



1-1-2001

Reining in Property Owners' Associations' Power: Texas's Need for a Comprehensive Plan.

Karen Ellert Pena

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Recommended Citation

Karen Ellert Pena, *Reining in Property Owners' Associations' Power: Texas's Need for a Comprehensive Plan.*, 33 ST. MARY'S L.J. (2001).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol33/iss2/3>

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COMMENTS

REINING IN PROPERTY OWNERS' ASSOCIATIONS' POWER: TEXAS'S NEED FOR A COMPREHENSIVE PLAN

KAREN ELLERT PEÑA

I. Introduction.....	324
II. The What, Where, and Why of Property Owners' Associations.....	326
A. Historical Development and Growth of Property Owners' Associations	326
B. Properties of Property Owners' Associations	329
C. Benefits and Burdens Associated with Property Owners' Associations	332
III. Problems Encountered in Texas Property Owners' Associations.....	335
A. Deed Restrictions Enforced	335
1. Building Restrictions	335
2. Use Restrictions.....	336
B. Assessments and Collection	337
1. Levying Assessments	338
2. Nonpayment of Assessments	339
C. Abuses of Power by Property Owners' Associations ...	340
IV. Texas's Piecemeal Approach to Property Owners' Association Problem-Solving	342
A. Recent Texas Legislation	342
1. House Bill 3407	342
2. House Bill 2224 and Senate Bill 434.....	343
B. Shortcomings of Recent Legislation and Associated Problems	345
V. Texas's Efforts at a Comprehensive Plan	346
A. The Texas Planned Community Act—Senate Bill 699	346
B. Senate Bill 507	350

C. Foreclosure Debate - Homestead Property and the Association Lien	353
VI. A Proposal - A Comprehensive Plan	355
A. Necessary Additions and Modifications to Senate Bill 507	356
1. Declarant Provisions	356
2. Minority Voting Protection	358
3. Property Owners Association Records	359
4. Reserve Provisions	360
5. Fiduciary Duty	361
B. Repeal of Foreclosure Right	362
VII. Conclusion	364

I. INTRODUCTION

When property owners' associations ("POA") take extreme actions against homeowners, statewide issues ensue.¹ Consider Brenda McCoy's \$70,000 litigation battle with her own POA.² The McCoys' POA sought \$115,000 in fines from the family because of an allegedly noncompliant deck-railing on their newly constructed home.³ Though the McCoys were current in their annual assessments and in compliance with deed restrictions, the POA sued the McCoys after the completion of their home and without notice of the POA's intent to pursue the matter in court.⁴ Although considered lucky, the McCoy family eventually settled. Brenda's concern, however, is that something must be done to prevent this abusive action from reoccurring.⁵

Texas's 76th and 77th Legislatures rallied to the cry of Texans like Brenda McCoy by introducing numerous pieces of legislation attempting to control POAs. This legislation included, in part, issues concerning: open meetings and records, alternate dispute resolution, disclosure requirements, foreclosure, and the general governance of POAs.⁶ While

1. See *Texas Planned Community Act, Hearings on Tex. S.B. 699 Before the House Comm. on Bus. & Indus.*, 76th Leg., R.S. Tape 1, at 74 (Apr. 20, 1999) (copy on file with the *St. Mary's Law Journal*) (testimony of Bruce Schimmel) (indicating that people from San Marcus, San Antonio, Midland, Austin and other statewide organizations asked for his support of S.B. 699).

2. See *id.* at Tape 2, 55-57 (testimony of Brenda McCoy) (discussing her homeowners' association's personal vendetta against her and her husband).

3. *Id.*

4. *Id.*

5. *Id.*

6. See, e.g., Tex. H.B. 1423, 77th Leg., R.S. (2001), available at <http://www.capitol.state.tx.us> (last visited Oct. 10, 2001) (proposing mandatory mediation for certain POA disputes); Tex. H.B. 1859, 77th Leg., R.S. (2001), available at <http://www.capitol.state.tx.us>

the 76th Legislature successfully passed House Bill 3407 (“H.B. 3407”)⁷ and Senate Bill 434 (“S.B. 434”),⁸ potentially significant laws, one crucial proposal, Senate Bill 699 (“S.B. 699”),⁹ attempting to establish a Texas Planned Community Act, was left behind.¹⁰ S.B. 699 did, however, produce constructive debate on the many issues Texas homeowners and their governing associations encounter. This debate ensued in the 77th Legislative session, taking on a different form, Senate Bill 507 (“S.B. 507”). Finally, the 77th Legislature enacted S.B. 507, the Texas Residential Property Owners Protection Act (“TRPOPA”).¹¹ Although, the TRPOPA is a viable step in the right direction, its limitations reveal that POA regulation is far from complete and needs more comprehensive solutions.

(last visited Oct. 10, 2001) (providing for extension of restrictions in certain residential POAs); Tex. S.B. 1834, 77th Leg., R.S. (2001), *available at* <http://www.capitol.state.tx.us> (last visited Oct. 10, 2001) (dealing with reimbursement to property members subsequent to foreclosure sale); Tex. H.B. 554, 76th Leg., R.S. (2001), *available at* <http://www.capitol.state.tx.us> (last visited Oct. 10, 2000) (providing POA dispute resolution within the jurisdiction of justice and small claims courts); Tex. H.B. 2224, 76th Leg., R.S. (1999), *available at* <http://www.capitol.state.tx.us> (last visited Oct. 10, 2001) (current version at TEX. PROP. CODE ANN. §§ 5.012, 202.006 (Vernon Supp. 2001)) (relating to disclosure requirements for the sale of real property under POA governance and the filing of POAs’ dedicatory instruments); Tex. H.B. 3298, 76th Leg., R.S. (1999), *available at* <http://www.capitol.state.tx.us> (last visited Oct. 10, 2001) (relating to the powers of POAs); Tex. H.B. 3407, 76th Leg., R.S. (1999), *available at* <http://www.capitol.state.tx.us> (last visited Oct. 10, 2001) (current version at TEX. GOV’T CODE ANN. §§ 551.0015, 552.0035 (Vernon Supp. 2001)) (relating to open meeting and open records); Tex. S.B. 954, 76th Leg., R.S. (1999), *available at* <http://www.capitol.state.tx.us> (last visited Oct. 10, 2001) (relating to the governance of POAs).

7. Tex. H.B. 3407, 76th Leg., R.S. (1999), *available at* <http://www.capitol.state.tx.us> (last visited Oct. 10, 2001) (current version at TEX. GOV’T CODE ANN. §§ 551.0015, 552.0035 (Vernon Supp. 2001)) (subjecting certain POAs to existing governmental code relative to open meeting and records).

8. Tex. S.B. 434, 76th Leg., R.S. (1999), *available at* <http://www.capitol.state.tx.us> (last visited Oct. 10, 2000) (current version at TEX. PROP. CODE ANN. §§ 207.001-005 (Vernon Supp. 2001)) (relating to the disclosure of certain information by POAs).

9. Tex. S.B. 699, 76th Leg., R.S. (1999), *available at* <http://www.capitol.state.tx.us> (last visited Oct. 10, 2001) (establishing a Planned Community Act for subdivisions requiring membership in a POA).

10. See Julie Mason, *Lawmakers Unable to Restrain Homeowners’ Associations*, HOUS. CHRON., May 28, 1999, at A37, 1999 WL 3992878 (reporting the Legislature’s failed attempt to pass meaningful regulation on homeowners’ associations due to legislative deadlines).

11. Texas Residential Property Owners Protection Act, 77th Leg., R.S., ch. 926, § 1, 2001 Tex. Sess. Law Serv. 1751 (Vernon) (to be codified as an amendment to Tex. Prop. Code Ann. §§ 209.001-011).

This Comment focuses narrowly on the effects of residential homeowners' associations¹² and specifically explores the need in Texas for a more comprehensive bill establishing uniform guidelines for POAs. It necessarily follows from establishing these guidelines that Texas homeowners' rights will receive an enhanced and more appropriate level of protection than what is available in the current system. Part II provides general information concerning the development, growth, and characteristics of POAs. Part III discusses some of the various problems encountered by Texas homeowners and their POAs. Next, Part IV outlines and analyzes several pieces of recently enacted Texas legislation concerning POAs. Part V looks specifically at the effort in Texas to promulgate comprehensive legislation. Building on current legislation, Parts VI and VII propose additions and modifications to existing legislation and illustrate the need for a comprehensive plan to govern effectively and efficiently the many POAs across Texas.

