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NUTS AND BOLTS OF COMMUNITY ORGANIZATIONS

I. INTRODUCTION

Dealing with community organizations is more involved than most professionals would initially think. Whether the entity is a Condominium Association (administering a Condominium regime), a HOA (administering a PUD, townhome, or detached home subdivision), an association overseeing commercial property, or a voluntary membership based civic club (whether incorporated or not), it is imperative that one becomes knowledgeable with many areas of the law. These include keeping abreast of the many federal and state statutory applications, developing case law, corporate law, basic parliamentary procedures, real estate matters, collection matters (foreclosure, bankruptcy, probate claims), and the like. Further, each community organization has its own set of Constituent Documents (Declaration, Bylaws, Articles, Rules, etc.) which must be reviewed and understood. In addition to the legal considerations, there are unexpected challenges which are unique to the representation of community organizations which arise as a result of homeowners and their homes being at issue. This paper will primarily address the nuts and bolts of two common forms of community organizations which govern residential communities: the Condominium Association and the Homeowners Association. This article is not intended to provide an extensive analysis of each issue presented (which would rightfully be deserving of a separate article unto itself) but will hopefully provide the reader with a general review of the many day to day issues which arise in representing these community organizations.

II. COMMONLY USED TERMS AND DEFINITIONS

Familiarity with the following terms and acronyms, some of which are used in this article, will be helpful:

A. ACC, ARC.

These acronyms are used to describe an “architectural control committee” or “architectural review committee” which oversees exterior building modifications or improvements within subdivisions. The authority and basis for action afforded these committees is set forth in the Declaration or CC&R's for the particular subdivision. Depending upon the terms of the Declaration or CC&R's, the Board of Directors may constitute the ACC or ARC, or the board members may appoint the committee members, or the committees may act separate and apart from the Board.

B. Articles.

The Articles of Incorporation of an incorporated POA.

C. Assessments.

The regular assessments levied by the Board of Directors of a POA against lot/unit owners for their pro-rata share of the budgetary operations of the POA (whether paid monthly, quarterly, annually, etc.).

D. Board of Directors.

The elected or appointed board which governs the administration of a POA in accordance with the Declaration, and Articles and Bylaws of the POA.

E. Bylaws.

The document which governs the operation of a POA as a corporate entity or unincorporated association (i.e. as to annual meetings, board constitution, board meetings, elections, etc.).

F. CAI.

The Community Associations Institute, a national educational membership organization composed of various interest groups serving the POA industry with local chapters throughout the nation, including Texas.

G. CC&R's.

This acronym stands for Declaration of Covenants, Conditions, and Restrictions which are filed of record in the real property records and creates a PUD/townhouse subdivision, or subdivision. Occasionally, the acronym will be used to describe a Condominium Declaration which creates a Condominium.

H. Community Association.

A POA.

I. Condominium.

A type of real property ownership created in accordance with local statutes, which includes fee simple ownership of a unit with tenancy in common ownership of common elements.

J. Condominium Association.

A POA which manages and administers a Condominium regime in accordance with local statutes and the Constituent Documents of the regime.

K. Constituent Documents.

The project documents of a POA, including the Declaration or CC&R's, Bylaws, Articles, and Rules.

L. Council of Co-Owners.

The term used in local statutes (Condominiums created prior to the Uniform Condominium Act) for a Condominium Association.

M. D&O.

Refers to “directors and officers” and is usually used in the context of directors and officers liability insurance coverage (also described as “E&O” or errors and omissions insurance coverage).

N. Declaration.

The term most commonly used to describe the document which creates the POA (whether Condominium Declaration, Master Deed, Declaration of CC&R's). The Declaration is filed of record and typically creates the obligation to pay assessments, reserves the continuing lien in favor of the association, and contains the restrictive covenants applicable to the community.

O. Dedicatory Instrument.

The term used by local statutes as a reference to any instrument covering the establishment, maintenance, and operation of a residential POA.

P. HOA.

The acronym that is typically used to describe all non-Condominium POA's; a POA which manages and administers a PUD, townhome subdivision, or detached home subdivision.

