. ILSFDA and HUD

The Interstate Land Sales Full Disclosure Act is also fully applicable to the sale of condominium projects that are to be constructed unless an exemption or combination of exemptions is applicable to the project. The condominium project must be registered under ILSFDA unless an exemption is available. Registration requires the filing of a Statement of Record with the U.S. Department of Housing and Urban Development's Office of Interstate Land Sales Registration (“HUD”). The Statement of Record amounts to a prospectus covering the developer and the project. The Property Report must be delivered to prospective purchasers in addition to the Condominium Information Statement (discussed below). For the most part, there are two exemptions under ILSFDA available to condominium projects: (a) the 100-lot exemption and, (b) the builder's exemption. The first exempts the developer from registration if there are less than 100 units in the project; but units are aggregated by HUD if the projects are connected in any substantial respect (*i.e.* shared recreational facilities or sales offices). If each unit can be delivered to a purchaser “ready for occupancy” within 24 months from the date the condominium purchase contract is signed, the “Builder's Exemption” applies to each unit and exempts units from registration under ILSFDA. A violation for failure to register a condominium project that is not exempt will result in condominium purchase contracts being revocable and purchasers having rights of rescission after closing. There are also civil and criminal penalties for failure to register.

2. Condominium Information Statement

TEX. PROP. CODE §82.153 requires that the developer deliver a Condominium Information Statement (“CIS”) to each purchaser of a condominium unit at the time the condominium unit is offered for sale to a prospective purchaser. The CIS must contain the information outlined in that section. A Declarant shall promptly amend the CIS to reflect a material and substantial change in its contents. If the change may adversely affect a prospective purchaser who has received a condominium information statement, the Declarant shall furnish a copy of the amendment to the prospective purchaser before closing. TEX. PROP. CODE §82.153(c).

The person preparing all or part of the CIS is liable for any false or misleading statement or for any omission of material fact in the portion of the condominium information statement that the person prepared. If the Declarant did not prepare any part of CIS that is delivered to prospective purchasers of units, the Declarant is not liable for any false or misleading statement or any omission of material fact *unless* the

² TEX. PROP. CODE §82.002(c-1).

Declarant actually knew or should have known of the statement or omission. TEX. PROP. CODE §82.152. A purchaser of a condominium unit has a right to cancel if the acknowledgments required under this TUCA section have not been met before the 6th day after the date the purchaser received the Declaration, Bylaws and Rules. TEX. PROP. CODE §82.156(a). A selling unit owner may not require a purchaser to close until he has been given the governing documents and the CIS. TEX. PROP. CODE §82.156(d).

A Declarant satisfied all requirements relating to the preparation of the CIS if it is currently registered with the SEC and delivers a copy of the POS to the purchaser. TEX. PROP. CODE §82.155.

3. Platting

The platting process for condominiums is far different than that for subdivisions, in that it is primarily governed by TEX. PROP. CODE §§82.051(f) and 82.059. Tax receipts must be attached to any plat or re-plat demonstrating that all taxes have been paid and current. Also, certain plats must be certified by independent licensed surveyors, engineers or architects. It has been held that County Commissioners' Courts lack the authority to approve condominium plats, however, TEX. PROP. CODE Chapter 82 does not affect their authority to require or approve the underlying subdivision plat required under Loc. Gov't Code Chapter 232. **Tex. Att'y. Gen. Op.** No. GA-0223 (2004). Therefore, if the Declarant is creating a new underlying subdivision on which to place the condominium, the subdivision plats must meet the approval requirements of the county under Loc. Gov't Code Chapter 232 and the municipality under Loc. Gov't Code Chapter 212, in which it is located. The Declarant shall complete all improvements labeled "MUST BE BUILT" on plats or plans. TEX. PROP. CODE §82.163. If any improvement contemplated in a condominium is labeled "NEED NOT BE BUILT" on a plat or plan, or is to be located within a portion of a condominium with respect to which the Declarant has reserved a development right, no promotional material that describes or depicts the improvement may be displayed or delivered to prospective purchasers unless the description or depiction of the improvement is conspicuously labeled or identified as "NEED NOT BE BUILT." TEX. PROP. CODE §82.162.

A 2019 change to TUCA's requirements for plat and plans allows for condominium without upper and lower boundaries. Therefore, if so provided in the Declaration, a unit may consist of an entire structure. This has paved the way for the creation of "site" or "horizontal" condominiums as they still conform to the definition of "unit" in TUCA as "a physical portion of the condominium designated for separate ownership or occupancy, the boundaries of which are described by the

declaration." TEX. PROP. CODE §§82.003(23) and 82.059(b)(7)& (d)(2).

4. Lenders

The developer's existing mortgagee will be required to consent to the Condominium Declaration, which consent must be recorded. TEX. PROP. CODE §82.051(b). This does not mean that the lender will not be allowed to foreclose its lien on the entirety of the property that secures the lender's debt; however, the lender will take the property subject to the rights created in the condominium documents.

Before conveying real property to the association, Declarant shall have all liens released the foreclosure of which would deprive unit owners of any right to access to or easement of support of the owners' units unless the CIS describes certain real property that may be conveyed subject to liens in specified amounts. TEX. PROP. CODE §82.159.

5. Development Rights Under TUCA

"**Development Rights**" means a right or combination of rights reserved by a Declarant in the Declaration to:

- Add real property to a condominium;
- Create units, common elements, or limited common elements within a condominium;
- Subdivide units or convert units into common elements; or
- Withdraw property from a condominium.

TEX. PROP. CODE §82.003(a)(12)(A)-(D).

"**Special Declarant Rights**" means rights reserved for the benefit of the Declarant to:

- Complete improvements indicated on plats and plans filed with the Declaration;
- Exercise any development right;
- Make the condominium part of a larger condominium or a planned community;
- Maintain sales, management, and leasing offices, signs advertising the condominium, and models;
- Use easements through common elements for the purpose of making improvements within the condominium or within real property that may be added to the condominium; or
- Appoint or remove any officer or board member of the association during any period of the Declarant control.

TEX. PROP. CODE §82.003(a)(22)(A)-(F).

Transfers of Special Declarant Rights must be done by written recorded instrument executed by the transferee. TEX. PROP. CODE §82.104(a). The transferor

is not relieved of any obligation or liability arising before the transfer, but not after if the transferee is not an affiliate of the transferor. TEX. PROP. CODE §82.104(b). Other, provisions governing transfer of Special Declarant Rights, including voluntary transfers, foreclosure sales, bankruptcies and receivership is governed by TEX. PROP. CODE §82.104(c)-(f).

a. Exercise of Development Rights

Declarant must prepare, execute and record an amendment to the Declaration and record new plats and plans accordingly to exercise a development right. The amendment must include (depending on the right exercised): the addition of real property, assigning a new identifying number to each new unit created, subdividing or converting a unit into additional common elements, and a re-allocation of interests as if the unit had been taken by condemnation. This provision does not extend the time limit on the exercise of development rights imposed by the Declaration. TEX. PROP. CODE §82.060.

b. Easements

Subject to the Declaration, Declarant has an easement through the common elements as may be reasonably necessary for discharging the Declarant's obligations or exercising special Declarant's rights whether arising under TUCA or reserved by the Declaration. TEX. PROP. CODE §82.066.

c. Books and Records

A Declarant shall furnish copies to the association of the information required by TEX. PROP. CODE §82.114(a) on the date the first unit is sold. TEX. PROP. CODE §82.114(d).

5. Assessments for Common Expense

Until an association makes a common expense assessment, a Declarant shall pay all of the expenses of the condominium as the expenses accrue. From the date of the initial assessment until declarant control terminates, or three years from a Declarant's first conveyance of a unit, whichever is earlier, the Declarant shall periodically pay to the association: (1) an amount equal to all operational expenses of the association, less the operational expense portion of the assessments paid by unit owners other than Declarant; or (2) the common expense liability allocated to each unit owned by the Declarant.