II. THE WHAT, WHERE, AND WHY OF PROPERTY OWNERS' ASSOCIATIONS

A. *Historical Development and Growth of Property Owners' Associations*

Residential Community Associations ("RCAs"), the frontrunner of Property Owners Associations and also known as common interest communities, are not new to the American residential property scene.¹³ Although in existence as far back as the 1800's, the RCA concept gained

12. See TEX. PROP. CODE ANN. § 202.001(2) (Vernon 1995) (defining a POA 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"). While the continuation of the code definition of POAs includes condominiums, it should be noted that Texas adopted the Uniform Condominium Act, effective January 1, 1994, to govern such developments. TEX. PROP. CODE ANN. §§ 82.001-.002 (Vernon 1995 & Supp. 2001).

13. See U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 3-4 (1989) (indicating that residential community associations date back to before the twentieth century); Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 598 (1993) (defining common interest community as one in which property owners are linked by a strong community interest); see also Patrick J. Rohan & John P. Healy, *Home Owner Association Assessment Litigation in New York - An Overview*, 73 ST. JOHN'S L. REV. 199, 199 (1999) (noting that since the turn of the twentieth century homeowner associations have been on the residential property scene).

momentum after World War II.¹⁴ Since then, the arrival of planned communities featuring vast amenities, including tennis and swimming facilities, golf courses, and other recreational facilities, spurred public interest as vehicles of shared ownership.¹⁵ Further, as cities skirted maintenance duties associated with community developments by refusing to accept the responsibility of the communities' road systems, RCAs stepped in as a necessary private vehicle for providing routine road and esplanade maintenance.¹⁶ In addition to the municipalities' lack of maintenance was the concern for safety and the need for security. Associations, again, filled this perceived gap in service by employing security guards and constructing entrance gates.¹⁷ In summary, the government's inability to provide basic public needs fueled the explosive expansion of RCAs.¹⁸

Today, an estimated forty-two million Americans live within community associations, taking one of three basic forms: condominium associations, cooperative associations, or homeowners' associations, otherwise known as planned community associations.¹⁹ These types of community

14. See Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 603-04 & n.44 (1993) (stating that the Community Associations Institute ("CAI") acknowledged the "Committee of Proprietors of Louisburg Square" association, established in Boston in 1828, as the oldest residential association); Uriel Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253, 257 (1976) (noting the year 1844 as the recording date of the first American homeowners' association in Boston); Patrick J. Rohan & John P. Healy, *Home Owner Association Assessment Litigation in New York - An Overview*, 73 ST. JOHN'S L. REV. 199, 199 (1999) (suggesting that the homeowners' association format received new life with the advent of Federal Housing Administration documentation and other related publications).

15. See Patrick J. Rohan & John P. Healy, *Home Owner Association Assessment Litigation in New York - An Overview*, 73 ST. JOHN'S L. REV. 199, 199 (1999) (implying that post-war Americans seemed to indulge in more amenities).

16. See *id.* at 199-200 (noting the use of HOAs as a private vehicle for pothole repair, parking and speeding regulation, and snow removal).

17. David J. Kennedy, Note, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 765-66 (1995); see also Community Associations Institute, *Inside Look at Community Association Homeownership*, at <http://www.caionline.org/about/inside.cfm> (last visited Oct. 13, 2001) (indicating results from a 1995 survey of community associations showed that a majority of owners living in gated communities attribute lower crime incidences to the gated feature).

18. See ROBERT JAY DILGER, NEIGHBORHOOD POLITICS: RESIDENTIAL COMMUNITY ASSOCIATIONS IN AMERICAN GOVERNANCE 62 (1992) (commenting that local governments acknowledge a lack of the financial resources needed to provide POA members with services, thus resulting in the housing preference of POAs).

19. See Community Associations Institute, *Facts About Community Associations*, at <http://www.caionline.org/about/facts.cfm> (last visited Oct. 13, 2001) (defining the three basic forms of associations as follows: a condominium community as one where "[a] person has individual ownership of a unit and a tenant in common ownership of the common element[.]" a cooperative as one where "[a] corporation holds title to the units and com-

associations can exist alone or in combination with each other.²⁰ When grouped together, the community association is generally referred to as a Master Planned Community.²¹ The real estate developments comprising these associations are either residential, commercial, or a hybrid of both.²² Generally, RCAs constitute the fastest growing and preferred type of new housing development, accounting for nearly all new home developments in Texas, California, New York, Florida, and over half of new home sales in major metropolitan areas.²³ Although POAs have experienced considerable growth in larger cities, a survey sponsored by the Advisory Commission on Intergovernmental Relations ("ACIR") and the Community Associations Institute ("CAI"), indicated thirteen percent of associations are located in rural areas.²⁴ The number of POAs has swelled from fewer than 500 prior to 1960 to approximately 205,000 today, representing fifteen percent of all U.S. housing.²⁵ Additionally, the

mon areas and a special lease gives a person exclusive rights of occupancy of a unit," and a planned community as one where "[a] person has individual ownership of a unit and a corporation has title to the common areas"); *see also* U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 10 (1989) (defining condominium, cooperative, and homeowners' association in conformity with the Community Associations Institute's definitions, however using the term RCA).

20. *See* Community Associations Institute, *Facts About Community Associations*, at <http://www.caionline.org/about/facts.cfm> (last visited Oct. 13, 2001) (stating that "[i]f multiple uses are included, the term Mixed Use Association is used").

21. *See id.* (stating that hybrids could also be termed "Master Associations" or "Umbrella Associations").

22. Patrick K. Hetrick, *Of "Private Governments" and the Regulation of Neighborhoods: The North Carolina Planned Community Act*, 22 CAMPBELL L. REV. 1, 7 (1999), WL 22 CAMPBLR 1; Community Associations Institute, *Facts About Community Associations*, at <http://www.caionline.org/about/facts.cfm> (last visited Oct. 13, 2001).

23. *See* Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama*, 6 WM. & MARY BILL RTS. J. 461, 469-70 (1998), WL 6 WMMBRJ 461 (commenting that the majority of all new residential developments constitute POAs); *see also* Laura Castro Trognitz, *Co-Opted Living: As Condos and Other Common Interest Communities Proliferate, So Do Rules and Conflicts That Lawyers are Being Asked to Sort Out*, A.B.A. J., Oct. 1999, at 54, 55, WL 85-OCT ABAJ 54 (indicating the percentage breakdown between the three types of associations as follows: Planned Community - 64%, Condominium - 31% and Cooperative - 5%); Clifford J. Treese, Community Associations Institute, *1999 Community Associations Factbook*, at <http://www.caionline.org/about/facts99.cfm> (last visited Oct. 13, 2001) (stating that the POA form of governance is employed in more than 50% of the new developments in large metropolitan areas).

24. *See* U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 3, 10-11 (1989) (indicating that RCAs are primarily a suburban phenomena).

25. Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Ala-*

CAI predicts that POAs will continue to experience a growth rate of six to eight thousand additional associations annually.²⁶

B. *Properties of Property Owners' Associations*

Developers create POAs by authority granted by state and local governments.²⁷ The grant of authority arises from a covenant, typically called a Declaration of Covenants, Conditions, and Restrictions ("CC&Rs") or a Master Declaration.²⁸ The Master Declaration attaches to the homeowners' deeds, thus binding the homeowners to mandatory membership in the association.²⁹ As such, each homeowner is subject to the association's powers and procedures.³⁰ Initially, a developer drafts the Master Declaration before he sells any lot, and remains in control of the amendment and enforcement of the CC&Rs until a certain number or percentage of lots are sold.³¹ At that time, the developer transfers the control of the association to its board of directors.³²

bama, 6 WM. & MARY BILL RTS. J. 461, 461 (1998), WL 6 WMMBRJ 461; Clifford J. Treese, Community Associations Institute, *1999 Community Associations Factbook*, at <http://www.caionline.org/about/facts99.cfm> (last visited Oct. 13, 2001).

26. Clifford J. Treese, Community Associations Institute, *1999 Community Associations Factbook*, at <http://www.caionline.org/about/facts99.cfm> (last visited Oct. 13, 2001).

27. See U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 3, 9-11 (1989) (describing the forms of a physical development as territorial or non territorial). Territorial associations encompass multiple buildings and amenities within the development while non territorial associations consist of a single high-rise building. *Id.*

28. See *Scoville v. Springpark Homeowner's Ass'n*, 784 S.W.2d 498, 506 (Tex. App.—Dallas 1990, writ denied) (Ovard, J., dissenting) (discussing the development of POAs).

29. See Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama*, 6 WM. & MARY BILL RTS. J. 461, 466 (1998), WL 6 WMMBRJ 461 (discussing how a POA's authority stems from the attachment of the CC&Rs to the property owner's deed).

30. See Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 600 (1993) (indicating that a purchaser agrees to comply with the developer's regulatory scheme when they obtain title to the property); Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama*, 6 WM. & MARY BILL RTS. J. 461, 466 (1998), WL 6 WMMBRJ 461 (explaining how members of the POA are required to pay fees and obey the POA rules which make the POA very different from voluntary civic associations).