Q. OTARD.

This acronym refers to “Over the Air Reception Devices” regulated by the Federal Communications Commission at 47 CFR Sec. 1.4000 which implements the Telecommunication Act of 1996, as amended.

R. POA.

A “property owners association” as defined by local statutes as “an incorporated or unincorporated association owned by or whose members consist primarily of the owners of the property covered by the Dedicatory Instrument and through which the owners, or the board of directors or similar governing body, manage or regulate the residential subdivision, PUD, Condominium, or townhouse regime, or similar planned development.”

S. PUD.

An acronym for PUD, which is a general reference to a POA which is not a Condominium consisting of individually owned lots and common areas owned by the association.

T. Restrictions.

The recorded restrictive covenants contained in the Condominium Declaration, or CC&R's.

U. Rules and Regulations.

Typically refers to the rules adopted and amended from time to time by the Board of Directors pursuant to their authority to do so under the Condominium Declaration or CC&R's.

V. Special Assessments.

Assessments levied by the Board of Directors of a POA in addition to the regular assessments for capital repair, replacements, or improvements, performing deferred maintenance, funding budgetary shortfalls, or other items as may be provided and/or allowed pursuant to the Constituent Documents. Depending upon the terms of the Constituent Documents, special assessments may require a vote and/or approval of the membership.

W. Townhouse.

A description of an individually owned non-Condominium dwelling unit which is in row house configuration or attached side by side (sometimes with party walls between adjoining units).

III. TYPES OF COMMUNITY ORGANIZATIONS

A. Introduction.

There are two common forms of community organizations which govern residential communities: the Condominium Association

and the Homeowners Association. A Condominium Association administers Condominium regimes. Community organizations which administer PUD communities, Townhomes, or detached home subdivisions are typically referred to as Homeowners Associations (“HOA”). Occasionally, a Condominium Association will be referred to as a HOA, however it would be incorrect to refer to a community organization overseeing PUD’s, Townhomes, or detached home subdivisions as a Condominium Association. Most attorneys practicing in this area of the law generically refer to any of these types of community organizations as being a “Property Owners Association” (“POA”) or a “Community Association.” These terms are typically used to describe a community organization (whether a Condominium Association or HOA) which are “mandatory membership” organizations where a unit/lot owners’ membership in the community organization is “automatic” with his or her ownership. These terms are used interchangeably in this paper.

B. Condominium Association.

Condominium Associations administer properties submitted to a Condominium regime in accordance with local statutes.

In order to understand what a Condominium Association does, one needs to understand what a Condominium is, and how it differs from other forms of real property ownership. While this may appear somewhat basic, it is surprising how many professionals do not have an accurate understanding of the fundamental basics of the condominium. Essentially, in order to create a Condominium, an owner of land acting as a “declarant” submits that land into a Condominium form of ownership by filing a Condominium Declaration. Upon the filing of the Condominium Declaration, the owner of the property subjected to the Condominium no longer owns the land with its improvements as a whole but rather owns the individual Condominium units identified and shown in the plans attached to the Condominium Declaration.

Ownership of an individual Condominium unit carries two inseparable ownership interests: (i) the right to occupy the described airspace constituting the specific Condominium unit (and all improvements within that airspace, typically excepting any common element structural items), and (ii) the ownership in common, with all other owners, of the common elements (the land, buildings; i.e., everything but the units). This common ownership is expressed as a fraction or percentage typically (but not required to be) based on the square feet of the respective unit in relation to the square feet of all of the units.

Common misunderstandings involving Condominiums include:
(i) the misconception that ownership of a Condominium unit is not a fee

simple ownership interest (assuming that the declarant owned the land in fee simple, as opposed to a leasehold estate, when submitting the land to the Condominium regime, each respective unit owner will also own a fee simple ownership interest in his/her unit which includes an undivided ownership interest in the common elements); (ii) the misconception that the Condominium Association “owns” the common elements or common area (in reality, the Condominium Association does not own any real property interest, it only maintains and administers the common elements/common areas on behalf of the respective Condominium unit owners who own same in undivided interests); and (iii) the misconception that you can judge whether a property is a Condominium by the “look” of the construction or design (Condominiums need not necessarily be “apartments” in appearance; they may also have the appearance of Townhomes, patio homes, or even detached homes as long as they are created in accordance with the statutory requirements).