Common expenses shall be assessed against all units conveyed, rented, or used as models or offices by the Declarant and against all units owned by a Declarant after termination of a Declarant's control or three years from a Declarant's first conveyance of a unit, whichever is earlier, in accordance with the common expense liability allocated to each unit. A past due assessment or

installment of an assessment may bear interest at a lawful rate established by the association.

This section does not prevent a Declarant from collecting from a purchaser at closing the prorated amount of any expenses, such as insurance or taxes, that the Declarant has prepaid to the association or directly to others on behalf of the unit that is being purchased. TEX. PROP. CODE §82.112(a)-(c)& (g).

6. Contracts and Leases of Declarant

An association in a residential or recreational condominium may terminate, without penalty for one year after the Board is elected by the unit owners, contracts and leases between the association and Declarant (or an affiliate of Declarant) if the contract was entered into while the Declarant had control and the association gives at least 90 days' notice to terminate the contract or lease to the other party. TEX. PROP. CODE §82.105.

B. Condominium Declaration

"Declaration" means an instrument, however denominated, that creates a condominium, and any amendment to that instrument. A condominium may be created under TUCA only by recording a Declaration executed in the same manner as a deed by all persons who have an interest in real property that will be conveyed to unit owners and by every lessor of a lease the expiration or termination of which will terminate the condominium or reduce its size. The Declaration shall be recorded in each county in which any portion of the condominium is located. TEX. PROP. CODE §82.051(a).

1. Contents of Declaration for All Condominiums

The Declaration for a condominium must contain:

- The name of the condominium, which must include the word "condominium" or be followed by the words "a condominium" or a phrase that includes the word "condominium," and the name of the association;
- The name of each county in which any part of the condominium is located;
- A legally sufficient description of the real property included in the condominium;
- A description of the boundaries of each unit created by the Declaration, including the unit's identifying number;
- A statement of the maximum number of units that the Declarant reserves the right to create;
- A description of the limited common elements other than those listed in TEX. PROP. CODE §§ 82.052(2) and (4);
- A description of any real property, except real property subject to development rights, that may be

allocated subsequently as limited common elements, together with a statement that the property may be so allocated;

- An allocation to each unit of its allocated interests;
- Any restrictions on use, occupancy, or alienation of the units;
- A description of and the recording data for recorded easements and licenses appurtenant to or included in the condominium or to which any portion of the condominium is or may become subject by reservation in the Declaration;
- The method of amending the Declaration;
- The plat or plan or the recording data of a plat or plan that has been recorded in the real property or condominium plat records;
- A statement of the association's obligation under TEX. PROP. CODE §82.111(i) to rebuild or repair any part of the condominium after a casualty or any other disposition of the proceeds of a casualty insurance policy;
- A description of any development rights and other special declarant rights reserved by the Declarant, together with a legally sufficient description of the real property to which each of those rights applies, and a time limit within which each of those rights must be exercised;
- If any development right may be exercised with respect to different parcels of real property at different times, a statement to that effect, together with:
 - either a statement fixing the boundaries of those portions and regulating the order in which those portions may be subjected to the exercise of each development right, or a statement that no assurances are made in those regards; and
 - a statement as to whether, if any development right is exercised in any portion of the real property subject to that development right, that development right must be exercised in all or in any other portion of the remainder of that real property;
- All matters required by this chapter to be stated in the Declaration; and
- Any other matters the Declarant considers appropriate.

TEX. PROP. CODE §82.055.

2. Description of Units

Sufficient legal descriptions of the units must contain the name of the condominium, the recording data of the Declaration, including amendments, plats and plans (if separate), the county the condominium in

located and the identifying number of the unit. As stated above, the unit descriptions must be included in the Declaration. This section applies to all condominiums no matter when created. TEX. PROP. CODE §82.054.

3. Allocation of Common Element Interests

The fraction or percentage of undivided interests in the common elements, expenses of the condominium association, and votes must be included in the Declaration with the formula used to establish the allocations. If units may be added or withdrawn, the Declaration must state the formula to be used to reallocate after the addition of withdrawal.

The Declaration may provide for classes or voting on specified issues affecting the class if necessary to protect valid interests of the class. This would normally be to give the Declarant more votes to maintain control of the regime.

Fractions of interests in the common elements must equal one; percentages must equal 100. TEX. PROP. CODE §82.055. The most common method of allocating interests is based on square footage of units.

4. Common Elements

All portions of the condominium other than the units, including general and limited common elements. TEX. PROP. CODE §82.003(a)(5). The common elements are not subject to partition, and any purported conveyance, judicial sale, or other voluntary or involuntary transfer of an undivided interest in the common elements without the unit to which that interest is allocated is void. TEX. PROP. CODE §82.057(f). Ownership of the general and limited common elements may not be judicially partitioned while they are suitable for a condominium regime. A person may not initiate an action for partition of limited or general common elements unless the mortgages are paid or the mortgagees' consent is obtained. Any agreement to the contrary is void. TEX. PROP. CODE §81.0108(a)-(c).

An owner of an apartment in a condominium regime shares ownership of the regime's common elements with the other apartment owners. TEX. PROP. CODE §81.107. A unit and the undivided interest in the common elements attributable to the unit may not be conveyed separately. TEX. PROP. CODE §81.109.

a. *General Common Elements*

General Common Elements are common elements that are not limited common elements. TEX. PROP. CODE §82.003(14).

b. *Limited Common Elements*

"Limited common element" means a portion of the common elements allocated by the Declaration or by operation of Section 82.052 for the exclusive use of one or more but less than all of the units. TEX. PROP. CODE

§82.058. Also see TEX. PROP. CODE §82.052(2) & (4) in Section 5.b. below.

Limited common elements and the provisions of the Declaration relating to the right to use the limited common elements may not be altered without the consent of each affected owner and the owner's first lien mortgage. A limited common element may be reallocated by amendment to the Declaration executed among the affected owners and recorded. TEX. PROP. CODE §82.058.

A condominium association may not alter or destroy an apartment or a limited common element without the consent of all owners affected and the first lien mortgagees of all affected owners. TEX. PROP. CODE §81.104(e).

5. Unit Boundaries

"Unit" means a physical portion of the condominium designated for separate ownership or occupancy, the boundaries of which are described by the Declaration. TEX. PROP. CODE §82.003(a)(23). The unit boundary descriptions are different but not conflicting in the old and new statutes. The post-1994 description is much more detailed as a result of so much confusion in this aspect of condominium ownership and maintenance responsibility.

a. *Pre- 1994*

Interior surfaces of the apartment's perimeter walls, floors, and ceilings, and the exterior surfaces of the balconies and terraces; except for the common elements, the portions of a building on the boundaries of an apartment and the airspace within those boundaries. The physical boundaries of an apartment are conclusively presumed to be the proper boundaries, regardless of settling, rising, or lateral movement of the building and regardless of the variances between those shown on the plat and the actual boundaries of the building. TEX. PROP. CODE §81.105(a)-(c).

b. *Under TUCA*

Except as otherwise provided by the declaration or plat: (1) if walls, floors, or ceilings are designated as boundaries of a unit, then all lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, and any other materials constituting part of the finished surfaces are a part of the unit, and all other portions of the walls, floors, or ceilings are a part of the common elements; (2) if any chute, flue, duct, wire, conduit, bearing wall, bearing column, or any other fixture is partially within and partially outside the designated boundaries of a unit, then the portion serving only that unit is a limited common element allocated solely to that unit, and the portion serving more than one unit or the common elements is a part of the general common elements; (3) subject to subdivision (2), the spaces, interior partitions, and other fixtures and

improvements within the boundaries of a unit are a part of the unit; and (4) shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, and exterior doors and windows or other fixtures designed to serve a single unit, but located outside the unit's boundaries, are limited common elements allocated exclusively to that unit. TEX. PROP. CODE §82.052.