31. See Clayton P. Gillette, *Mediating Institutions: Beyond the Public/Private Distinction - Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1383 (1994) (commenting that it is routine for the developer to remain in voting control at this particular stage).

32. See *id.* (indicating that control passes from the developer to the association).

Once created, the territorial POA operates, whether in the hands of the developer or homeowners, within a defined geographic area, much like a municipality.³³ Additionally, POAs have extensive control over land-use, traditionally associated with municipal zoning, as demonstrated by the POA's architectural control and its enforceable rules governing home use and occupancy.³⁴ Further, POA police powers exist to impose mandatory annual fees and special assessments.³⁵ In light of these governmental characteristics, commentators have analogized POAs to "private" or "mini-governments."³⁶

33. See U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 11 (1989) (describing functions of the POAs as owning, regulating, and maintaining common grounds, such as streets, recreational facilities, open spaces, parking lots, and sidewalks); Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 600 (1993) (commenting that the roles of the association - maintenance, operation, and regulation - distinguish the POA from a voluntary civic organization).

34. See Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama*, 6 WM. & MARY BILL RTS. J. 461, 467 (1998), WL 6 WMMBRJ 461 (noting that even with municipal-like powers, POAs are rarely subjected to constitutional constraints because they are not often viewed as "state actors").

35. See Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 598 (1993) (indicating that citizens of a "community association" are subject to its taxing powers); Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama*, 6 WM. & MARY BILL RTS. J. 461, 477 (1998), WL 6 WMMBRJ 461 (commenting that members of POAs are required to pay fees, special assessments, and obey the POA's rules).

36. See, e.g., Shirley L. Mays, *Privatization of Municipal Services: A Contagion in the Body Politic*, 34 DUQ. L. REV. 41, 57 (1995) (noting that homeowner associations have taken over many functions typically performed by municipalities, including maintenance of water and sewage systems, roads, common areas, lighting, waste removal, and communication systems); Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 601 & n.31 (1993) (indicating that a number of commentators refer to community associations as "mini governments"); Julie Mason, *State Senate Moves to Regulate Texas Homeowners Associations*, HOUS. CHRON., Apr. 10, 1999, at A1, 1999 WL 3983357 (stating that "homeowners associations occupy a prominent position - often functioning as de facto political subdivisions in the absence of meaningful regulatory standards imposed by city government").

POAs come in all sizes.³⁷ Whether small or large, POAs commonly operate in a uniform manner and hold similar duties and powers.³⁸ However, one difference is that smaller associations commonly opt for self-management, as opposed to board-controlled organizations.³⁹ For smaller POAs, self-management, usually comprised of member volunteers, is preferable because it reduces the complexity of the management process.⁴⁰ Larger associations also include member volunteers serving in board and committee positions, but typically utilize outside management companies.⁴¹ Recent estimates show that there are more than one million governing volunteers in POAs.⁴²

37. See, e.g., U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 11 (1989) (reporting 1989 survey results relating to the size of associations as varying from under 10 to more than 16,000 units, with an average of 543 units); Clifford J. Treese, Community Associations Institute, *1999 Community Associations Factbook*, at <http://www.caionline.org/about/facts99.cfm> (last visited Oct. 13, 2001) (noting the number of units in community associations range from under 50 to over 500).

38. See Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 603 (1993) (indicating that size alone does not grant large associations increased powers, roles, or responsibilities).

39. See *id.* (noting that smaller associations tend to be self-managed); Clifford J. Treese, Community Associations Institute, *1999 Community Associations Factbook*, at <http://www.caionline.org/about/facts99.cfm> (last visited Oct. 13, 2001) (reporting the breakdown of management styles in 1990 associations as: volunteer/self-management - 27%, on-site staff - 26%, management company - 42%, combination - 5%).

40. See Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 603 (1993) (suggesting that the reduced number of homes and decreased complexity of the budget and assessment process allows for self-management).

41. See Bureau of Labor Statistics, *Occupational Outlook Handbook: Property, Real Estate, and Community Association Managers*, at <http://www.bls.gov/oco/ocos022.htm> (Jan. 4, 2001) (implying that larger associations have the funds to afford professional management).

42. See Julie Mason, *State Senate Moves to Regulate Texas Homeowners Associations*, HOUS. CHRON., Apr. 10, 1999, at A1, 1999 WL 3983357 (reporting that POA lobbyists stress the volunteer aspect of association governing groups); see also Clifford J. Treese, Community Associations Institute, *1999 Community Associations Factbook*, at <http://www.caionline.org/about/facts99.cfm> (last visited Oct. 13, 2001) (indicating that the number of volunteers exceeds one million).

C. *Benefits and Burdens Associated with Property Owners' Associations*

Developers, homeowners, and governments each reap the benefits of the ever popular POA.⁴³ First, developers employ carefully designed development practices to produce housing units that are more marketable and attractive than traditional housing.⁴⁴ Additionally, after developing the planned community, the POA allows the developer to exit the project without the continuing responsibility of managing and maintaining the development.⁴⁵

Secondly, POAs provide homeowners, as purchasers of individual units, a wide selection of communities and service packages.⁴⁶ Creative marketing by developers allows a variety of POAs to meet the special needs of homeowners.⁴⁷ POAs often tout special benefits such as private security through secured community grounds and private patrol services, and recreational facilities, including park grounds and swimming pools.⁴⁸ The amenities offered by POAs enhance and preserve the owners' investment in their homes.⁴⁹

43. U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 4 (1989).

44. *Id.* See Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama*, 6 WM. & MARY BILL RTS. J. 461, 465 (1998), WL 6WMMBRJ 461 (noting that developers establish POAs with approval from state or local governments).

45. U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 4 (1989).

46. *See id.* (noting that homeowners are also able to take advantage of a developer's reduced cost of production).

47. *See id.* (noting that the benefits of meeting specific consumer demand at a lower cost of production).

48. *See* Carl B. Kress, Comment, *Beyond Nahrstedt: Reviewing Restrictions Governing Life in a Property Owner Association*, 42 UCLA L. REV. 837, 839 & n.10 (1995) (discussing the benefits of POA membership granting access to boat slips, pools, jacuzzis and tennis courts, as well as providing increased security).

49. *See* U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 13 (1989) (noting the claim that RCAs stabilize neighborhood land values); *see also* David J. Kennedy, Note, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 766 (1995) (suggesting that joining a residential association preserves and enhances "the value of what is often one's largest investment: one's home and the real estate on which it is situated").

Finally, municipalities reap the benefits of a larger tax base of the virtually self-financed developments created by POAs.⁵⁰ Because POA property is private, local governments do not typically provide routine services such as police patrols, road maintenance, and trash collection.⁵¹ Therefore, local governments and taxpayers are relieved of the responsibility to finance and provide services for these developments.⁵²

Despite the benefits, POAs are not without burdens.⁵³ Some see POAs as vehicles that “reduce the efficiency of land markets,” regulate excessively, and place financial burdens on moderate and fixed-income owners for necessary services.⁵⁴ With POAs comprising virtually all new housing in the Southwest, some contend that consumer choice is greatly diminished as a result of the near-ubiquity of POA communities.⁵⁵

Another burdensome area concerns POA regulation, management, and leadership. Conflicts based upon the numerous restrictions associated with POAs often create heated disputes.⁵⁶ One explanation for such disputes lies in the sheer number of individuals living under such governing

50. See U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 5 (1989) (noting that POAs pay for some of their own services and facilities).

51. *Id.*

52. *Id.*

53. See, e.g., *Raymond v. Aquarius Condo. Owner's Ass'n*, 662 S.W.2d 82, 89 (Tex. App.—Corpus Christi 1983, no writ) (stating that “each constituent [of a POA] must relinquish some degree of freedom of choice and agree to subordinate some of his traditional ownership rights when he elects this type of ownership experiences”); Carl B. Kress, Comment, *Beyond Nahrstedt: Reviewing Restrictions Governing Life in a Property Owner Association*, 42 UCLA L. REV. 837, 839 (1995) (noting that along with the benefits of POA ownership are burdens that are not associated with individual housing).

54. U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 13 (1989); see David J. Kennedy, Note, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 776 (1995) (commenting that association fees are an additional tax burden on members).

55. See U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 13 (1989) (noting that critics view POAs as a mechanism that regulate consumer choice); see also James L. Winokur, *Reforming Servitude Regimes: Toward Association Federalism and Community*, 2 WIS. L. REV. 537, 545 (1990) (reporting that a California study concluded that ten percent of those who purchased property with a mandatory association presumably did so because of a lack of affordable alternatives).