A Condominium Association is charged with the responsibility of insuring, maintaining and repairing the common elements of the Condominium. While the specifics of these obligations are covered by the applicable statute and the Condominium Declaration, this generally includes the maintenance and repair of the common elements which constitute the land (sometimes referred to as “common area”) and the buildings (the foundation, slab, structure, roof, etc; generally everything but the units), and the maintenance of insurance insuring the common elements and units. In addition, certain central services (water, sewer, cable, trash pick up, etc.) may be provided as a common expense. As in all forms of community organizations, the Condominium Association also enforces the restrictive covenants and other Rules and Regulations adopted by the Board of Directors applicable to the Condominium. Such maintenance, repair and other obligations/services are funded by the collection of assessments from the unit owners, the amount of such assessments being determined by annual budgets adopted by the Board of Directors. These assessments are typically the only significant source of revenue a Condominium Association has to perform its obligations (these assessments are sometimes capped and cannot be increased without membership approval) which is why prompt and efficient collection efforts (including foreclosure rights) are so vital to the day to day operation of Condominium Associations.

Condominium Associations have been described by the courts as “democratic sub-societies.” The membership, which is composed of the owners, elects directors (a minimum of three) and the directors are vested with the authority and have the fiduciary obligation to operate the affairs of the Condominium Association and carry out the repair and maintenance of the common elements. Typically, such boards, acting on behalf of the POA, will engage a property manager or management

company to carry out such duties in the manner directed by the Board.

C. Homeowners Associations.

Homeowners Associations administer properties in PUD's, townhouse properties (non-Condominium), and detached home subdivisions.

In a PUD or townhome property, each home owner typically owns his or her lot, which is improved by a patio home, townhome, "zero lot line" home, or the like. These dwellings may share party walls on common lot lines and/or share common roofs and exterior siding components, or may be in "row house" configurations. Each owner owns his or her lot, together with the improvements thereon (i.e. foundation/slab, structure, and roof above), middle party wall to middle party wall with neighboring homes where there are shared party walls. These lots are either platted, or in older communities, individually described by metes and bounds. Unlike the Condominium Association, the HOA actually owns the common area (typically deeded by the developer), which is usually described as the entirety of the subdivision, save and except the lots (i.e., the grounds, any private streets, pools, clubhouse, tennis courts, and other amenities). The HOA maintains and repairs the common area, and insures the common amenities (pools, club house, etc.). In addition, the HOA typically maintains, repairs, and replaces the exterior surfaces of the buildings (containing the Townhomes, patio homes, etc.) so as to maintain uniformity of appearance (this maintenance, repair, and replacement stops short of the foundation/slab and structure which is usually the responsibility of the individual owner). In some such communities, the HOA also has the responsibility of obtaining and maintaining blanket insurance coverage on all of the Townhomes, and to provide for certain central services (such as water, sewer, and trash pick up). As in all such community organizations, the Homeowners Associations in such developments also enforce the applicable restrictive covenants. In addition, there is typically a greater emphasis on architectural change regulations and restrictions which should be closely monitored and enforced.

A HOA in such a community operates much the same way as a Condominium Association (with reference to being a "democratic sub-society"). The elected Board of Directors of such organizations also adopt annual budgets and levy assessments accordingly (typically uniform in amount, not based on square feet) to cover the cost of its operations. The budgetary requirements of HOA's are different from that of Condominium Associations in that the maintenance, repair, and replacement of the structures themselves are not included (same being the responsibility of the respective owners) and therefore the assessments levied against the owners are typically less than a

comparable Condominium Association property (obviously, one cannot really compare assessment amounts without analyzing exact budgetary components, as each property is different).

Despite the significant legal differences, there is sometimes considerable confusion as to whether a specific property is a Condominium (administered by a Condominium Association) or a PUD/townhome. property (administered by a Homeowners Association). This confusion typically stems from the fact that often these properties may “look” identical. It is absolutely necessary to review and understand the Constituent Documents of each such property (the Declaration, articles and bylaws of the association, etc.) to make a conclusive determination and to properly identify the rights and responsibilities of the owners and the applicable community organization.

