

FEDERAL & STATE LAWS THAT MODIFY POA DOCUMENTS

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Representative Experience

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- Preparation and review of property use agreements and vendor contracts
- Oversight of fiscal matters such as budgeting, levying special assessments, and maintenance of reserve funds
- Counseling in the pre-transition, transition, and post-transition phases of the community development
- Advice and guidance with regard to warranty, construction, and accounting claims
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- Representation of landlords/tenants, and property managers related to the development and administration of residential communities and commercial real estate
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Education

Baylor Law School

- J.D., 2002
- Chief Justice Thomas R. Phillips Scholar
- *Baylor Law Review* (Executive Editor, Notes and Comments Editor, Author)
- Judicial Clerk, The Honorable Walter S. Smith, Jr., United States District Court for the Western District of Texas

Texas A&M University—College Station

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- Texas Super Lawyers Rising Star, Thomson Reuters, *Texas Monthly Magazine* 2007-2017
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Professional & Community Involvement

- Leadership Austin – Essential Class
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Admitted to Practice

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Presentation Topics

- Petition Referendum Election and Voting
- Community Governance – State and Federal Laws
- POA Legislative Updates
- Board of Directors – Ethics and Governance
- Document Preservation and Retention Obligations

Military Service

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FEDERAL & STATE LAWS THAT MODIFY POA DOCUMENTS

I. INTRODUCTION

This paper addresses a number of laws – federal and state – that apply to Texas POAs.¹ Because covenants arise out of contract, in the event of a conflict with a statute, the statute will control. Accordingly, before advising a POA with regard to its rulemaking authority or enforcement options, one should consider whether the issue being addressed is covered by an existing law.

II. COVENANTS ARE CONTRACTUAL OBLIGATIONS

POAs are subject to and governed by recorded documents that are typically referred to as “governing documents” or “dedicatory instruments.” The term “dedicatory instrument” is defined in Section 202.001(1) of the Property Code, as follows:²

Dedicatory Instrument” means each document governing the establishment, maintenance, or operation of a residential subdivision, planned unit development, condominium or townhouse regime, or any similar planned development. The term includes a declaration or similar instrument subjecting real property to restrictive covenants, bylaws, or similar instruments governing the administration or operation of a property owners’ association, properly adopted rules and regulations of the property owners’ association, or all lawful amendments to the covenants, bylaws, instruments, rules, or regulations.

Fundamentally, restrictive covenants are negative covenants that limit permissible uses of land.³ Accordingly, the enforceability of covenants is primarily based on the fact that Texas law recognizes the right of parties to freely negotiate and enter into contracts as they see fit. When contracts touch and concern real property and are recorded in the county where the property is located, they may run with the land and bind successors in title. Such contracts are enforced, provided they do not contravene public policy and are not otherwise illegal.”⁴

The contractual nature of POAs means dedicatory instruments are subordinate to applicable state and federal laws and, in the event of a conflict, the statutes must be followed. Hence, one advising a POA should be familiar with those areas of POA governance that intersect with existing legal requirements to ensure that the POA avoids taking any action inconsistent with some statutory requirement.

III. BOARD GOVERNANCE AND VOTING

A. Suspension of an Owner’s Right to Vote or to Run for the Board of Directors

It is not uncommon to find POA bylaws⁵ that contain restrictions on an owner’s right to run for the board of directors or to cast a vote if the owner has an existing covenant violation or is delinquent in the payment of POA assessments or other sums due the association.

If the POA is a homeowners’ association governed by Chapter 209,⁶ the POA should not enforce such rules. A Chapter 209 POA may not deprive an owner of the right to run for the board of directors or vote to elect a director, and the following statutory provisions invalidate such clauses:

Sec. 209.0059. RIGHT TO VOTE. (a) A provision in a dedicatory instrument that would disqualify a property owner from voting in a property owners’ association election of board members or on any matter concerning the rights or responsibilities of the owner is void.

209.00591. BOARD MEMBERSHIP. (a) Except as provided by this section, a provision in a dedicatory instrument that restricts a property owner’s right to run for a position on the board of the property owners’ association is void.

¹ The term “POA” is used throughout, and it is intended to be a general reference to any type of “property owners association” under § 202.001 of the Texas Property Code.

² TEX. PROP. CODE § 202.001(1).

³ RESTATEMENT (THIRD) OF PROP. SERVITUDES § 1.3(3) (AM. L. INST. 2000)

⁴ *Curlee v. Walker*, 244 S.W.497, 498 (Tex. 1922).

⁵ Chapter 81 of the Texas Property Code applies to condominiums created prior to January 1, 1994. Chapter 82 of the Texas Property Code applies to condominiums created on or after January 1, 1994.