56. See, e.g., Laura Castro Trognitz, ‘Yes, It's My Castle’: *Suits by Unhappy Residents Against Homeowners' Associations Grow*, A.B.A. J., June 2000, at 30 (quoting Wilber Washington II, a Virginia attorney, as saying “there is a growing trend of homeowners fighting back against associations that are perceived as running afoul of owners' rights”); Carl B. Kress, Comment, *Beyond Nahrstedt: Reviewing Restrictions Governing Life in a Property Owner Association*, 42 UCLA L. REV. 837, 839-40 (1995) (commenting on the headaches of group living).

associations.⁵⁷ Typically, the disputes stem from the association's architectural control and land-use restrictions.⁵⁸

Further, POAs impose burdens upon the greater community.⁵⁹ Some suggest that developers, whether intentionally or unintentionally, fuel discriminatory forces present in POAs.⁶⁰ For instance, some POA private road systems act to exclude nonmembers.⁶¹ Furthermore, the privatization of entire sections of communities stifles speech in such neighborhoods.⁶² Thus, what one citizen considers public domain might otherwise become privileged POA property.

In summary, POAs can bring improvement to the lives of its members, and therefore a powerful appeal exists to reside in such a community. As noted, however, the benefits are not without costs. POAs are the proverbial double-edged sword. The next section addresses some specific problems encountered by Texas POAs and their respective memberships.

57. See Laura Castro Trognitz, 'Yes, It's My Castle': Suits by Unhappy Residents Against Homeowners' Associations Grow, A.B.A. J., June 2000, at 30 (stating one attorney's opinion that with the increase in people living in community associations, increased opportunities for conflict will follow).

58. See Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 611 (1993) (indicating that use restrictions are "[o]ne of the most debated areas of community association activity"); see also Stewart E. Sterk, *Minority Protection in Residential Private Governments*, 77 B.U. L. REV. 273, 280 (1997) (indicating that courts have invariably enforced restrictions requiring architectural control committee approval before making improvements); see also Carl B. Kress, Comment, *Beyond Nahrstedt: Reviewing Restrictions Governing Life in a Property Owner Association*, 42 UCLA L. REV. 837, 840 & n.12 (1995) (citing common areas of regulation as: use of common area, antennas, temporary structures, pets, garbage, signs, burning, basketball hoops, and machinery and equipment).

59. See David J. Kennedy, Note, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 767-68 (1995) (discussing various harms imposed on the outside community).

60. See *id.* at 768 (noting that "[t]he very establishment of a residential association is fraught with potential for discrimination on the basis of race and class").

61. See *id.* at 770 (citing the privatization of streets that encompasses a historical neighborhood with many homes of architectural importance deprived nonresidents of viewing these homes); see also James Podgers, *Fencing with the Law: Courts Block Efforts to Barricade Neighborhoods from Urban Troubles*, A.B.A. J., Nov. 1994, at 54-55 (noting a movement in Los Angeles to privatize the streets in over one hundred neighborhoods). In a lawsuit filed by an organization fighting privatization, the court found, "[a]lthough we understand the deep and abiding concern of the City and appellant with crime prevention and historic preservation, we doubt the Legislature wants to permit a return to feudal times with each suburb being a fiefdom to which other citizens of the State are denied their fundamental right of access to use public streets within those areas." *Id.*

62. See David J. Kennedy, Note, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 772 (1995) (reporting that one "court emphasized that the prohibition against distribution of newspapers turned the association's membership into a captive audience for the in-house paper").

III. PROBLEMS ENCOUNTERED IN TEXAS PROPERTY OWNERS' ASSOCIATIONS

Perhaps the largest potential for abuse exists in the nature of the POA's organizational structure, specifically the governing board.⁶³ A commentator recently noted that "[a]ssociations are not always staffed by 'concerned and caring neighbors.'"⁶⁴ Board members and other controlling officers are granted a host of powers affecting the homeowners and their private lives. In part, the oppressive administration of power can and does provoke legal disputes between POAs and their members.⁶⁵ This section illustrates specific areas prone to legal disputes. While the examples are not exhaustive of the problematic areas, they comprise the prevalent hot spots.⁶⁶

A. Deed Restrictions Enforced

1. Building Restrictions

Typically, POA disputes involve an association (acting on behalf of the neighbors) against a homeowner or a neighbor against a neighbor.⁶⁷ A substantial number of these disputes involve architectural control and

63. See Clayton P. Gillette, *Mediating Institutions: Beyond the Public/Private Distinction - Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1383 (1994) (indicating legal disputes challenging POA autonomy result from the association's enforcement of regulations); see also Patrick K. Hetrick, *Of "Private Governments" and the Regulation of Neighborhoods: The North Carolina Planned Community Act*, 22 CAMPBELL L. REV. 1, 8 (1999), WL 22 CAMPBLR 1 (noting a natural increase in legal problems with the increase in POAs).

64. Patrick K. Hetrick, *Of "Private Governments" and the Regulation of Neighborhoods: The North Carolina Planned Community Act*, 22 CAMPBELL L. REV. 1, 37 (1999), WL 22 CAMPBLR 1. See also Gary S. Moore, *Notice and Consent to the Financial and Legal Obligations in Property Owners' Associations*, 25 REAL EST. L.J. 378, 379 (1997) (noting that the latitude of the power can, at its extreme, affect what types of residents are attracted to POAs).

65. See Gary S. Moore, *Notice and Consent to the Financial and Legal Obligations in Property Owners' Associations*, 25 REAL EST. L.J. 378, 379 (1997) (commenting on an increase in disputes resulting from the POA form of government); see also Laura Castro Trognitz, 'Yes, It's My Castle': *Suits by Unhappy Residents Against Homeowners' Associations Grow*, A.B.A. J., June 2000, at 30-31 (describing numerous heated disputes stemming from overreaching POA boards).

66. See Laura Castro Trognitz, *Co-Opted Living: As Condos and Other Common Interest Communities Proliferate, So Do Rules and Conflicts That Lawyers Are Being Asked to Sort Out*, A.B.A. J., Oct. 1999, at 54-55, WL 85-OCT ABAJ 54 (noting the most common legal disputes, as reported by the CAI, involve architectural control, parking, assessments and collections, pets, noise, and disputes with developers).

67. See Todd Brower, *Communities Within the Community: Consent, Constitutionalism, and Other Failures of Legal Theory in Residential Associations*, 7 J. LAND USE & ENVTL. L. 203, 215 (1992) (describing the manner in which POA rules are enforced).

building restrictions.⁶⁸ For example, in *Beere v. Duren*,⁶⁹ a homeowner, living on a golf course lot, sued his neighbor for erecting a six-foot wood fence in direct violation of deed restrictions.⁷⁰ Such deed restrictions, also referred to as covenants, conditions, and restrictions (“CC&Rs”), are a servitude upon lots within the subdivision.⁷¹ The *Beere* court liberally analyzed the purpose and intent of the deed restriction.⁷² The subdivision’s CC&Rs stated that its purpose was to protect and enhance the value, attractiveness, and desirability of the property.⁷³ Additionally, a further restriction prohibited the construction of an opaque fence or wall “within the 20 foot rear setback of [l]ots abutting the [g]olf [c]ourse.”⁷⁴ Although the trial court upheld the restriction based upon its purpose, the court of appeals reversed, finding that the trial court abused its discretion in not granting injunctive relief to the homeowner who was enforcing the restrictions.⁷⁵

2. Use Restrictions

Another category of legal problems encountered by homeowners and POAs involves use restrictions. A POA’s board commonly enforces covenants governing the use of common property, and less frequently, the use of privately owned property.⁷⁶ In certain circumstances, the POA attempts to regulate conduct visible from other homeowner properties or the common property.⁷⁷ Such issues can fuel hot debates.⁷⁸ Examples of

68. See, e.g., *Pilarcik v. Emmons*, 966 S.W.2d 474, 476 (Tex. 1998) (involving the architectural control committee’s approval of a homeowner’s use of composition roofing material); *Beere v. Duren*, 985 S.W.2d 243, 245, 247 (Tex. App.—Beaumont 1999, pet. denied) (enjoining a neighbor for construction of a fence and timber wall in violation of deed restrictions); *Gonzalez v. Atascocita N. Cmty. Improvement Ass’n*, 902 S.W.2d 591, 592 (Tex. App.—Houston [1st Dist.] 1995, no writ) (suing homeowner for painting home colors that violated deed restrictions).

69. 985 S.W.2d 243 (Tex. App.—Beaumont 1999, pet. denied).

70. *Beere v. Duren*, 985 S.W.2d 243, 246-48 (Tex. App.—Beaumont 1999, pet. denied).

71. See Clayton P. Gillette, *Mediating Institutions: Beyond the Public/Private Distinction—Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1383 (1994) (indicating that the provisions in the CC&Rs are provided by the developer).

72. *Beere*, 985 S.W.2d at 246 (citing TEX. PROP. CODE ANN. § 202.003(a) (Vernon 1995)).