In a detached home subdivision, each owner owns his/her individual lot, and the individual home located thereon. These lots are platted by a subdivision plat usually with public, dedicated streets serving same. In these subdivisions, the HOA typically owns common areas which are improved by amenities such as a clubhouse, swimming pool, or other amenities. It maintains such common area property (and the amenities located thereon), as well as certain central services such as street lights, street esplanade landscaping, subdivision signage, and the like. Some of these Homeowners Associations provide for trash pick up. Deed restriction enforcement and architectural control (as to improvements or exterior modifications) are an integral part of the function of such an association.

A HOA in a detached home subdivision operates much the same as a Homeowners Association which governs a PUD/townhouse property. Its operating budget is based upon its obligations as set forth in its Constituent Documents.

IV. STATUTORY FRAMEWORK

A. Federal Law.

All POA’s (whether a Condominium Association or Homeowners Association) are subject to certain Federal Laws. These include:

1. Fair Debt Collections Practices Act, 15 U.S.C.A. Sec.1692 (“FDCPA”).

A person is considered a debt collector and is subject to the FDCPA if the person is attempting to collect a “consumer debt.”

Courts have been split as to whether assessments payable to POA's constitute "consumer debts" under the FDCPA, and this issue has not been specifically addressed by a federal or state court having jurisdiction in Texas. As such, prudence dictates that attorneys who collect assessments on behalf of POA's assume that the FDCPA applies and comply with same. The FDCPA generally addresses (i) communication in connection with the debt collection (including communication with the debtor and communication with third parties), (ii) harassment or abuse, (iii) false or misleading representations, (iv) unfair practices, and (v) validation of debts (including providing certain required written notice in written notices to the debtor and verification of the debt claimed). Analysis of these provisions in detail is beyond the scope of this article.

2. Fair Housing Act, Reasonable Accommodations under the Fair Housing Act.

Discrimination is prohibited on the basis of race, color, sex, and natural origin under the Federal Fair Housing Act (Civil Rights Act of 1968). In 1988 the Fair Housing Act was amended to add "familial status and handicap status" to this list. While the concept barring discrimination based on race, color, sex, and natural origin is widely understood (and accepted), the inclusion of familial status and handicap status to the list has had a direct, evolving impact on POA's, and Condominium Associations in particular.

3. OTARD and FCC Satellite Dish Regulations.

In 1996 the Federal Communications Commissions (FCC) adopted rules governing Over the Air Reception Devices ("OTARD") as part of the Telecommunications Act of 1996. These rules were amended in 1999 and 2000 to clarify certain POA applications.

4. Bankruptcy.

Bankruptcy considerations will come into play in connection with collection procedures against owners who may file or be in bankruptcy. A basic understanding of Chapter 7 and Chapter 13 proceedings will be necessary in order to deal with these issues.

B. State Laws.

POA's are governed by numerous State Laws on many different levels. A complete list or description of these laws and their applications are beyond the scope of this article, however, as an example, the more frequently encountered laws in Texas which the POA professional should have familiarity are as follow:

1. Corporation Matters.

Texas non-profit Corporation Act (Article 1396, Texas Revised Civil Statutes)/Business Organizations Act. If the POA is incorporated (required for all Condominium Associations created after January 1, 1994, and typically the norm for all POA's) it will likely be incorporated as a Texas non-profit corporation and therefore be subject to the Texas nonprofit corporation act. Effective January 1, 2006, corporations are formed pursuant to the Business Organizations Act. There are numerous provisions in the non-profit corporation act which affect the day to day operations of POA's, and if the POA corporate documents (i.e. Articles or bylaws) are silent as to an issue, there will usually be a provision in the non-profit act which addresses same.

2. Condominium Matters.

Chapter 81 and Chapter 82, Texas Property Code. These statutory provisions apply only to Condominiums and Condominium Associations.

Chapter 81, "Condominiums created before adoption of the Uniform Condominium Act" applies to Condominiums created prior to January 1, 1994.