⁶ Chapter 209 applies to residential subdivisions that are not condominium communities and 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. TEX. PROP. CODE 209.003.

B. Mandatory Indemnification of Officers and Directors

While most modern governing documents feature some right of indemnification for officers and directors, Section 8.051 of the Texas Business Organizations Code contains the following mandatory indemnification provision that applies to a prevailing defendant:

8.0151 MANDATORY INDEMNIFICATION. (a) An enterprise shall indemnify a governing person, former governing person, or delegate against reasonable expenses actually incurred by the person in connection with a proceeding in which the person is a respondent because the person is or was a governing person or delegate if the person is wholly successful, on the merits or otherwise, in the defense of the proceeding.

There is a limited exception to the general rule within the statute; however, for the limitation to apply, the statute requires such limited indemnification provisions to be in the certificate of formation, stating: “[t]he certificate of formation of an enterprise may restrict the circumstances under which the enterprise must or may indemnify or may advance expenses to a person under this chapter.”⁷

C. Additional Condominium Act Requirements

Chapter 82⁸ of the Texas Property Code contains specific provisions that must be included in a condominium’s bylaws. In particular, Section 82.106 provides that an association’s bylaws must provide for: (1) the number of members on the board and the titles of the officers of the association; (2) election by the board of a president, treasurer, secretary, and any other officers the bylaws specify; (3) the qualifications, powers and duties, terms of office, and the manner of electing and removing a board member or officer and filling vacancies; (4) the powers, if any, that the board or an officer may delegate to other persons or to a managing agent; (5) the designation of officers who are authorized to prepare, execute, certify, and record amendments to the declaration on behalf of the association; (6) the method of amending the bylaws; and (7) the manner of notice of meetings of the association. In particular, one should ensure that the proper representative executes any declaration amendment to avoid a claim that the amendment is invalid.

IV. FAIR HOUSING AND THE AMERICANS WITH DISABILITIES ACT

A. State and Federal Fair Housing Laws

POAs are often subject to ordinances and other governmental use regulations that restrict a developed area or subdivision to single-family residential use. Similarly, a POA’s governing documents will typically contain covenants that limit use and enjoyment of property to single-family residential use only with related restrictions on commercial or business activities.

Even in cases where restrictive covenants clearly prohibit an activity related to use of the property, enforcement may be improper under the Fair Housing Act if a rule impacts the use and enjoyment of property based on race, color, national origin, religion, sex, familial status (including children under the age of 18 living with parents or legal custodians), and disability. Also, discrimination may occur if the POA denies a request for a “reasonable accommodation” related to any of the foregoing classes.

The Fair Housing Act⁹ generally focuses on the impact of certain rules as opposed to identifying bright-line rules that specify improper acts. The general language is designed to provide flexibility to address different factual scenarios. Unfortunately, the omission of particular guidelines from the Fair Housing Act and the lack of a sufficient body of interpretive case law make it difficult to provide a comprehensive list of prohibited acts. Rather, the determination of whether an accommodation is “reasonable” is often fact-specific and may vary on a case-by-case basis.¹⁰

Where POAs are concerned, two issues arise with greater frequency:

- (1) **Group Living or Assisted Living Arrangements** – Protection under the Fair Housing Act has been extended to certain assisted living facilities and group homes where a group living arrangement is necessary due to the need for active supervision and care of residents, or to reduce costs through shared resources and common caretakers.

⁷ The bylaws are the rules that address how the association is governed and typically address the rights and obligations of directors and officers as well as the voting rights of the POA’s members.

⁸ Chapter 81 of the Texas Property Code applies to condominiums created prior to January 1, 1994. Chapter 82 of the Texas Property Code applies to condominiums created on or after January 1, 1994.

⁹ 42 U.S. Code § 3613, *et seq.*

¹⁰ *Advocacy Center v. Woodlands Estate Ass’n.*, 192 F. Supp. 2d 1344, 1349 (M.D. Fla. 2002).

- (2) **Facility Rules** – Rules that limit access to community facilities are also subject to the Fair Housing Act. For example, the United States Department of Housing and Urban Development has issued the following statement concerning the ability to impose age limits on swimming pools and aquatic facilities:¹¹

Rules which restrict children from using swimming pools during certain hours could prevent families with children from having full use and enjoyment of the premises. To be lawful, a housing provider must have a health or safety reason for excluding families with children from using a pool during certain hours.

B. Community Homes and Facilities for Disabled Persons Under Texas Law

Even if fair housing statutes do not apply, under Texas law, community homes that satisfy certain statutory provisions may not be kept from operating in an otherwise deed-restricted community. Section 202.003(b) of the Texas Property Code states “[a] dedicatory instrument or restrictive covenant may not be construed to prevent the use of property as a family home” and further explains that a “family home” is a “residential home that meets the definition of and requirements applicable to a family home under the Community Homes for Disabled Persons Location Act (Article 1011n, Vernon’s Texas Civil Statutes).”