73. *Id.* at 246.

74. *Id.* at 248.

75. *Id.* at 249.

76. See Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 611-12 (1993) (noting that POAs regulate conduct on both common property and privately owned property).

77. See *id.* (indicating that POAs regulate conduct and conditions outside the home).

areas subjected to use regulation include: parking restrictions, mobile homes, business use, basketball equipment, pets, and antennas.⁷⁹

*Munson v. Milton*⁸⁰ is a typical case. In *Munson*, the defendants employed a professional rental agent to rent their house to third-parties for short periods.⁸¹ Residents in the subdivision sought an injunction to prohibit the homeowners from renting the home, asserting the rental violated a use restriction prohibiting the business use of the subdivision properties.⁸² The court noted that homeowners can bind their properties with use restrictions and that the prohibition of business use is an enforceable restraint on alienation.⁸³ Specifically, the court held that contractual restrictions only prohibited rental activity related to transient-type housing, therefore, the temporary injunction enjoining the owners from renting their home for lodging, vacation, and recreational purposes was overly broad.⁸⁴ The court went on to modify the injunction to enjoin homeowners “from ‘renting and/or leasing said property to the public for temporary or transient housing purposes.’”⁸⁵

B. Assessments and Collection

A POA’s power to make and collect assessments is typically upheld by courts.⁸⁶ Members who challenge the computation or enforcement of the

78. See, e.g., *Wilmoth v. Wilcox*, 734 S.W.2d 656, 658 (Tex. 1987) (ordering removal of manufactured home because of deed restriction violation); *Benard v. Humble*, 990 S.W.2d 929, 932 (Tex. App.—Beaumont 1999, pet. denied) (holding a homeowner’s rental of property violated single-family residence restriction); *Cox v. Melson-Fulsom*, 956 S.W.2d 791, 795 (Tex. App.—Austin 1997, no pet.) (granting permanent injunction requiring the removal of a trailer from a homeowner’s property); *Tien Tao Ass’n v. Kingsbridge Park Cmty. Ass’n*, 953 S.W.2d 525, 533 (Tex. App.—Houston [1st Dist.] 1997, no pet.) (finding a corporate homeowner who housed priests and followers violated the single family residential use restriction); see also Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 611 (1993) (commenting that use standards and control is “one of the most debated areas in community associations”).

79. Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 612 n.69 (1993).

80. 948 S.W.2d 813 (Tex. App.—San Antonio 1997, writ denied).

81. *Munson v. Milton*, 948 S.W.2d 813, 815 (Tex. App.—San Antonio 1997, writ denied).

82. See *id.* (noting the permissive uses of lots are residential, camping, or picnicking).

83. *Id.* at 817.

84. See *id.* at 817-18 (noting that as modified, the trial court’s injunction enforces a reasonable restraint).

85. *Id.*

86. See Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 612 (1993) (stating that POAs, within their fiscal process, have power to impose assess-

assessment and refuse to pay their assessment face various penalties.⁸⁷ Of these penalties, a property lien and a suit for money damages are the most common. However, both carry the potentially drastic consequence of lien foreclosure.⁸⁸

1. Levying Assessments

A recent illustration of a POA's levying power is *Hodas v. Scenic Oaks Property Ass'n*.⁸⁹ In *Hodas*, a homeowner family was forced to subsidize a new security gate, security services, and a new drainage system.⁹⁰ The Hodases challenged the POAs assessment power.⁹¹ The POA asserted that the "special assessment" section of the CC&Rs empowered the organization to levy assessments for the added amenities.⁹² The Hodases, however, argued that they required notice as POA members of the "special assessment" meeting held to decide on the new additions.⁹³

Although the court agreed that one of the additions did not fit within the definitions of the POA's "special assessments," the court continued to analyze the extent of the POA's powers.⁹⁴ The court ultimately concluded the assessments were valid and affirmed the POA's deficiency judgment against the homeowners.⁹⁵ This case illustrates yet another example of a court implicitly validating the extensive powers of POAs.

ments including: general, special, neighborhood, and specific assessments); *see also* Stewart E. Sterk, *Minority Protection in Residential Private Governments*, 77 B.U. L. REV. 273, 281 (1997) (asserting that courts have even sustained the POA's "power to levy assessments beyond those authorized in the Declaration").

87. *See* Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 613 (1993) (indicating the assessment of various penalties by the POA on a delinquent member).

88. *See id.* at 613-14 (reporting that penalties can consist of a lien upon the property, a suit for money damages, the denial of common property use or other innovative collection approaches); *see also* Laura Castro Trognitz, *Co-Opted Living: As Condos and Other Common Interest Communities Proliferate, So Do Rules and Conflicts That Lawyers are Being Asked to Sort Out*, A.B.A. J., Oct. 1999, at 54, 57, WL 85-OCT ABAJ 54 (noting the drastic problems for homeowners who are delinquent in assessments).

89. 21 S.W.3d 524 (Tex. App.—San Antonio 2000, pet. denied).

90. *Hodas v. Scenic Oaks Prop. Ass'n*, 21 S.W.3d 524, 527 (Tex. App.—San Antonio 2000, pet. denied).

91. *Id.* at 527.

92. *Id.*

93. *Id.* at 528.

94. *Id.* at 529.

95. *Hodas*, 21 S.W.2d at 529, 531.

2. Nonpayment of Assessments

When homeowners like the Hodases refuse or are unable to pay assessments, the POA is allowed *undaunted* latitude.⁹⁶ A POA's governing documents typically impose a lien on all lots within the subdivision to secure payment of delinquent or unpaid assessments.⁹⁷ The landmark case, *Inwood North Homeowners' Ass'n v. Harris*,⁹⁸ involves the default of such a lien.⁹⁹

In *Harris*, the association's CC&Rs specifically provided for annual and special assessments.¹⁰⁰ The CC&Rs stated that the collection of assessments, including interest and collection costs, "[was] designated to be 'a charge on the land and shall be secured by a continuing [v]endor's [l]ien upon the [l]ot against which such assessments or charges are made.'"¹⁰¹ The POA argued that if an assessment was not paid, it could foreclose on the homeowner's *entire* property.¹⁰² Although the lower court refused to order foreclosure because the CC&Rs did not form a proper vendor's lien, the Texas Supreme Court reversed, finding a valid contractual lien.¹⁰³ The *Harris* court held that the association was entitled to the harsh remedy of foreclosure based upon the existence of a contractual lien.¹⁰⁴ With this new precedent, Property Owners Associations obtained a powerful and oppressive right of recourse.¹⁰⁵

96. See James L. Winokur, *Critical Assessment: The Financial Role of Community Associations*, 38 SANTA CLARA L. REV. 1135, 1156 (1998) (suggesting that when homeowners default on their obligation to pay assessments, the fiscal strength of the POA suffers).

97. See *id.* (noting that "many state statutes impose the lien regardless of the absence of such language in the declaration").

98. 736 S.W.2d 632 (Tex. 1987).

99. *Inwood N. Homeowners' Ass'n v. Harris*, 736 S.W.2d 632, 636-37 (Tex. 1987) (holding that Texas's homestead laws do not preclude foreclosure for nonpayment of assessments).

100. *Id.* at 633.

101. *Id.* (quoting Article IV of the declaration).

102. See *id.* at 637 (implying such from the court's validation of the foreclosure).

103. See *id.* at 634 (noting that the lien was contractual).

104. *Harris*, 736 S.W.2d at 637.

105. See, e.g., *Texas Planned Community Act, Hearings on Tex. S.B. 699 Before the House Comm. on Bus. & Indus.*, 76th Leg., R.S. Tape 2, at 138-39 (Apr. 20, 1999) (copy on file with the *St. Mary's Law Journal*) (testimony of Harvella Jones, Founder of The Homeowner's Advocate) (discussing the speaker's loss of her home to foreclosure in 1995). Others suggest that non-judicial foreclosure without notice is too radical. *Id.* at Tape 3, at 6-7 (testimony of Yvonne Silva).