Chapter 82, "Uniform Condominium Act" is somewhat more complicated, as parts of the Act apply to all Condominiums, no matter when created, and parts of the Act apply only to Condominiums created after January 1, 1994. It is necessary to review the applicability section of the Act (Sec. 82.002) to determine which parts apply to all Condominiums, no matter when created. Furthermore, the Act allows Condominium Associations administering Condominiums created prior to 1994 the right to adopt the Uniform Condominium Act in its entirety by an appropriate amendment of its Condominium Declaration (i.e. by a vote/approval of the members).

3. Fair Debt Collection Act.

Chapter 392, Texas Finance Code. This Act contains

provisions similar to the Federal Fair Debt Collection Practices Act.

4. Foreclosure of Real Property.

Chapter 51, Texas Property Code (and in particular, §51.002). Provided that the Constituent Documents of the POA allow non-judicial foreclosure (and a power of sale has been granted in conjunction with same), all non-judicial foreclosures must be conducted in accordance with §51.002 of the Texas Property Code (“Sale of Property under Contract Lien”). The “contract lien” referenced in the statute is the continuing lien created and reserved in the Constituent Documents of the POA.

5. Restrictive Covenants (extension, renewal, creation, modification, or addition to restrictions); Non-Condominium.

Chapter 201, Property Code, “Restrictive Covenants Applicable to Certain Subdivisions” This Chapter sets forth a process whereby owners of lots in subdivisions in certain counties (exceeding minimum population requirements) can extend, renew, create, modify, or add to the restrictive covenants applicable to such subdivision. It does not apply to Condominiums.

6. Restrictive Covenants (construction and enforcement).

Chapter 202, Property Code, “Construction and Enforcement of Restrictive Covenants.” This Chapter applies to all residential subdivisions, PUD’s, Condominium or townhouse regimes, or similar planned developments. Generally, this Chapter codifies the proposition that restrictive covenants shall be liberally construed to give effect to the purpose and intent of the restrictions; specifically addresses the use of property as a “family home” (as defined in the Community Homes for Disabled Persons Location Act, Article 101n, Vernon's Texas Civil Statutes) as being permitted notwithstanding that such use would otherwise be in violation of restrictive covenants; establishes a presumption of reasonableness in the exercise of discretionary authority by POA’s; allows a court to assess civil damages for violations of restrictive covenants in an amount not to exceed \$200.00 for each day of the violation; contains provisions allowing for the withdrawal of a signature on petitions to terminate restrictive covenants; requires POA’s to file all “Dedicator Instruments” of the POA in the real property records of the county in which the property is located (see §V and VI of this paper for further commentary as such topic); outlines several restrictive covenants which are prohibited by law (generally relating to landscaping water conservation measures); and contains a (new) provision regulating the display of political signs (see §XG of

this paper for commentary as to such topic).

7. County Attorney Authorized to Enforce Restrictions.

Chapter 203, Texas Property Code, "Enforcement of Land Use Restrictions in Certain Counties." This Chapter allows the county attorney in certain counties (exceeding minimum population requirements) to enforce restrictions governing the use of property, building set backs, or affects the size, type, or number of buildings or other structures which may be built on the property.

8. Powers of POA's (Non-Condominium).

Chapter 204, Property Code, "Powers of Property Owners' Association relating to Restrictive Covenants in Certain Subdivisions." This Chapter applies only to certain counties exceeding minimum population requirements (or counties adjacent to such counties) and does not apply to Condominium developments. This Chapter is somewhat comprehensive and outlines procedures for the creation of POA's in subdivisions, the extension to, addition to, or modification of existing restrictions, the method of adoption of restrictions, powers of the POA, and the creation and powers of architectural control committees acting within such subdivisions.

9. "Resale Certificates" in POA's (Non-Condominium).

Chapter 207, Property Code, "Disclosure of Information by Property Owners' Association." This chapter contains provisions allowing purchasers of property in subdivisions which have a POA that is entitled to levy assessments the right to request and obtain certain "Subdivision information" and Resale Certificate. This Chapter does not apply to Condominium properties (however, Condominium Associations are required to deliver similar information to purchasers in accordance with the provisions of Chapter 82 of the Property Code).

Also note §5.012, Texas Property Code, which requires Sellers of non-condominiums to provide purchasers with "Notice of Obligations Related to Membership in Property Owners Association."