Article 1011n of Vernon’s Texas Civil Statutes, the Community Homes for Disabled Persons Location Act has been replaced by Chapter 123 of the Texas Human Resources Code, and it is now known as the Community Homes for Persons with Disabilities Act (the “Community Homes Act”). Under the Community Homes Act, a home that meets all of the qualifications of a “community home” is authorized in any district zoned as residential and cannot be prohibited by a deed restriction or reservation on the property.¹² In effect, this provision operates as a “safe harbor” for facilities that otherwise would not be compliant with deed restrictions placed on the property.

In order to qualify as a “community home” and be entitled to such protection, the entity operating the facility must comply with certain statutory requirements.¹³ These requirements include offering the required services of food and shelter, personal guidance, care, habilitation services, and supervision.¹⁴ Additionally, not more than six persons with disabilities and two supervisors may reside in a community home at the same time, regardless of the legal relationship of those persons.¹⁵ The community home must be licensed and, applicable to the question in this case, must be located at least one-half mile from an existing community home.¹⁶

C. The Americans with Disabilities Act

The Americans with Disabilities Act (the “ADA”)¹⁷ is a civil rights law that prohibits discrimination against individuals with disabilities and generally applies to public entities and facilities that are open to the general public. Associations with facilities that are open to members of the general public should determine whether the ADA applies.

V. CONDOMINIUM CONSTRUCTION DEFECT CLAIMS

A. Condominium Defect Claims

All condominiums, residential and commercial, are now subject to a mandatory construction defect notice process for any defect claims brought by the association. In 2015, House Bill 1455 (84R) added two new sections to Chapter 82 of the Texas Property Code (the Texas Uniform Condominium Act). Under Section 82.102(a)(4), a condominium association, acting through a majority of its board, has the right to bring a claim affecting two or more units and the common elements. Prior to HB 1455, a majority of the condominium association board had the right to bring the claim without the participation of unit owners.

Section 82.119 of the Texas Property Code describes procedures that must be following by a condominium associated prior to filing suit or initiating arbitration proceedings for claims associated with the construction or design of condominium common elements or condominium units. The procedures are not limited to the original design and construction of the unit or common element. The procedures also apply to subsequent improvements.

Before filing suit or initiating an arbitration proceeding, the condominium association must first obtain an independent inspection of the common elements or units that are subject to the claim. The parties subject to the claim,

¹¹ Legal Opinion GME-0012, September 29, 2006.

¹² TEX. HUM. RES. CODE § 123.003.

¹³ *Id.* at § 123.004.

¹⁴ *Id.* at § 123.005.

¹⁵ *Id.* at § 123.006.

¹⁶ *Id.* at §§ 123.007 and 123.008.

¹⁷ 42 U.S. Code § 12101, *et seq.*

e.g., the developer, contractors, or design professionals, must be provided notice of the inspection, an opportunity to attend the inspection, and a copy of the final inspection report.

Once the inspection report is complete, and for a period of 90 days thereafter, the parties subject to the claim may inspect or correct any condition identified in the report. If the conditions identified in the inspection report are not corrected, and the condominium association still desires to file suit or initiate arbitration proceedings, the condominium association must first provide each member a copy of the inspection report and a detailed notice describing the claim and the effect of litigation or arbitration on the community, schedule a member meeting, and at the member meeting obtain the approval to file suit or initiate the arbitration proceeding from at least 50% of the members.

B. Vehicle Towing

Towing is addressed in the Texas Occupations Code – Chapter 2308, Vehicle Towing and Booting. Section 2308.002(7) states that the term “parking facility” includes public or private property used, wholly or partly, for restricted or paid vehicle parking. The term covers “property governed by a property owners' association” and the definition of “parking facility owner” includes “a property owners' association having control under a dedicatory instrument, as that term is defined in Section 202.001, Property Code, over assigned or unassigned parking areas.” Failure to comply with the statutory requirements can result in civil liability as well as criminal penalties and fines.¹⁸

VI. ARCHITECTURAL CONTROL MATTERS

A. Satellite Dish Installation (“Antennas”)

In Section 207 of the Telecommunications Act of 1996, the Federal Communications Commission adopted the Over-the-Air Reception Devices rules concerning governmental and nongovernmental restrictions on viewers' ability to receive video programming signals from direct broadcast satellites, broadband radio service providers and television broadcast stations.