Units are separately taxed and assessed. TEX. PROP. CODE §82.005(b).

6. Restrictions on Use, Occupation and Alienation of Units

"Residential purposes" means recreational or dwelling purposes. TEX. PROP. CODE §82.003(21).

In Section B.4. above, a list of types of subjects of restrictions which may not be prohibited or enforced contained in TEX. PROP. CODE Chapter 202 and OTARD are listed, which also apply to condominiums. An examination of this list reveals that not many of these would affect condominium units; however, some, such as religious and flag displays do. Many of these are still allowed to be regulated subject to architectural control approvals as to size and location. Each needs to be read in context and common sense applied with regard to inclusion in the Declaration and treatment by the association or a committee appointed to review these submissions in the condominium.

Subject to the provisions of the Declaration, unit owners may make improvements or alterations that do not impair the structural integrity or mechanical systems or lessen support of any portion of the condominium. Owners may not change the appearance of the common elements, a unit, or any other part of the condominium without the prior written permission of the association. If an owner acquires ownership or an adjoining unit or part of an adjoining unit, with the prior written approval of the association, the owner may remove, alter, and create apertures in an intervening partition, even if the partition is a common element, so long as those acts do not impair the structural integrity or mechanical systems or lessen the support of any portion of the condominium. TEX. PROP. CODE §82.061. Additionally, if found to be reasonable by the Board, boundaries may be relocated between adjoining units and interests of the units reallocated by an amendment to the Declaration upon application to the association at the expense of the applying unit owners. TEX. PROP. CODE §82.062.

Always check local ordinances for "home office" carve outs and maximum occupancy regulations that the owners would have to comply with regardless of the restrictions. Covenants may be more restrictive but not less than the applicable ordinances.

Restrictions on leasing and rights of first refusal can be utilized, but must be drawn so that they are reasonably related to their intended purpose, *i.e.* preserving the character of the condominium as a homogeneous residential community of predominantly

owner-occupied Units and by preventing the condominium from assuming the character of an apartment renter-occupied complex leasing of a Unit or units

7. Assessments for Common Expenses

“Common expense liability” means the liability for common expenses allocated to each unit. TEX. PROP. CODE §82.003(6). **“Common expenses”** means expenditures made by or financial liabilities of the association, together with any allocations to reserves. TEX. PROP. CODE §82.003(7). After an initial assessment by an association, assessments must be made at least annually and must be based on a budget adopted at least annually by the association. The association’s reserves and unit owners’ working capital contributions may not be used to pay operational expenses until the declarant control period terminates. TEX. PROP. CODE §82.112(a).

a. *Creation of Lien*

The association's lien for assessments is created by recordation of the Declaration, which constitutes record notice and perfection of the lien. Unless the Declaration provides otherwise, no other recordation of a lien or notice of lien is required. An assessment levied by the association against a unit or unit owner is a personal obligation of the unit owner and is secured by a continuing lien on the unit and on rents and insurance proceeds received by the unit owner and relating to the owner's unit. In this section, **“assessments”** means regular and special assessments, dues, fees, charges, interest, late fees, fines, collection costs, attorney's fees, and any other amount due to the association by the unit owner or levied against the unit by the association, all of which are enforceable as assessments under this section. TEX. PROP. CODE §82.113(a).

b. *Lien Priority*

Unless the Declaration provides otherwise, the association's lien for assessments has priority over any other lien except: (1) a lien for real property taxes and other governmental assessments or charges against the unit unless otherwise provided by TEX. TAX CODE §32.05; (2) a lien or encumbrance recorded before the Declaration is recorded; (3) a first vendor's lien or first deed of trust lien recorded before the date on which the assessment sought to be enforced becomes delinquent under the declaration, bylaws, or rules; and (4) a lien for construction of improvements to the unit or an assignment of the right to insurance proceeds on the unit if the lien or assignment is recorded or duly perfected before the date on which the assessment sought to be enforced becomes delinquent under the Declaration, Bylaws, or Rules. TEX. PROP. CODE §82.113(b)(1)-(4).

c. *Power of Sale*

By acquiring a unit, the owner grants to the association a power of sale in connection with the association's lien. By written resolution, a board may appoint, from time to time, an officer, agent, trustee, or attorney of the association to exercise the power of sale on behalf of the association. Except as provided by the Declaration, an association shall exercise its power of sale pursuant to TEX. PROP. CODE §51.002. TEX. PROP. CODE §82.113(d).

d. *Method of Foreclosure*

A condominium association may use either judicial or non-judicial foreclosure to enforce its lien, except it may not foreclose for an assessment consisting solely of fines. Costs may be added, and the owner may not get the sale set aside just because the proceeds at the sale were insufficient to cover the owner's debt. TEX. PROP. CODE §82.113(c).

e. *Redemption after Foreclosure*

Owners have 90 days after the foreclosure sale to redeem. The method and amounts which must be paid to redeem is determined by whether it was the association or a third party who purchased at the sale. TEX. PROP. CODE §82.113(g).

8. Method of Amending the Declaration

The process for amending a condominium declaration must be stated in the instrument, subject to the following:

a. *Pre-1994*

A Declaration may not be amended except at a meeting of the apartment owners at which the amendment is approved by the holders of at least 67 percent of the ownership interests in the condominium. TEX. PROP. CODE §81.111. Amendments made to declarations recorded before January 1, 1994 are not invalidated by TUCA but must be in conformity with the Condominium Act and the Declaration's amendment procedures; however, any such amendment must be permitted by TUCA.

b. *Under TUCA*

An amendment generally requires vote of at least 67 percent of allocated votes unless all of the units are restricted to non-residential use. An amendment to a Declaration may be adopted by written ballot at a special meeting held to consider an amendment or by any method permitted by the Declaration. TEX. PROP. CODE §82.0067(a)(1)-(3).

There are certain exceptions that require 100 percent of the votes in the association: creating or increasing special declarant rights, increase the number of units, change the boundaries of a unit, alter or destroy a unit or limited common element, change a unit's

allocated interest, or change the use restrictions on a unit. PROP. CODE §82.0067(e).

Amendments must be recorded to be effective [TEX. PROP. CODE §82.0067(d)] and certified by an officer designated for that purpose or the president [TEX. PROP. CODE §82.0067(g)]. An action to challenge the validity of an amendment must be brought within one year of the date the amendment was recorded. TEX. PROP. CODE §82.0067(c).

An association may amend the declaration to authorize the board: (1) to bring an action to evict a tenant of a unit owner for the tenant's violation of the declaration, bylaws, or rules of the association; (2) to bring an action to evict a tenant of a unit owner who fails to pay the association for the cost of repairs to common elements damaged substantially by the owner's tenant; or (3) to collect rents from a tenant of a unit owner who is at least 60 days' delinquent in the payment of any amount due to the association. TEX. PROP. CODE §82.0067(h)(1)-(3).

An association or a board may not meet to adopt an amendment or other change to the declaration, articles of incorporation, bylaws, or rules of the association unless the association or board has given to each unit owner a document showing the specific amendment or other change that would be made to the Declaration, Certificate of Formation, Bylaws, or Rules. The information must be given to each unit owner after the 20th day but before the 10th day preceding the date of the meeting. The information is considered to have been given to a unit owner on the date the information is personally delivered to the unit owner, as shown by a receipt signed by the unit owner, or on the date shown by the postmark on the information after it is deposited in the United States mail with a proper address and postage paid. TEX. PROP. CODE §82.070.