10. Texas Residential Property Owners Protection Act (Non-Condominium)

Chapter 209, "Texas Residential Property Owners Protection Act." This Chapter, effective January 1, 2002, was enacted in honor of Wenonah Blevins and is unofficially referred to as the "Wenonah Blevins Residential Property Owners Protection Act." It reflects the apparent legislative intent to establish limitations and controls on the powers of POA's following a much publicized, sensational POA

foreclosure (judicial foreclosure, at a sheriff's sale) where an 82 year old Houston widow named Wenonah Blevins lost her house with substantial equity to a third party.

This Chapter, which does not apply to Condominium properties, is very comprehensive and generally provides, among other matters: a requirement that POA's file "management certificates" in the county real property records with certain proscribed information; that POA's make its books and records reasonably available for inspection; that certain notice be provided to homeowners prior to certain enforcement action (and the levy of fines or attorney fees) with the right to a hearing before the Board of the POA; certain limitations/requirements on the assessment and collection of attorney fees, together with a "cap" on attorney fees related to non-judicial foreclosures (generally, 1/3rd of the actual costs and assessments, excluding attorneys fees, or \$2,500.00); prohibition of foreclosure remedies if the debt consists solely of fines or attorney fees incurred by the POA solely associated with fines; required notices to be provided to the owner and to be recorded following foreclosure; and a 180 day right of redemption period following the foreclosure of a POA lien whereby the owner can redeem the property and obtain back title (irrespective of whether the purchaser was the POA or a third party).

11. Extension or Modification of Residential Restrictive Covenants.

Chapter 210, Property Code, "Extension or Modification of Residential Restrictive Covenants." This Chapter applies to residential subdivisions in certain counties (with minimum population requirements) and outlines a procedure to extend or modify existing restrictive covenants through a petition and vote procedure.

12. Amendment and Enforcement of Restrictions.

Chapter 211, Property Code, "Amendment and enforcement of Restrictions in Certain Subdivisions." This Chapter applies to residential subdivisions in certain counties (with a population of less than 65,000) and allows the creation or modification of a procedure to amend restrictions where the restrictive covenants in place do not have any amendment procedure.

V. CONSTITUENT DOCUMENTS

Aside from statutory applications, a POA is governed by its Constituent Documents. These include the Condominium Declaration or CC&R's, the Articles of the corporate entity constituting the POA, the Bylaws of the corporate entity constituting the POA, the Rules and Regulations of the POA, and the Board of Director established policies and practices. Under most local statutes, all of the foregoing constitute "Dedicatory Instruments" which are required to be filed of record in the real property records. In addition to the foregoing, there are other matters which may affect the operation of the POA unrelated to the foregoing Constituent Documents, such as recorded plats, easements, deed restrictions or restrictive

covenants existing prior to the establishment of the POA, and other matters affecting the real property administered by the POA (note that in a Condominium, the Declaration itself will contain certain survey plats and site plans). When undertaking the assessment of a POA case, one must obtain copies of the Constituent Documents of the POA. Often, these documents are incomplete, illegible, or unexecuted copies. It is suggested that when assessing a new POA case, that an “audit” of the Constituent Documents.

VI. HIERARCHY OF AUTHORITIES

POA’s derive their power and authority from public law and their respective Constituent Documents. All of these authorities govern their day to day operation. These authorities can be “ranked” in order (higher ranked authorities overruling conflicting provisions found in lower ranking authorities) as follows:

A. Public Law.

It should be apparent that the highest authority governing the operation of POA’s is public law, which overrules inconsistent provisions of the Declaration, CC&R’s, Articles of the POA, Bylaws of the POA, and/or Rules and Regulations adopted by the Board of Directors of POA’s. Categories of Public Law have a hierarchal ranking on their own, ranging from federal laws (highest) to local ordinances (lowest). Generally, public laws include:

1. Federal Law.

This is the highest legal authority governing the operation of POA’s. Examples of federal laws which govern (and override inconsistent or differing provisions of the Constituent Documents of POA’s) include the telecommunication /OTARD rules allowing satellite and antennas under certain circumstances; Fair Housing Amendments and ADA considerations; Bankruptcy matters, the Fair Debt Collection Practices Act; and federal income tax matters.