The rules (47 C.F.R. § 1.4000, *et seq.*) have been in effect since October 1996, and they prohibit certain property use restrictions and covenants that impair the installation, maintenance or use of antennas used to receive video programming. The rules govern the use of video antennas including direct-to-home satellite dishes that are less than one meter (39.37”) in diameter (or of any size in Alaska), TV antennas, and wireless cable antennas. The rules prohibit most restrictions that: (1) unreasonably delay or prevent installation, maintenance or use; (2) unreasonably increase the cost of installation, maintenance or use; or (3) preclude reception of an acceptable quality signal.

The rules apply to individuals who place antennas that meet size limitations on property that they own or rent and that is within their exclusive use or control, including condominium owners and cooperative owners, and tenants who have an area where they have exclusive use, such as a balcony or patio, in which to install the antenna. The rules also apply to townhomes and manufactured homes, as well as single family homes. Under the FCC rules, a law, regulation, or restriction impairs installation, maintenance, or use of an antenna if it: (i) Unreasonably delays or prevents installation, maintenance, or use; (ii) Unreasonably increases the cost of installation, maintenance, or use; or (iii) Precludes reception or transmission of an acceptable quality signal.

B. Political Signs

Political signs are permitted 90 days before and 10 days after an election if they advertise a political candidate or ballot item for election. Section 202.009 of the Texas Property Code provides that a property owners' association may not enforce or adopt a restrictive covenant that prohibits a property owner from displaying on the owner's property one or more signs advertising a political candidate or ballot item for an election: (1) on or after the 90th day before the date of the election to which the sign relates; or (2) before the 10th day after that election date. Section 202.009 does allow enforcement of covenants that, among other things, require: (1) ground-mounted signs; (2) no more than one sign for each candidate or ballot item; and (3) that the sign be no larger than four feet by six feet.

C. Drought-Resistant Landscaping

Section 202.007 of the Texas Property Code provides that “[a] property owners’ association may not include or enforce a provision in a dedicatory instrument that prohibits or restricts a property owner from . . . using drought-resistant landscaping . . .” However, 202.007(d) provides a specific exclusionary clause that establishes an association’s right to regulate the installation and use of gravel, rocks, or cactus.¹⁹ In addition, the Texas Property Code does not prohibit a POA from requiring an owner to submit a detailed description or a plan for the installation of drought-

¹⁸ TEX. OCC. CODE § 2308.403.

¹⁹ TEX. PROP. CODE § 202.007(d).

resistant landscaping or water-conserving natural turf for review and approval by the POA to ensure, to the extent practicable, maximum aesthetic compatibility with other landscaping in the subdivision.

D. Water-Conserving Natural Turf

Section 202.007 of the Texas Property Code provides that “[a] property owners' association may not include or enforce a provision in a dedicatory instrument that prohibits or restricts a property owner from . . . using . . . water-conserving natural turf.” Insertion of the word “natural” was deliberate. The original introduced version of SB 198 simply referred to “water-conserving turf.” The bill was amended by committee action to address concerns about the use of artificial turf and the enrolled legislation refers to *natural* turf only. Accordingly, use of artificial turf does not enjoy any statutory protection.

E. Composting, Rain Barrels and Irrigation Systems

Allowed	POA May Regulate
Composting – Solid-waste composting of vegetation, including leaving grass clippings, leaves, or brush, or leaving grass clippings uncollected on grass – 202.007(a)(1)	Type and Location – A POA may regulate size, type, shielding, materials, and location (fenced yard or patio) of a composting device if the restriction does not prohibit the economic installation of the device where there is reasonably sufficient area to install the device.
Rain Barrels – Rain barrels or a rainwater harvesting system – 202.007(a)(2)	Location – may be limited to certain areas.
Efficient Irrigation Systems – Implementing efficient irrigation systems, including underground drip or other drip systems – 202.007(a)(3)	Installation – May regulate installation and establish visibility limitations for aesthetic purposes.

F. Solar Panels

Section 202.010(b) of the Texas Property Code provides a POA may not include or enforce a provision in a dedicatory instrument that prohibits or restricts a property owner from installing a solar energy device. If, however, the POA has a policy that restricts placement of the solar energy device to the fenced yard or patio owned and maintained by the property owner or the roof of the home. In essence, the lack of a policy means the POA will have limited enforcement rights. However, even where a policy limits placement to a particular area, an owner may install the device in an alternate location if the alternate location placement increases energy production by more than 10 percent above the energy production of the device if located in an area designated by the POA.

VII. CONCLUSION

This paper is by no means a complete list of all of the federal and state laws that can impact a POA. It should be noted that, in general, three themes predominate: (1) reasonable accommodation rules; (2) disenfranchisement rules; and (3) efficiency rules. Familiarity with certain concepts will aid in issue-spotting and steer one towards the appropriate resources and information.