9. Recording

A county clerk shall, without prior approval from any other authority, record declarations and amendments to declarations in the real property records, and a county clerk shall record condominium plats or plans in the real property records or in books maintained for that purpose. If a county clerk maintains a book for the condominium plat records, the book shall be the same size and type as the book for recording subdivision plats. TEX. PROP. CODE §82.051(d).

A. **Condominium Governance**

“**Association**” means the unit owners’ association organized under Section 82.101. TEX. PROP. CODE §82.003(a)(3). Prior to January 1, 1994, condominium associations were not required to be incorporated. After January 1, 1994, a unit owners’ association must be organized as a profit or non-profit corporation. A Declarant may not convey a unit until the secretary of

state has issued a certificate of incorporation. TEX. PROP. CODE §82.101.

“**Dedicator instrument**” means each governing instrument governing the establishment, maintenance, or operation of a condominium regime. The term includes a declaration or similar instrument subjecting real property to: (A) restrictive covenants, bylaws, or similar instruments governing the administration or operation of a unit owners' association; (B) properly adopted rules and regulations of the unit owners' association; or (C) all lawful amendments to the covenants, bylaws, instruments, rules, or regulations. TEX. PROP. CODE §82.003(11-a)(A)-(C).

1. Construction and Validity of Governing Documents

The provisions of the Declaration and Bylaws are severable. If there is a conflict between the provisions of the Declaration and Bylaws, the Declaration prevails except to the extent the declaration is inconsistent with TUCA. Title to a unit and common elements is not made unmarketable by virtue of unrecorded bylaws or insubstantial failure of the Declaration to comply with TUCA. Whether substantial incompliance with TUCA affects marketability is governed by other laws. TEX. PROP. CODE §82.053. To be enforceable, a bylaw or rule of the association must not be arbitrary or capricious. TEX. PROP. CODE §82.102(c).

2. Bylaws

The Bylaws of a condominium regime govern the administration of the buildings that comprise the regime. TEX. PROP. CODE §81.202.

The administration and operation of the condominium are governed by the Bylaws, which must provide for:

- Number of members on the Board and the titles of the officers of the association;
- Election by the Board of a president, treasurer, secretary, and any other officers the Bylaws specify;
- Qualifications, powers and duties, terms of office, and the manner of electing and removing a board member or officer and filling vacancies;
- Powers, if any, that the board or an officer may delegate to other persons or to a managing agent;
- Designation of officers who are authorized to prepare, execute, certify, and record amendments to the Declaration on behalf of the association;
- Method of amending the Bylaws; and
- Manner of notice of meetings of the association.

TEX. PROP. CODE §82.106.

3. Board Members and Officers

The Board shall act in all instances on behalf of the association if in its good-faith judgment the action is reasonable. Each officer or director is liable as a fiduciary of the unit owners for their acts or omissions; however, an officer or director is not liable to the association or any unit owner for monetary damages for an act or omission occurring in that person's capacity of officer or director unless: (1) they breached a fiduciary duty to the association or unit owner; (2) they received an improper benefit; (3) the act or omission was in bad faith, involved intentional misconduct, or was one for which liability is expressly provided by statute. TEX. PROP. CODE §82.103(a) & (f)(1)-(3).

The board may not act on behalf of the association to terminate the condominium, elect members of the board, or determine the qualifications, powers, and duties, or terms of office of board members. The board may fill a vacancy in its membership for the unexpired portion of a term. TEX. PROP. CODE §82.103(b).

Provisions for standards of board members and officers of condominiums created before January 1, 1994 that have not adopted the foregoing provision of TUCA are governed by TEX. BUS. ORG. CODE, Chapter 22.

4. Powers of the Association

The powers under this section apply to all associations whenever created. This was a boon to associations whose documents did not include these powers prior to the passage of TUCA.

Unless otherwise provided by the declaration, the association, acting through its board, may:

- Adopt and amend Bylaws;
- Adopt and amend budgets for revenues, expenditures, and reserves, and collect assessments for common expenses from unit owners;
- Hire and terminate managing agents and other employees, agents, and independent contractors;
- Institute, defend, intervene in, settle, or compromise litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium;
- Make contracts and incur liabilities relating to the operation of the condominium;
- Regulate the use, maintenance, repair, replacement, modification, and appearance of the condominium;
- Adopt and amend rules regulating the use, occupancy, leasing or sale, maintenance, repair, modification, and appearance of units and common elements, to the extent the regulated actions affect common elements or other units;

- Impose interest and late charges for late payments of assessments, returned check charges, and, if notice and an opportunity to be heard are given in accordance with Subsection (d), reasonable fines for violations of the Declaration, Bylaws, and Rules of the association;
- Adopt and amend Rules regulating the collection of delinquent assessments and the application of payments;
- Adopt and amend rules regulating the termination of utility service to a unit, the owner of which is delinquent in the payment of an assessment that is used, in whole or in part, to pay the cost of that utility;
- Impose reasonable charges for preparing, recording, or copying Declaration amendments, resale certificates, or statements of unpaid assessments;
- Enter a unit for bona fide emergency purposes when conditions present an imminent risk of harm or damage to the common elements, another unit, or the occupants;
- Suspend the voting privileges of or the use of certain general common elements by an owner delinquent for more than 30 days in the payment of assessments;
- Purchase insurance and fidelity bonds it considers appropriate or necessary;
- Exercise any other powers conferred by the Declaration or Bylaws;
- Exercise any other powers that may be exercised in this state by a corporation of the same type as the association; and
- Exercise any other powers necessary and proper for the government and operation of the association. TEX. PROP. CODE §82.102(a)(1)-(7) & (a)(12)-(21).

a. *Fines*

Before an association may charge the unit owner for property damage for which the unit owner is liable or levy a fine for violation of the Declaration, Bylaws, or Rules, the association shall give to the unit owner a written notice that: (1) describes the violation or property damage and states the amount of the proposed fine or damage charge; (2) states that not later than the 30th day after the date of the notice, the unit owner may request a hearing before the board to contest the fine or damage charge; and (3) allows the unit owner a reasonable time, by a specified date, to cure the violation and avoid the fine unless the unit owner was given notice and a reasonable opportunity to cure a similar violation within the preceding 12 months. The association may give a copy of the notice to an occupant of the unit. The association must give notice of a levied fine or damage charge to the unit owner not later than

the 30th day after the date of levy. TEX. PROP. CODE §82.102(d)(1)-(3)&(e).

b. Borrow Money

By resolution of the board of directors the association may: (1) borrow money; and (2) assign as collateral the association's right to future income, including the right to receive assessments, and the association's lien rights, *unless* a dedicatory instrument requires a vote of the members to borrow money or assign right to future income as collateral. Unless a lower percentage is required, approval requires the consent of owners holding 67 percent of all voting interests. TEX. PROP. CODE §82.102(f)(1)-(2)(A)&(B)&(g).

c. Additional Powers

For condominium associations created after January 1, 1994, the following powers are applicable:

- Cause additional improvements to be made as a part of the common elements;
- Acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property, except common elements of the condominium;
- Grant easements, leases, licenses, and concessions through or over the common elements;
- Impose and receive payments, fees, or charges for the use, rental, or operation of the common elements and for services provided to unit owners.

TEX. PROP. CODE §82.102(a)(8)-(11).

5. Maintenance of Condominium

Before January 1, 1994, TEX. PROP. CODE §81.002 (the definitions section of the Condominium Act) and the Declaration determined the manner in which the maintenance responsibility of the common elements, limited common elements and the units was divided between the association and the owners. Even so, because the definitions mostly apply to a high-rise type structure and many declarations were vague as to these issues, it was not always clear who was to maintain what facilities and components. Boards were left to base the allocation of responsibility on prior practice, budget constraints, and common sense.