2. State Law.

There are several State laws affecting POA’s which have a direct and indirect impact on their operations. These State laws vary drastically from state to state and some affect Homeowners Associations specifically and some affect both Condominium Associations and Homeowners Associations.

3. Local Ordinances.

POA’s are also subject to applicable municipal or county ordinances.

B. Constituent Documents.

The next grouping of authorities governing a POA are the Constituent Documents of the POA, which are ranked in the following category of authority:

1. Recorded Plats and Easements.

These might include the subdivision plat map or

easements affecting the community. In a Condominium development, the survey of the Condominium (showing all improvements etc. and site plans) are attached to the Condominium Declaration.

2. Recorded Condominium Declaration or CC&R's.

These documents “create” the development and set forth the basic covenants, conditions, and restrictions which govern the Condominium or subdivision. These covenants, conditions, and restrictions “run with the land” and are binding upon all owners who acquire title to property (units or lots) in the development.

3. Articles.

These articles, which are filed with the Secretary of State, create the POA as a corporate entity and would, control over any inconsistent provision contained in the Bylaws of the POA.

4. Bylaws.

Unlike the Declaration and CC&R's (which contain the covenants, conditions, and restrictions governing the development), the Bylaws contain provisions dealing with the administrative and governance issues (i.e., number of board members, election of board members, annual membership meetings, etc.) Bylaws must usually also be recorded as a “Dedicatory Instrument” in the county real property records.

5. Rules and Regulations, Policies and Practices.

The lowest authority on the hierarchy chart are the board adopted Rules and Regulations, policies and practices. Many Declarations and CC&R's provide the Board of Directors of the POA with the authority to adopt Rules and Regulations governing the conduct of the members in or about the common elements/common areas. In addition, most Boards adopt specific policies dealing with the operation of the POA (i.e. as to collection matters, repair charge-backs, and the like). These rules, regulations, and policies also constitute “Dedicatory Instruments” which must be recorded in the County real property records.

VII. HOW POA'S FUNCTION

POA's are created by the filing of the Condominium Declaration/CCR's applicable to the specific development in the real property records of the county in which the development is located (i.e. Condominium Declaration, CCR's etc.), by the incorporation of the POA as a non-profit corporation, and by the adoption of the Bylaws (by the initial Board) which govern the POA's corporate operation. These Constituent Documents are binding and enforceable on all subsequent purchasers of property (units/lots) in the development, and such purchasers automatically become members of the POA solely by virtue of their ownership (usually referred to as being on a “mandatory membership” basis) and are contractually bound by the covenants, conditions, and restrictions established by the Constituent Documents of the POA.

The contractual covenants set forth in the Constituent Documents are independent in nature: the contractual obligations of the owners/members as to their compliance with the restrictive covenants, architectural control

requirements, obligation to pay assessments and the like are wholly independent from the contractual obligations of the POA to provide services required of it (such as maintenance, repair, replacement, insurance, etc. of common areas/common elements). An owner/member cannot withhold his/her assessment payments for a perceived lack of performance by the POA and a POA cannot deny an owner/member services required of it in the event of non-payment of assessments. While the Constituent Documents of many POA's provide that members who are delinquent in the payment of assessments can be denied the use of certain common amenities such as the swimming pool, it would be inappropriate for a POA to withhold common area/common element maintenance, repair, replacement, or insurance functions to a specific owner if that owner was delinquent in the payment of assessments.

The POA is intended to operate by virtue of a democratic process whereby the owner/members elect the individual directors, and the directors serving on the Board have the power and authority to administer the affairs of the POA. The Board elects officers from among the Board members (i.e. President, Vice President, Secretary, and Treasurer). As to the POA's operations, there are actually only a few items which the owners/members vote on, typically being limited to the election or removal of Directors (usually with or without cause), approval of increases in assessments or special assessments (where caps are in place or approval is required by the Constituent Documents), approval as to the making of certain capital improvements (i.e. construction of an amenity not presently in place), approval of corporate borrowing or pledging of assessments receivable for loans (if such approval is required by the Constituent Documents), and the like. The basic concept is that the members elect the directors and then the board oversees the day to day operations of the POA (i.e. entering into contracts, hiring/firing employees and contractors, making maintenance, repair, replacement decisions, etc.). If the members had the right to micro-manage the affairs of the POA, the POA would not be able to function on an efficient basis.