C. *Abuses of Power by Property Owners' Associations*

Homeowners, as well as courts, expect POAs to act reasonably when exercising control over homeowners' properties and lives.¹⁰⁶ Such reasonable expectations include: the ability to rent one's property under certain circumstances, the fair interpretation and enforcement of architectural control provisions, and the fair allocation of association benefits and burdens.¹⁰⁷ However, POAs do not always act reasonably, as evidenced by *Ashcreek Homeowner's Ass'n v. Smith*.¹⁰⁸

In *Ashcreek Homeowner's Ass'n*, a POA sued a homeowner for money damages and attorney fees for violating two deed restrictions: a broken fence slat and a missing basketball-goal backboard.¹⁰⁹ The court of appeals affirmed the trial court's grant of the homeowner's motion for summary judgment.¹¹⁰ Having determined that the POA never gave the homeowner proper registered notice of the violations, the court did not address the other issues.¹¹¹ However, the court stated that the POA's failure to give notice of the violations was clearly unreasonable.¹¹²

While many legal disputes involve the POA's unreasonable enforcement or interpretation of covenants, POAs also impose restrictions that exceed the board's power as granted in the CC&Rs.¹¹³ *Candlelight Hills Civic Ass'n v. Goodwin*¹¹⁴ concerned a challenge of a board's abuse of power.¹¹⁵ In *Candlelight*, a resident member brought a declaratory judgment against his homeowners association, claiming that the association's

106. See Stewart E. Sterk, *Minority Protection in Residential Private Governments*, 77 B.U. L. REV. 273, 286-87 (1997) (opining that few homeowners expect to surrender full power over their lives to a POA). Few home buyers "believe that they ceded to the association the power to act unreasonably." *Id.* at 287.

107. See *id.* at 284-86 (stating instances where community association action is challenged).

108. 902 S.W.2d 586 (Tex. App.—Houston [1st Dist.] 1995, no writ).

109. *Ashcreek Homeowner's Ass'n v. Smith*, 902 S.W.2d 586, 587, 590 (Tex. App.—Houston [1st Dist.] 1995, no writ).

110. *Id.* at 587.

111. *Id.* at 589-90.

112. *Id.* at 590.

113. See Gerald Korngold, *Resolving the Flaws of Residential Servitudes and Owners Associations: For Reformation Not Termination*, 1990 WIS. L. REV. 513, 530 (1990) (opining that private governments may impose restrictions exceeding the body's power grant); see also Laura Castro Trognitz, *Co-Opted Living: As Condos and Other Common Interest Communities Proliferate, So Do Rules and Conflicts That Lawyers Are Being Asked to Sort Out*, A.B.A. J., Oct. 1999, at 54, 57, WL 85-OCT ABAJ 54 (reporting that many disputes arise from the unreasonable enforcement or interpretation of covenants by boards).

114. 763 S.W.2d 474 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

115. *Candlelight Hills Civic Ass'n v. Goodwin*, 763 S.W.2d 474, 480 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (involving an action dubbed the *ultra vires* doctrine, where a homeowner challenges a POA board for abusing its discretion). "Ultra

board abused its power by attempting to purchase a recreational facility from the maintenance fee account.¹¹⁶ The homeowner argued that the restrictive covenant simply did not give the POA purchasing rights and accordingly, the POA board overstepped its authoritative bounds.¹¹⁷ The trial court ruled for the homeowner and the POA appealed.¹¹⁸

On appeal, the POA argued that it had purchasing rights from the broad powers of the restrictive covenant.¹¹⁹ Furthermore, the POA argued that it could support its financial decision by aggregating the total number of member votes.¹²⁰ In its analysis, the appellate court liberally construed the restrictive covenant, finding that the POA actually had power via its “articles of incorporation, its bylaws, and the Texas Non-Profit Corporation Act” to make the real estate acquisition.¹²¹ However, the court of appeals did not allow the POA to manipulate its members’ votes to conform with its financial decision.¹²²

Although the homeowner’s *ultra vires* challenge was overruled on appeal, *Candlelight* illustrates the issues surrounding board discretion. This tension between aggressive POAs and their members requires resolution, including better-enforced member voting so that POA’s are held accountable for their decisions and discretionary judgment.¹²³ Whatever the solution, one must acknowledge that with the increase in strained relations between POAs and their members, abuse of POA power has the potential to undermine the POA concept.

The increase in popularity and rising tensions within POAs has sparked much debate.¹²⁴ The acknowledgement of the pitfalls of confusing and inconsistent case law, prompted recognition of the need for legislative

vires” is “[a]n act performed without any authority to act on subject.” BLACK’S LAW DICTIONARY 1522 (6th ed. 1990).

116. *Candlelight*, 763 S.W.2d at 477.

117. *Id.*

118. *Id.* at 476.

119. *Id.* at 478.

120. *See id.* at 481 (stating that because the *Candlelight* community consisted of different residential subsections, the POA argued it could combine the votes of each subsection). The POA argued “that the votes can be pooled to determine the individual subsections’ percentage.” *Candlelight*, 763 S.W.2d at 481. (arguing that the POA could manipulate the voting system by considering the averages).

121. *Id.* at 476-77.

122. *Id.* at 481.

123. *See Texas Planned Community Act, Hearings on Tex. S.B. 699 Before the House Comm. on Bus. & Indus.*, 76th Leg., R.S. Tape 2, at 61 (Apr. 20, 1999) (copy on file with the *St. Mary’s Law Journal*) (testimony of Steve Thomas Solcich) (noting Steve Solcich, of Property Rights Foundation, Inc., testified that “homeowner members must have a workable recourse to remove a violating director”).

124. *See* Patrick K. Hetrick, *Of “Private Governments” and the Regulation of Neighborhoods: The North Carolina Planned Community Act*, 22 CAMPBELL L. REV. 1, 9 (1999),

guidance.¹²⁵ The following section outlines Texas's attempts to lend such guidance.

IV. TEXAS'S PIECEMEAL APPROACH TO PROPERTY OWNERS' ASSOCIATION PROBLEM-SOLVING

Across the country, legislative activity addressing POA's formation and operation is on the increase.¹²⁶ In Texas, it began with the 76th Legislative session, where Texas Legislators introduced more than thirty bills "seeking to limit the powers of homeowners associations and the costs associated with foreclosures on common interest development units."¹²⁷ This Comment now turns to a discussion of Texas's piecemeal legislative activity, in particular three bills passed in the 76th Legislature session: House Bills 3407, 2224, and Senate Bill 434.

A. Recent Texas Legislation

1. House Bill 3407

One of the past problems with POAs is that they denied members the right to attend governing board meetings, as well as the right to obtain POA records or documents. The Legislature recognized that POAs are able to cloak their powers by concealing their board meetings and records.¹²⁸ However, H.B. 3407 elected to change the secretive nature of POA's, and is now codified in sections 551.0015 and 552.0035 of the Texas Government Code.¹²⁹

The Texas Legislature enacted very few laws during its 76th Legislative session relating to POAs, however, sections 551.0015 and 552.0035 pro-

WL 22 CAMPBLR 1 (acknowledging that the popularity and rising use of POAs has brought to life "the shortcomings of traditional legal structures").

125. See *id.* at 9-10 (noting the inherent pitfalls relative to the common law of servitudes, which requires the development of contemporary laws).

126. See Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 594 (1993) (commenting on the increase in legislative activity and its types).

127. Laura Castro Trognitz, *Co-Opted Living: As Condos and Other Common Interest Communities Proliferate, So Do Rules and Conflicts That Lawyers are Being Asked to Sort Out*, A.B.A. J., Oct. 1999, at 54, 59, WL 85-OCT ABAJ 54. See Julie Mason, *Lawmakers Unable to Restrain Homeowners' Associations*, HOUS. CHRON., May 28, 1999, at A37, 1999 WL 3992878 (noting Rep. Ken Yarbrough's attempt to pass several "bills aimed at reining in association powers").

128. See HOUSE COMM. ON BUS. & INDUS., BILL ANALYSIS, Tex. H.B. 3407, 76th Leg., R.S. (1999), at <http://www.capitol.state.tx.us> (Sept. 15, 1999) (stating the purpose of the bill is to protect the public interest).

129. Tex. H.B. 3407, 76th Leg., R.S. (1999), available at <http://www.capitol.state.tx.us> (last visited Oct. 10, 2001) (current version at TEX. GOV'T CODE ANN. §§ 55.0015, 552.0035 (Vernon Supp. 2001)).

vided a first step in limiting the power of POAs by acting to safeguard members' interests in POA accountability.¹³⁰ Sections 551.0015 and 552.0035 of the open meeting's and open record's laws subject only those POAs that closely resemble governmental entities to abide by Texas's Open Meetings and Open Records Acts.¹³¹ Sections 551.0015 and 552.0035 identify three government-like qualities that a POA must possess to fall under the open records disclosure requirement.¹³²

First, sections 551.0015 and 552.0035 only apply to a distinct class of POAs located in specific, large counties.¹³³ Second, the POA must have "the power to make mandatory special assessments for capital improvements or mandatory regular assessments."¹³⁴ Finally, the regular or mandatory assessments must currently be or have been based on the value used to set ad valorem taxes.¹³⁵ If a particular POA meets all three elements, it is subject to the regulations of a government entity and therefore, must follow the Open Meetings Act and Open Records Act. This policy allows for more decision making accountability within a POA and gives members the ability to keep certain POAs in check.