TUCA endeavors to clarify maintenance responsibility. First, the definitions of the old Condominium Act are superseded by those of TUCA, except where they conflict with the Declaration; therefore, there is no guidance from the Condominium Act. TEX. PROP. CODE §82.002(c). Second, TUCA is very specific about maintenance responsibility, but that provision is not one that has been made "retroactive." TEX. PROP. CODE §82.107. Third, maintenance has little to do with unit boundaries, as both Chapters

demonstrate. I recommend to my clients that if their pre-1994 Declaration is not clear on a maintenance responsibility, that they fall back on TUCA as it was intended to clarify the gaps and omissions left by the Condominium Act. Note that a provision with regard to association entry with notice into a unit to prevent wasting of association paid water and damage caused by water is included in the TUCA section. Along with insurance coverage for damages and losses, maintenance responsibility is the most controversial and time consuming of all condominium topics.

a. Pre-1994

An apartment owner in a condominium regime is responsible for the apartment owner's pro rata share of: (1) the expenses to administer the condominium regime and to maintain and repair the general common elements; (2) in proper cases, the expenses to administer the limited common elements of the buildings in the condominium regime; and (3) other expenses approved by the council of owners. TEX. PROP. CODE §81.204.

b. Under TUCA

Except as provided by the Declaration:

- The association is responsible for maintenance, repair, and replacement of the common elements, and each unit owner is responsible for maintenance, repair, and replacement of the owner's unit. Each unit owner shall afford to the association and the other unit owners, and to their agents or employees, access through the owner's unit reasonably necessary for those purposes. If damage is inflicted on the common elements or on any unit through which access is taken, the unit owner responsible for the damage, or the association if it is responsible, is liable for the prompt repair of the damage.
- Each unit owner is responsible for the cost of maintenance, repair, and replacement of any utility installation or equipment serving only the owner's unit, without regard to whether the installation or equipment is located wholly or partially outside the designated boundaries of the unit. For purposes of this subsection, utility installations and equipment include electricity, water, sewage, gas, water heaters, heating and air conditioning equipment, and television antennas.
- Each unit owner is responsible for the cost of maintenance, repair, and replacement of windows and doors serving only the owner's unit.
- The association may enter a unit, after giving notice to the owner and occupant of the unit, to:
 - prevent or terminate waste of water purchased by the association as a common expense; or

- perform maintenance and repairs of the condominium that, if not performed, may result in increased damage by water to components of the condominium that the association maintains. TEX. PROP. CODE §82.107.

6. Insurance

The insurance provision under TUCA applies to all condominiums and is really complicated. TEX. PROP. CODE §82.111. The following is a simplified version:

From the day the first owner buys a unit from the Declarant, the association must maintain:

- All risk coverage in a total amount of 80 percent of replacement cost or actual cost value on the insurable common elements as of the effective date of the policy and each renewal date;
- Commercial general liability coverage (including medical) covering all occurrences for death, bodily injury, and property damage arising out of or in connection with use, ownership or maintenance of the common elements;
- If a building has unit with horizontal boundaries, the insurance maintained must include the units, not including betterments installed by owners; and
- Other insurance deemed appropriate by the Board to protect the condominium, association, and unit owners.

If the above insurance is not readily available, the owners and lienholders must be notified.

Insurance policies carried, must provide that:

- Each unit owner is an insured person with respect to liability arising out of a person's ownership of an undivided interest;
- Insurer waives its right of subrogation against a unit owner;
- No act or omission of a unit owner will void the policy or be a condition of recovery under the policy; and
- The association's insurance provides primary coverage if there is a policy under the name of a unit owner covering the same property at the time of the occurrence.

Further requirements under TEX. PROP. CODE §82.111 are:

- The association submits and adjusts claims made to its carriers;
- Proceeds are paid to an insurance trustee if the Board deems necessary or desirable (not to owners or lienholders). They are first disbursed to restore or repair damaged common elements and units.

Any surplus may then be distributed unless the condominium is terminated;

- Any insured portion of the condominium that is damaged or destroyed must be promptly repaired or replaced unless the condominium is terminated, repair or replacement would be illegal under any state or local health or safety statute or ordinance, or at least 80 percent of the unit owners vote not to rebuild;
- If the cost of repair is less than the deductible, the party who would be responsible in the absence of insurance shall pay the cost of repairs; and
- If damage is caused by an owner, his guests or invitees, the association may assess the deductible expense any other expense in excess of insurance proceeds against the unit and unit owner as an assessment.

7. Association Records

All financial and other records of the association shall be reasonably available at its registered office or its principal office in this state for examination by a unit owner and the owner's agents. An attorney's files and records relating to the association are not records of the association and are not subject to inspection by unit owners or production in a legal proceeding.

An association must keep detailed financial records that comply with generally accepted accounting principles and are sufficiently detailed to prepare a resale certificate. The Declarant must provide copies on the date the first unit is sold, and the association also must keep:

- Plans and specs used to construct the buildings (unless constructed before January 1, 1994);
- The CIS and amendments;
- Names and mailing address of owners;
- Voting records, proxies, and correspondence relating to amendments to the Declaration; and
- Minutes of Board meetings. TEX. PROP. CODE §82.114(a)(1)-(6) & (d).

a. Audits

An annual audit of the association's records is required and is a common expense, that must be prepared by a CPA if the Bylaws provide or the Board or members vote at a meeting. Copies must be made available to all owners. TEX. PROP. CODE §82.114(c).

b. Meetings

Association meetings must be held at least once a year. Special meetings may be called by the president, majority of the Board, or 20 percent of the votes of owners. All meetings of the Board must be open to members, subject to their right to adjourn into executive session to consider actions involving personnel, pending

litigation, contract negotiations, enforcement actions, matters involving the invasion of privacy of unit owners, or matters that are to remain confidential by request and agreement; except that the general substance of the matters to be discussed in executive session must first be announced in the open meeting. TEX. PROP. CODE §82.108(a)&(b).

(1) Methods of Voting

Boards may meet by electronic and telephonic means if everyone can be heard, so long as notice has been given to the owners and the meeting doesn't involve the voting on a fine, damage assessment, appeal from a denial of an architectural control approval, or suspension of a right of a particular member before the member has an opportunity to present the member's position. Boards may also act by unanimous written consent so long as the Board action does not involve the same matters and a record of the action is filed with the minutes of the Board meetings. TEX. PROP. CODE §82.108(c)(1)&(2).

(2) Notice

Meeting notices shall be given as provided in the Bylaws; if the Bylaws do not so provide, pursuant to TEX. BUS. ORG. CODE §§22.156 & 22.217. On written request of a unit owner, the Board shall notify the unit owner of the time and place of the next regular or special meeting of the Board. TEX. PROP. CODE §82.108(d)-(f).

(3) Quorum

At least 20 percent presence of the votes establish a quorum for a meeting of the owners. The Bylaws may provide otherwise, but not less than 10 percent. For a meeting of the Board, a quorum is present throughout the meeting of the Board if at least 50 percent of the votes are present at the beginning of the meeting. TEX. PROP. CODE §82.109.

(4) Voting and Proxies

If only one of the multiple owners of a unit is present at a meeting of the association, that person may cast the vote or votes allocated to that unit. If more than one of the multiple owners is present, the vote or votes allocated to that unit may be cast only in accordance with the owners' unanimous agreement unless the Declaration provides otherwise. Multiple owners are in unanimous agreement if one of the multiple owners casts the votes allocated to a unit and none of the other owners makes prompt protest to the person presiding over the meeting.

Votes allocated to a unit may be cast under a written proxy duly executed by a unit owner. If a unit is owned by more than one person, each owner of the unit may vote or register protest to the casting of votes by the other owners of the unit through a proxy duly executed by the unit owner. A unit owner may not revoke a proxy

given under this section except by giving actual notice of revocation to the person presiding over a meeting of the association.