The Board of Directors of a POA derive their power and authority from the Constituent Documents of the POA and applicable law. In addition, boards are required to abide by applicable law and the POA's Constituent Documents. Directors are typically elected by the membership (vacancies arising/resulting from death, resignation, etc. are usually filled by appointment by the remaining directors) to serve terms established by the Constituent Documents. In a POA, directors voluntarily serve their term without pay or compensation. Directors have a fiduciary obligation to the owners/members of the POA to (i) enforce the covenants, terms, conditions, and restrictions set forth in the Constituent Documents (i.e., enforcement of restrictive covenants, architectural control functions, assessment collection) and (ii) to provide (or cause to be provided) the services necessary for the operation and upkeep of the common area/common elements (i.e. maintenance, repair, replacement, insurance obligations and the like). In carrying out its fiduciary duties, the Board will be judged on the basis of reasonableness under a business judgment standard.

VIII. LIENS / LIEN PRIORITY / "SUPER LIENS"

A. Assessment Liens.

The Constituent Documents provide that the POA has an "inchoate" lien for the payment of an assessments (general or special) that are due for maintenance, capital improvements and other charges permitted by the Constituent Documents. An inchoate lien is an interest which is not a presently enforceable lien until it ripens or becomes vested as a result of an action such as non-payment. It is also unique

because while the lien for past due assessments can be wiped out through foreclosure, the lien itself cannot. It is generally superior to other liens on the property but either subordinated at the closing of the sale of the property or by virtue of the verbiage in the Constituent Documents. It becomes a forecloseable lien once the assessments become past due pursuant to the terms and conditions of the Constituent Documents.

B. Lien Priority.

Lien priority is established by the date upon when the lien attaches to the property. Generally, the assessment lien is created by the developer of the subdivision by recordation of the Declaration prior to the sale of any lots to homeowners. As the Declaration and assessment lien is in existence prior to purchase by a homeowner, the Association would stand in first lien position. However, in order to encourage mortgage lending, most POA's subordinate their lien to lenders.

However, one should be aware that not every POA subordinates their lien. The language in the Declaration of one such example reads as follows:

“The assessment lien provided for herein shall be superior to the lien of any mortgage hereafter created. A sale or transfer of any tract shall not affect the assessment lien. The sale or transfer of any lot pursuant to a mortgage foreclosure or any proceedings in lieu thereof shall not extinguish the assessment lien as to payments which become due prior to such sale or transfer.” [Example of Declaration provision]

It cannot be over-emphasized that this is a very unusual POA Declaration provision. Most often, the lien is subordinated in favor of lenders. However, when such a provision exists, particularly when coupled with the requirement to notify a lender a certain number of days in advance of a foreclosure, this can be a very effective method of collecting assessments. If the homeowner fails to pay, the lender will step up and pay so that any resultant foreclosure will not adversely affect their lien.

C. Super Liens.

Many states have statutes (or in absence of a statute, many POA's have embodied in their Constituent Documents) so called “Super Liens” which means that notwithstanding the foreclosure of the first lien by a mortgagee, the mortgagee and/or purchaser at the foreclosure or post foreclosure remain liable for a specified amount of past due assessments. The scope of such statutes varies greatly from state to state and these statutes must be reviewed carefully (both pre and post foreclosure) to adequately assess the rights and liabilities of the mortgagee under these laws. In many circumstances, these liens can be terminated if proper notice is given.

IX. CONCLUSION / ANALYSIS

While the world of POA's seems complex and confusing, if the professional who is confronted with dealing with a POA takes the following steps, he/she will be in a position to correctly analyze and assess any

situation:

1. Collect and review current copies of all Constituent Documents;
2. Obtain and review local laws pertaining to POA's;
3. Compare and contrast laws against Constituent Documents; and
4. Take action in strict accordance with laws and Constituent Documents.

DISCLAIMER: This article contains information on general legal issues and is not intended to provide advice on any specific legal matter or factual situation. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this information without seeking professional counsel.

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