2. House Bill 2224 and Senate Bill 434

With two more disclosure related bills enacted during the 76th Legislative session, legislators took steps to eliminate the shock of POA land restrictions imposed on homeowners. The first bill, H.B. 2224, now codified in sections 5.012 and 202.006 of the Texas Property Code, requires the seller of residential property governed by a POA to give the purchaser written documentation outlining applicable restrictions and obligations incident to ownership of the property.¹³⁶ The intent of requiring delivery of the written notice before the formation of a binding contract

130. *Id.*

131. TEX. GOV'T CODE ANN. §§ 551.0015, 552.0035 (Vernon Supp. 2001). HOUSE COMM. ON BUS. & INDUS., BILL ANALYSIS, TEX. H.B. 3407, 76th Leg., R.S. (1999), at <http://www.capitol.state.tx.us> (Sept. 15, 1999) (articulating the provisions of the Texas Open Meetings Act as requiring all meetings, regular or special, to be freely open, with few exceptions); HOUSE COMM. ON BUS. & INDUS., BILL ANALYSIS, TEX. H.B. 3407, 76th Leg., R.S. (1999), at <http://www.capitol.state.tx.us> (Sept. 15, 1999) (stating similarities between some POAs and governmental bodies as being service providers and collectors of ad valorem taxes).

132. TEX. GOV'T CODE ANN. §§ 551.0015, 552.0035 (Vernon Supp. 2001).

133. *See id.* (requiring mandatory membership for a class of real property owners within a highly populated county, 2.8 million people or more, or an adjacent county).

134. *Id.*

135. *Id.*

136. TEX. H.B. 2224, 76th Leg., R.S. (1999), available at <http://www.capitol.state.tx.us> (last visited Oct. 10, 2001) (current version at TEX. PROP. CODE ANN. §§ 5.012, 202.006 (Vernon Supp. 2001)).

is to provide safeguards to the uninformed purchaser.¹³⁷ The bill even provides homeowners with some limited recourse, as the purchaser may terminate the executory contract if the seller fails to provide the required notice.¹³⁸

The other successfully enacted disclosure bill, S.B. 434, now codified in sections 207.001-.005 of the Texas Property Code, gives yet another form of disclosure to the homeowner.¹³⁹ Prior to the passage of this legislation, the Texas Real Estate Commission provided addendum and resale certificates where a sales transaction involved mandatory POA assessments.¹⁴⁰ Real estate certificates usually contain information such as amount and frequency of assessments.¹⁴¹ As some POAs refused to provide the resale certificate or other information required by a prospective buyer, section 207.003 acted to make such documentation and information mandatory upon a written request by an owner.¹⁴² Provisions in section 207.004 for noncompliance include: (1) the ability of an owner to seek court orders or judgments following the submission of two written requests without a POA response, and (2) non-liability of buyer, lender or title company for any claims or debts due the POA when they do not disclose requested information.¹⁴³ Such legislation further provides a necessary incentive for POAs to act responsively and furthers attempts to safeguard consumers.

137. See HOUSE COMM. ON BUS. & INDUS., BILL ANALYSIS, TEX. H.B. 2224, 76th Leg., R.S. (1999), at <http://www.capitol.state.tx.us> (June 4, 1999) (noting that even an informed purchaser may be unaware of potentially extensive restrictions and obligations imposed on the member).

138. See *id.* (providing the purchaser the right "to terminate the contract for any reason within the earlier of seven days after the purchaser receives the notice or the date the transfer occurs as provided by the contract," if the contract is executed without the seller disclosing the required notice).

139. Tex. S.B. 434, 76th Leg., R.S. (1999), available at <http://www.capitol.state.tx.us> (last visited Oct. 10, 2001) (current version at TEX. PROP. CODE ANN. §§ 207.001-.005 (Vernon Supp. 2001)) (relating to the disclosure of certain information by POAs).

140. See HOUSE COMM. ON STATE AFFAIRS, BILL ANALYSIS, TEX. S.B. 434, 76th Leg., R.S. (1999), at <http://www.capitol.state.tx.us> (Aug. 16, 1999) (acknowledging the pertinent information contained in a resale certificate).

141. See TEX. PROP. CODE ANN. § 207.003(b) (Vernon Supp. 2001) (stating the requirements for resale certificates).

142. *Id.* at § 207.003 (requiring POAs to furnish a resale certificate, restrictions, by-laws, and POA rules within 10 days of receipt of an owner's written request); see also Julie Mason, *Lawmakers Unable to Restrain Homeowners' Associations*, HOUS. CHRON., May 28, 1999, at A37, 1999 WL 3992878 (noting Representative Ken Yarbrough's amazement over opposition to the resale certificate bill by associations).

143. TEX. PROP. CODE ANN. § 207.004 (Vernon Supp. 2001).

B. *Shortcomings of Recent Legislation and Associated Problems*

While the disclosure bills take important steps to ensure that all potential buyers receive adequate POA information from either the seller or the POA itself, Texas Government Code sections 551.0015 and 552.0035 affords protection to only certain POA members.¹⁴⁴ The Legislature narrowly drafted sections 551.0015 and 552.0035 of the Texas Government Code to only apply to the three POAs in Texas.¹⁴⁵ Because certain POAs act so much like governments, they should be treated as such.¹⁴⁶ Open meetings and open records should be available to all interested POA members. This basic premise was addressed by witness testimony during legislative hearings on the bill.¹⁴⁷ An attorney for the Texas Community Association Institute voiced the CAI's "strong support for the concept of open meetings and open records."¹⁴⁸ Although generally supportive of sections 551.0015 and 552.0035 of the Texas Government Code, attorney Larry Niemann recommended a clearer and less complex approach.¹⁴⁹ In his view, use of the applicable governmental code provisions for open meetings and records is too sophisticated and comprehensive for private members to use.¹⁵⁰ Simple and clear language would provide a better approach to guarantee open meetings and records.¹⁵¹

Weighing the arguments for and against POA regulation yields a unanimous concern for equal treatment.¹⁵² The enactment of Texas Govern-

144. TEX. GOV'T CODE ANN. §§ 551.0015, 552.0035 (Vernon Supp. 2001) (requiring a POA to possess three qualities to be subject to H.B. 3407).

145. *See Texas Planned Community Act, Hearings on Tex. H.B. 3407 Before the House Comm. on Bus. & Indus.*, 76th Leg., R.S. Tape 2, at 2 (Mar. 30, 1999) (copy on file with the *St. Mary's Law Journal*) (testimony of Representative Williams) (explaining the narrow drafting of his bill that utilized a classification scheme which would exclude any POA without ad valorem-based assessments).

146. *See id.* (stating that these larger POAs "act very much like municipal government[s]," unlike the typical POA).

147. *Id.* at 15-16 (testimony of Larry Niemann).

148. *Texas Planned Community Act, Hearings on Tex. H.B. 3407 Before the House Comm. on Bus. & Indus.*, 76th Leg., R.S. Tape 2, at 16 (Mar. 30, 1999) (copy on file with the *St. Mary's Law Journal*) (testimony of Larry Niemann).

149. *See id.* (suggesting use of the approach embodied in the Texas Uniform Condominium Act which clearly demands open meetings with few exceptions).

150. *Id.* at 16-17.

151. *See id.* (espousing that the clear language of the Texas Uniform Condominium Act has worked well over the years and would guarantee open meetings in the POA environment).

152. *See id.* at 13-14 (testimony of Susan Hill, President of Texas Neighborhoods Together) (suggesting that special laws for some POAs open the door to special treatment to other POAs down the road); *Texas Planned Community Act, Hearings on Tex. H.B. 3407 Before the House Comm. on Bus. & Indus.*, 76th Leg., R.S. Tape 2, at 16 (Mar. 30, 1999) (copy on file with the *St. Mary's Law Journal*) (testimony of Larry Niemann) (supporting

ment Code sections 551.0015 and 552.0035 creates a double standard – affording the protections embodied in the applicable governmental code to a minority of POAs, while leaving the vast majority of POA members unprotected.¹⁵³ Consequently, the need for legislative action is necessary to ensure equal opportunities for members of all POAs.¹⁵⁴ Therefore, to avoid the certain adverse results created by a double standard, the Legislature should act comprehensively. The next section analyzes Texas's attempt to act accordingly.

V. TEXAS'S EFFORTS AT A COMPREHENSIVE PLAN

Although some POA related bills passed in 1999, the 76th Legislature was not without its fallen heroes. In particular, Senator Carona proposed a comprehensive plan that was unfortunately left behind.¹⁵⁵ However, Senator Carona's plan, Texas Planned Community Act ("TPCA"),¹⁵⁶ was the motivating rally cry which initialized and inspired future legislation.