A proxy is void if it is not dated or if it purports to be revocable without notice. A proxy terminates one year after its date unless it specifies a shorter or longer time.

Cumulative voting is not allowed. TEX. PROP. CODE §82.110.

8. Management Certificate

An association shall record in each county in which any portion of the condominium is located a management certificate, signed and acknowledged by an officer of the association, stating: (1) the name of the condominium; (2) the name of the association; (3) the location of the condominium; (4) the recording data for the Declaration; (5) the name and mailing address of the association; and (6) other information the association considers important. The clerk shall record and index it as (what else?) "Condominium Association Management Certificate." Any changes to the information must be reflected in a new recorded certificate within 30 days of the change; but there is no liability of the directors, officers or managing agent for delay or failure to record the certificate unless it was willful or caused by gross negligence. TEX. PROP. CODE §82.116.

9. Obligations of Unit Owners

Not later than the 30th day after an owner acquires a unit (or changes to the following information), the unit owners shall provide the association with:

- Mailing address, telephone number, and driver's license number;
- Lien holder name, address and loan number;
- Name and telephone number of tenants/occupants; and
- Contact information for any person managing the unit.

TEX. PROP. CODE §§82.114(e) & (f).

For condominiums created after January 1, 1994, and except as provided by the condominium governing documents or TUCA, unit owners shall:

- Pay assessments and charges properly levied and regular assessments without demand;
- Comply with the governing documents and amendments;
- Pay for damage to the condominium caused by their negligence or willful misconduct or of their tenants, guests, etc.;

- Be liable to the association for violations of the governing documents, and costs incurred by the association to obtain compliance, including attorney's fees whether or not suit is filed. TEX. PROP. CODE §82.117.

10. Termination

Condominium regimes may be terminated in their entirety.

a. *Pre-1994*

Termination must be by unanimous agreement, or if the Declaration provides for termination by agreement of the owners of at least 67 percent or a stated percentage of a greater percentage of the ownership interests (no amendment may be made to the Declaration to reduce the vote required for termination of the condominium regime), and if creditors in whose behalf encumbrances against the building are recorded agree to accept the undivided portion of the property owned by the debtors as security. If a condominium regime is terminated, each unit owner owns an undivided interest in the common property that corresponds to the undivided interest previously owned by the owner in the common elements. TEX. PROP. CODE §81.110.

b. *Under TUCA*

TUCA provides a statutory mechanism for terminating the condominium regime with a minimum of 80 percent of the vote of the owners and authorizes the association, through the board, to act as a trustee that distributes the proceeds to creditors and owners through a plan of distribution. It has a provision for termination of the condominium pursuant to an offer to purchase that is accepted by the association, then ratified by the owners. Values of each unit are determined by appraisers selected and approved by the association.

The association may act on behalf of the owners entering into the sale contract, but it is not binding on the owners until a termination agreement is approved by the requisite number of owners. On termination, title to the real property vests in the Association as trustee for all the owners, *consenting and non-consenting*, and the association is authorized to convey the units to the purchaser. Until the sale is concluded and the proceeds distributed, the Association continues to exist and retains all power it had before termination.

The net proceeds from the sale are to be applied first to the unit owners' creditors, then distributed to the unit owners as their interests appear. Therefore, the units' lienholders must be paid out of the proceeds due the respective owners. The process is performed through an escrow agent including the recordation of documents and funding of the transaction. Usually a title company is called upon to perform this function.

Owners may rescind the termination agreement and reinstate the Declaration in effect immediately before the election to terminate by the same percentage of unit owners that was required to terminate. The rescission agreement must be in writing, executed by the owners who desire to rescind, and recorded. TEX. PROP. CODE §82.068.

11. Rights of Action and Attorney's Fees

If a Declarant or any other person subject to this chapter violates this chapter, the Declaration, or the Bylaws, any person or class of persons adversely affected by the violation has a claim for appropriate relief. The prevailing party in an action to enforce the Declaration, Bylaws, or Rules is entitled to reasonable attorney's fees and costs of litigation from the non-prevailing party. TEX. PROP. CODE §82.061.

12. Possession of Firearms

Unless possession of a firearm or firearm ammunition on condominium property is prohibited by state or federal law, a condominium unit owner, or a tenant or guest of a condominium unit owner, or a guest of a tenant of a condominium unit owner may not be prohibited from lawfully possessing, carrying, transporting, or storing a firearm, any part of a firearm, or firearm ammunition: (1) in the condominium unit owner's unit; (2) in a vehicle located in a parking area provided for the residents or guests of the condominium property; or (3) in other common element locations as necessary to: (A) enter or exit the condominium property; (B) enter or exit the condominium unit owner's unit; or (C) enter or exit a vehicle on the condominium property or located in a parking area provided for residents or guests of the condominium property.

This section applies notwithstanding any provision of a dedicatory instrument to the contrary and regardless of the date of the provision's adoption. TEX. PROP. CODE §82.121.

C. **Purchasers of Units in Condominiums**

In addition to the protections offered purchasers of condominium units since January 1, 1994 discussed above in the Declarant sections of this article, the following are other provisions which affect potential owners of units:

1. Resale Certificates

If a unit owner other than a declarant intends to sell a unit, before executing a contract or conveying the unit, the unit owner must furnish to the purchaser a current copy of the Declaration, Bylaws, any association rules, and a resale certificate that must have been prepared not earlier than three months before the date it is delivered to the purchaser. The resale certificate must be issued by the association and must contain the current operating budget of the association and statements of:

- Any right of first refusal or other restraint contained in the declaration that restricts the right to transfer a unit;
- Amount of the periodic common expense assessment and the unpaid common expenses or special assessments currently due and payable from the selling unit owner;
- Other unpaid fees or amounts payable to the association by the selling unit owner;
- Capital expenditures, if any, approved by the association for the next 12 months;
- Amount of reserves, if any, for capital expenditures and of portions of those reserves designated by the association for a specified project;
- Unsatisfied judgments against the association;
- Nature of any pending suits against the association;
- Insurance coverage provided for the benefit of unit owners;
- Whether the board has knowledge that any alterations or improvements to the unit or to the limited common elements assigned to that unit violate the Declaration, Bylaws, or association Rules;
- Whether the board has received notice from a governmental authority concerning violations of health or building codes with respect to the unit, the limited common elements assigned to that unit, or any other portion of the condominium;
- Remaining term of any leasehold estate that affects the condominium and the provisions governing an extension or renewal of the lease;
- Name, mailing address, and telephone number of the association's managing agent, if any;
- Association's current operating budget and balance sheet; and
- All fees payable to the association or an agent of the association that are associated with the transfer of ownership, including a description of each fee, to whom the fee is paid, and the amount of the fee.

Within 10 days after receiving a written request by a unit owner, an association shall furnish to the selling unit owner or the owner's agent a resale certificate signed and dated by an officer or authorized agent of the association containing the information required. A selling unit owner or the owner's agent is not liable to the purchaser for erroneous information provided by the association in the certificate.

If an association does not furnish a resale certificate or any information required in the certificate within the 10-day period, the unit owner may provide the purchaser with a sworn affidavit signed by the unit owner in lieu of the certificate. An affidavit must state that the unit owner requested information from the association

concerning its financial condition, as required by this section, and that the association did not timely provide a resale certificate, or the information required in the certificate. If a unit owner has furnished an affidavit to a purchaser, the unit owner and the purchaser may agree in writing to waive the requirement to furnish a resale certificate.

The association is not liable to a selling unit owner for delay or failure to furnish a resale certificate, and an officer or agent of the association is not liable for a delay or failure to furnish a certificate unless the officer or agent willfully refuses to furnish the certificate or is grossly negligent in not furnishing the resale certificate. Failure to provide a resale certificate does not void a deed to a purchaser.

If a properly executed resale certificate incorrectly states the total of delinquent sums owed by the selling unit owner to the association, the purchaser is not liable for payment of additional delinquencies that are unpaid on the date the certificate is prepared and that exceed the total sum stated in the certificate. A unit owner or the owner's agent is not liable to a purchaser for the failure or delay of the association to provide the certificate in a timely manner.

A resale certificate does not affect: (1) an association's right to recover debts or claims that arise or become due after the date the certificate is prepared; or (2) an association's lien on a unit securing payment of future assessments. A purchaser, lender, or title insurer who relies on a resale certificate is not liable for any debt or claim that is not disclosed in the certificate. An association may not deny the validity of any statement in the certificate. TEX. PROP. CODE §82.061.

2. Purchaser's Right to Cancel

For condominiums created after January 1, 1994:

If a prospective purchaser of a unit from a unit owner other than Declarant and has not received copies of the governing documents as required by TEX. PROP. CODE §82.157(a), before the purchaser executes a contract of sale, or, if the contract does not contain an underlined or bold-print provision acknowledging the purchaser's receipt of those documents and recommending that the purchaser read those documents before executing the contract, the purchaser may cancel the contract before the sixth day after the date the purchaser receives those documents. If the purchase has not received a resale certificate before executing a contract of sale, the purchaser may cancel the contract before the sixth day after the date the purchaser receives the resale certificate or executes a waiver under TEX. PROP. CODE

§82.157(b), whichever occurs first. TEX. PROP. CODE §82.156(a).

If the seller is Declarant and the purchaser has not received the CIS before the contract is entered into, or if a contract does not contain an underlined or bold-print provision acknowledging the purchaser's receipt of the CIS and recommending that the purchaser read the CIS before executing the contract, the purchaser may cancel the contract before the sixth day after the date the purchaser receives the condominium information statement. TEX. PROP. CODE §82.156(b).

Cancellation under these sections must be in writing by certified mail, is without penalty, and all payments made by the purchaser before cancellation must be refunded. TEX. PROP. CODE §82.156(c).

V. CONSTRUCTION AND ENFORCEMENT OF RESTRICTIVE COVENANTS

The above sections of this article demonstrate that there are significant differences in the ownership characteristics between subdivisions and condominiums and control by their associations. The basic similarity, and the reason the two forms of ownership are commonly combined (or confused), is that they are both created and governed by and subject to restrictions and restrictive covenants. Moreover, TEX. PROP. CODE, Chapter 202 is the only part of the Code that applies to all restrictive covenants, whether for subdivisions or condominium regimes.

The definition is the same as that in Chapter 209: "**Restrictive covenant**" means any covenant, condition, or restriction contained in a dedicatory instrument, whether mandatory, prohibitive, permissive, or administrative. TEX. PROP. CODE §202.001(4); however, the definition of "**Property Owners' Association**" includes "planned unit development, condominium or townhouse regime, or similar planned development." TEX. PROP. CODE §202.001(2). Further, this chapter applies to all restrictive covenants regardless of the date on which they were created. TEX. PROP. CODE §202.002(a).

A. Strict vs. Liberal Construction

"A restrictive covenant shall be liberally construed to give effect to its purpose and intent." TEX. PROP. CODE §202.003(a). While this section seems to require a new judicial liberal construction of a restrictive covenant's language to ascertain its purpose and intent, Texas common law, prior to the enactment of this section, called for restrictive covenants to be construed in favor of the free and unrestricted use of the premises

and against the party seeking to enforce the covenants. *Wilmoth v. Wilcox*, 734 S.W.2d 656, 657 (Tex. 1987).

The Texas Supreme Court did not address whether §202.003(a) supplants *Wilmoth* when that issue was raised by the respondents in *Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex. 1998). More recently, in *Tarr v. Timberwood Park Owners Ass'n*, 556 S.W.3d 278 (Tex. 2018), the Court acknowledged the debate but side-stepped the issue. It opined that rather than decide which interpretation should prevail, the restriction at the heart of the controversy in the case was not breached by the owner because his use was not expressly prohibited and "[n]o construction, no matter how liberal, can construe a property restriction into existence when the covenant is silent as to that limitation." *Tarr*, 556 S.W.3d at 289.

The Fourth Court of Appeals has employed both standards to review a restrictive covenant, finding that a restrictive covenant should be liberally construed to determine the framer's intent, and if there is any ambiguity as to that intent, the covenant should then be strictly construed in favor of the free and unrestricted use of the premises. *See Munson v. Milton*, 948 S.W.2d 813, 816 (Tex.App.—San Antonio 1997, pet. denied). *See also, Uptegraph v. Sandalwood Civic Club*, 312 S.W.3d 927-28 (Tex.App.—Houston [1st Dist.] 2010, not pet.).

This judicial toning however, must never lose sight of legislative intent. We believe that the legislature, in its enactment of §202.003(a) intended that restrictive covenants be construed in a manner which may occasionally run hard afoul of strict common law requirements, i.e., strict construction favoring grantee, and strict construction against the drafter. Invariably, the strong but clear statutory language of §202.003(a) does not mesh with established common law contract principles, creating a perpetual need for reconciliation.

B. Presumption of Reasonableness

An exercise of discretionary authority by a property owners association or other representative designated by an owner of real property concerning a restrictive covenant is presumed reasonable unless the court determines by a preponderance of the evidence that the exercise of discretionary authority was arbitrary, capricious, or discriminatory. TEX. PROP. CODE §202.004(a).

A presumption is simply a rule of procedure or an administrative assumption that may be overcome when positive evidence to the contrary is introduced. *Green v. Ransor, Inc.*, 175 S.W.3d 513, 516 (Tex.App.—Fort Worth 2005, no pet.). Therefore, a showing, by a preponderance of the evidence, that the property owner's association exercised its discretionary authority concerning a restrictive covenant in a way that was arbitrary, capricious, or discriminatory merely destroys the presumption that the association acted reasonably. *Uptegraph*, 312 S.W.3d at 933.

C. Designated Representative

TEX. PROP. CODE §82.00102(a)(4) and §209.002(7)(A) specifically provide for an appointment to property owners associations where they exist to enforce restrictive covenants by means of litigation or administrative proceedings as does TEX. PROP. CODE §202.004(b).

D. Civil Damages

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

Although individual property owners are not expressly excluded, subsection specifically provides that a property owners association or other representative designated by an owner of real property may sue to enforce a restrictive covenant; individual property owners are nowhere identified in the statute as persons or entities authorized to initiate, defend or intervene in litigation affecting the enforcement of a restrictive covenant. These two subsections plainly contemplate enforcement actions by property owners' associations or owners' representatives. When subsection 202.004(c) is considered in the context of the statute's other provisions, it is evident that the legislature intended the civil damages provided in the subsection to be available only to the entities expressly named in the statute and to no others. Any other construction would be inconsistent with the other provisions of the statute. *Hawkins v. Walker*, 233 S.W.3d 380, 389-90 (Tex.App.—Fort Worth 2007, no pet.).

Notably, the amount of damages that may be assessed under section 202.004(c) is not related to the showing of any type of injury or harm or the extent of such injury or harm; rather, it is related to the number of days that the violation takes place, without any reference to the nature, extent, or existence of any type of injury or harm. Nothing in section 202.004 indicates that the damages that the trial court may assess under subsection (c) are intended to be compensation for any actual harm or injury from the violation of the restrictive covenant. A showing of actual harm is not a prerequisite for a court to assess the \$200 per day. *Uptegraph*, 312 S.W.3d at 397-398. The trial court did not act arbitrarily or unreasonably in denying civil damages. Both parties prevailed on some issues concerning the restrictive covenants and the by-laws, while losing other issues. *Air Park--Dallas Zoning Comm. v. Crow Billingsley Airpark, Ltd.*, 109 S.W.3d 900, 909 (Tex.App.—Dallas 2003, no pet.).

Another court takes a less magnanimous view in awarding these damages: There was no abuse of discretion in the trial court's refusal to award civil damages under Tex. Prop. Code §202.004 when there was no evidence of owner's knowingly, intentionally and deliberately disregarding the restrictive covenants.

Sanchez v. Southampton Civic Club, Inc., 367 S.W.3d 429, 436 (Tex.App.—Houston [14th Dist.] 2012, no pet.). The same court in *KBG Invs, v. Greenspoint Prop. Owners' Ass'n*, 478 S.W.3d 111 (Tex.App.—Houston [14th Dist.] 2015, no pet.) held that damages under TEX. PROP. CODE 202.004(c) are punitive rather than compensatory and fall squarely under TEX. CIV. PRAC. & REM. CODE Chapter 41, which does not allow recovery of these damages without any proof of actual damages. *At 122-23.*

E. Recording Requirement

All dedicatory instruments must be recorded in the real property records of each county in which the property to which they relate is located and have no effect until they are recorded. TEX. PROP. CODE §202.006(a)&(b).

F. Statutory Restrictions

The list of prohibited restrictions under this chapter are found at Section III., B., 5. of this article.

VI. CONCLUSION

While the above survey of POA and condominium statutes merely scratches the surface of the issues and discussions they create (not to mention differences of opinion), it is a fair overview of what you should begin to know about working with developing, governing and owning within a planned community.

Association law is no longer so esoteric as it once was because of its proliferation and popularization, but there are still many misconceptions about its workings and authority and much xenophobia surrounding its application; moreover, association living is still not perceived as necessary or friendly, even though its critics are hard pressed to find viable alternatives.

Hopefully in years to come, the perception will change and the “them” and “us” lines drawn in the sand will disappear and will morph into a new generation of “we.”

APPENDIX - A APPLICABLE STATUTES

STATE STATUTES

- **TEX. PROP. CODE Chapter 5. Conveyances**
Contains provisions for attorney's fees for breach of restrictive covenant action (§5.006), home sales disclosures (§5.012), and transfer fees (§5.202).
- **TEX. PROP. CODE Chapter 51. Provisions Generally Applicable to Liens**
Governs foreclosure of condominium assessment liens.
- **TEX. PROP. CODE Chapter 81. Texas Condominium Act**
Applies to condominiums created before January 1, 1994 and some provisions to all Texas condominiums regardless of when created.
- **TEX. PROP. CODE Chapter 82. Texas Uniform Condominium Act (TUCS)**
Applies to condominiums created after January 1, 1994. The following sections apply to a condominium in this state for which the declaration was recorded before January 1, 1994: Sections 82.005, 82.006, 82.007, 82.053, 82.054, 82.102(a)(1)-(7), (a)(12)-(21), (f), and (g), 82.108, 82.111, 82.113, 82.114, 82.116, 82.118, 82.121, 82.157, and 82.161. The definitions prescribed by Section 82.003 apply to a condominium in this state for which the declaration was recorded before January 1, 1994, to the extent the definitions do not conflict with the declaration. The sections listed in this subsection apply only with respect to events and circumstances occurring on or after January 1, 1994, and do not invalidate existing provisions of the declaration, bylaws, or plats or plans of a condominium for which the declaration was recorded before January 1, 1994.
- **TEX. PROP. CODE Chapters 201, 205, 206, 210 & 211. Amendment and Extension of Restrictions**
POA statutes "bracketed" to certain locations and/or populations
- **TEX. PROP. CODE Chapter 204. Powers of Property Owners Association Relating to Restrictive Covenants in Certain Subdivisions**
Applies in the Texas Counties of Brazoria, Galveston, Harris & Montgomery, per the 2010 U.S. census. (In addition to, not in place of, statewide laws.), to modify and renew restrictive covenants and create POAs.
- **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. PROP. CODE Chapter 252. Texas Unincorporated Nonprofit Association Act.**

The provisions of the Texas Property Code do not cover all aspects of unincorporated association governance; and those not addressed may be controlled by this Chapter.

- **TEX. PROP. CODE Chapter 301. Texas Fair Housing Act**
Provides for fair housing practices in Texas, creates a procedure for investigating and settling complaints of discriminatory housing practices, and provides rights and remedies substantially equivalent to those granted under federal law.
- **TEX. RULES OF CIV. PROC. Rule 735. Foreclosure Requiring a Court Order and Rule 736. Expedited Order Proceeding**
- **TEX. BUS. ORG. CODE Chapter 7. Limitation of Liability for a Governing Person**
- **TEX. BUS. ORG. CODE Chapter 22. Nonprofit Corporations**
The provisions of the Texas Property Code do not cover all aspects of association corporate governance; and those not addressed may be controlled by this Chapter.
- **TEX. CIV. PRAC. & REM. CODE Chapter 84. Charitable Immunity & Liability Act of 1987**
Defines limited scope of liability for volunteers of community associations.
- **TEX. FINANCE CODE Chapter 392. Debt Collection**
Applies to collection of assessments and other charges by associations, managing agents, and attorneys.
- **TEX. ELECTION CODE §259.002. Political Signs**
- **TEX. HEALTH & SAFETY CODE Chapter 757. Pool Yard Enclosures**
- **TEX. HUM. RES. CODE Chapter 123. Rights and Responsibilities of Persons with Disabilities §123.001, et seq. Community Homes for Disabled Persons Location Act**
Prohibits restrictions that discriminate against Community Homes.
- **TEX. LOC. GOVT. CODE Chapter 212. Municipal Regulation of Subdivisions & Property Development**
Empowers municipalities to regulate platting and development of subdivisions.
- **TEX. LOC. GOVT. CODE Chapter 232. County Regulation of Subdivision**
Empowers counties to regulate platting and development of subdivisions.
- **TEX. OCC. CODE. §§2308.001-.595, Texas Towing and Booting Act**

FEDERAL STATUTES

- **Interstate Land Sales Full Disclosure Act ("ILSFDA"), 15 U.S.C. § 1701, et. seq.**
Applies to the sale of lots in subdivisions and units in condominium projects that are to be constructed unless an exemption or combination of exemptions is applicable to the project.

- **Telecommunications Act of 1996, the Federal Communications Commission §207**
Over-the-Air Reception Devices ("OTARD") rule.
- **Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601.**
Provides for fair housing practices and creates a procedure for investigating and settling complaints of discriminatory housing practices using the federal statutes and agencies.
- **Fair Debt Collection Practices Act, 15 U.S.C. §§1692-1692, as amended by Pub. L. 109-351, §§801-02, 120 Stat. 1966 (2006)**
Regulates debt collection practices for associations, managing agents and attorneys.
- **Americans with Disabilities Act; 42 U.S.C. §12101 *et seq.***
Requires POAs which operate a "public accommodation" to adhere to specific construction and use standards to accommodate disabled persons.
- **Fair Housing Amendments Act of 1988; 42 U.S.C. §3601 *et seq.***
Requires POAs to allow modifications and accommodations for disabled persons.
- **1996 Telecommunications Act; amendment to 47 U.S.C. §151 *et seq.***
Prohibits restrictions that impair a viewer's ability to receive video programming services designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite service.
- **Internal Revenue Code, 26 U.S.C.A. §528, Certain Homeowners Associations and §501(c)(4)**
This is the section applicable to POAs when filing federal tax returns.
- **Service Members Civil Relief Act; 50 U.S.C. §501 *et seq.***
Requires notice to active service members to acquaint themselves with their rights under this Act if they are notified of a restrictive covenant violation or assessment collection/foreclosure action.