A. *The Texas Planned Community Act—Senate Bill 699*

Although Senator Carona's bill was not passed by the Legislature, his proposal provided a sound solution to limit the unbounded powers of POAs. The TPCA, as proposed, was organized into five subchapters: (A) General Provisions, (B) Amendment and Extension of Restrictive Covenants, (C) Management of Association, (D) Protection of Purchasers, and (E) Property Owners' Association Lien for Assessments.¹⁵⁷

the general application of open meetings and open records to provide equal treatment for all POAs).

153. See HOUSE COMM. ON BUS. & INDUS., BILL ANALYSIS, TEX. H.B. 3407, 76th Leg., R.S. (1999), at <http://www.capitol.state.tx.us> (Sept. 15, 1999) (indicating that prior to this bill members of POAs "had neither the right to attend the meetings of the governing boards of these associations nor the right to request and secure records or documents belonging to these associations"). Yet this bill provides these rights to only a select few based upon the stated requirements, therefore leaving many POA members still unprotected. *Id.*

154. See Interview with David Dittfurth, Professor of Law, St. Mary's University School of Law, in San Antonio, Tex. (Sept. 12, 2000) (on file with the *St. Mary's Law Journal*) (discussing the need for state legislation to establish one law for all associations). Members of associations whose open meeting and open record rights are not protected under H.B. 3407 could pursue an equal protection challenge. *Id.*

155. See Julie Mason, *Lawmakers Unable to Restrain Homeowners' Associations*, HOUS. CHRON., May 28, 1999, at A37, 1999 WL 3992878 (reporting the demise of S.B. 699 throughout the legislative session).

156. See Tex. S.B. 699, 76th Leg., R.S. (1999), available at <http://www.capitol.state.tx.us> (last visited Oct. 10, 2001) (proposing to amend Section 1, Title 11 of the Texas Property Code by adding Chapter 207, the Texas Planned Community Act).

157. *Id.*

The first substantial section, subchapter B, addressing the amendment and extension of restrictive covenants, provided a critical provision for older residential communities by allowing a two-thirds majority vote to amend or extend expiring restrictions irrespective of a declaration's 100% requirement.¹⁵⁸ A two-thirds majority requirement gives members a real vote in defining the power of POAs and forces them to act in accordance with member ratification.¹⁵⁹

Secondly, subchapter C of the TPCA proposed to restrict and rearrange POA management altogether.¹⁶⁰ The TPCA proposed to codify some two-dozen functions of POA boards.¹⁶¹ These powers ranged from adopting and amending bylaws, budgets, and POA rules, to "exercis[ing] any other powers necessary and proper for the operation of the" POA.¹⁶² Of particular significance, the proposal would have allowed the POA to levy fines against its members.¹⁶³ In conjunction with the power to impose fines, the TPCA also provided appropriate due process procedures. Specifically, the TPCA required approval of the fees by a majority of the POA's members.¹⁶⁴

Perhaps most important, the TPCA would have provided numerous safeguards for homeowners in regard to POA actions such as: (1) suspending a member's privilege to use any common area, (2) suing a member, (3) charging a member for property damage, or (4) levying a fine

158. *See id.* (referring to procedures in subchapter B for amending or extending restrictions); *Texas Planned Community Act, Hearings on Tex. S.B. 699 Before the State Affairs Comm.*, 76th Leg., R.S. Tape 3, 11-12 (Mar. 11, 1999) (copy on file with the *St. Mary's Law Journal*) (testimony of Roy Hailey) (commenting that this provision is especially important in older POAs with expiring restrictions); *see also* Patrick J. Rohan, *Preparing Community Associations for the Twenty-first Century: Anticipating the Legal Problems and Possible Solutions*, 73 ST. JOHN'S L. REV. 3, 28 (1999) (acknowledging an increase in lawsuits questioning POA power to collect assessments after the original CC&Rs expire). For instance, lawsuits have arisen over the validity of HOAs attempting to collect assessments after expiration of the CC&Rs. *Id.*

159. *See* Tex. S.B. 699, 76th Leg. R.S. (1999), available at <http://www.capitol.state.tx.us> (last visited Oct. 10, 2001) (granting member control in the ability to change some restrictive covenants).

160. *Id.*

161. *See id.* (referencing proposed § 207.061).

162. *See id.* (referencing proposed § 207.061(a)(1)-(24)).

163. *See id.* (referencing proposed § 207.061(a)(14) which stated that the power to "impose reasonable fines for a violation of the restrictions or the bylaws or rules of the association" lies with the POA).

164. Tex. S.B. 699, 76th Leg., R.S. (1999), available at <http://www.capitol.state.tx.us> (last visited Oct. 10, 2001) (referencing proposed § 207.061(a)(14) which granted members "notice and an opportunity to be heard").

against a member.¹⁶⁵ The proposal also allowed members the authority to recover attorney's fees in relation to improper notice.¹⁶⁶ Additionally, the TPCA allowed either party to use alternative dispute resolution.¹⁶⁷ The TPCA also contained important provisions relating to notice of new or amended POA rules,¹⁶⁸ assessments,¹⁶⁹ architectural control requirements,¹⁷⁰ meetings,¹⁷¹ records,¹⁷² voting issues,¹⁷³ director removal provi-

165. *Id.* (noting that § 207.061(d) included a number of safeguard requirements for members). First, the POA must provide written notice to the member. *See id.* (stating that the notice by personal delivery or by mail, return receipt requested, must describe the violation and inform the member of any amount due). Second, the POA must afford the member reasonable time to cure the infraction to avoid a fine or suspension. *See id.* (noting that the time to cure was not necessary if the member was a repeat offender). Third, the POA must inform the member in the notice that he has the right to request a hearing on the violation, to occur within thirty days of receipt of the written request. *See id.* (indicating that the hearing to resolve the issue is "before a board-appointed committee, or before the board if the board does not appoint a committee" with audio recording permissible).

166. *See* Tex. S.B. 699, 76th Leg., R.S. (1999), available at <http://www.capitol.state.tx.us> (last visited Oct. 10, 2001) (noting that § 207.061(d) allowed a "reimbursement of reasonable attorney's fees and other reasonable costs" associated with the enforcing of restriction, bylaws, or POA rules only if the POA gives written notice to the member).

167. *See id.* (referencing proposed § 207.061(d) which stated that the presence of the owner was not required at the hearing).

168. *See id.* (noting § 207.061(g) proposed a thirty-day waiting period prior to a board adopted rule, giving even further protection to members).

169. *See id.* (explaining that § 207.062 afforded older POAs with outdated caps on assessments to increase such amounts by a majority vote of the membership).

170. *See* Tex. S.B. 699, 76th Leg., R.S. (1999), available at <http://www.capitol.state.tx.us> (last visited Oct. 10, 2001) (noting that § 207.063 provided for architectural control authority to automatically vest in the POA under certain circumstances, thereby eliminating uncertainties associated with, for example, a declarant's inaction). Automatic vesting would occur if: (1) the authority of the architectural control committee terminates, (2) the last residential building site is completed and sold, or (3) the architectural control committee assigns authority to the POA. *Id.*

171. *See* Tex. S.B. 699, 76th Leg., R.S. (1999), available at <http://www.capitol.state.tx.us> (last visited Oct. 10, 2001) (noting that § 207.064 required open board meetings with special meetings callable by a petition of at least ten percent of the membership, which affords protection similar to that embodied in H.B. 3407). This section allowed adjournment into a "closed executive session to consider actions involving personnel, threatened or pending litigation, contract negotiations, enforcement actions, matters involving the invasion of privacy of individual owners, or matter that are to remain confidential by request of the affected parties and agreement of the board." *Id.* Also, the executive session provisions are similar to the provision provided by the government code employed in Texas H.B. 3407. *See* TEX. GOV'T CODE ANN. § 551.0015 (Vernon Supp. 2001).

172. *See* Tex. S.B. 699, 76th Leg., R.S. (1999), available at <http://www.capitol.state.tx.us> (last visited Oct. 10, 2001) (adding that § 207.066 gave a member the right to examine and copy the POA's books and records upon written request with "proper purpose"). This provision is similar to the provision provided by the government code. TEX. GOV'T CODE ANN. § 551.0035 (Vernon Supp. 2001).

sions,¹⁷⁴ documentation of management,¹⁷⁵ and board member education.¹⁷⁶ In total, the management provisions of the TPCA outlined the powers of POAs and provided a comprehensive roadmap for POA boards that would have remedied some of the abuses inherent in POA governance.

Subchapter D of the TPCA proposed to enforce POA disclosure. This section largely expanded the concept of POA disclosure.¹⁷⁷ Upon written request from an owner, a POA would have to deliver a current copy of the subdivision's CC&Rs, bylaws, POA rules, and a resale certificate to the member.¹⁷⁸ These procedures and policies provided more specificity and more authoritative accountability.

The final subchapter E of the TPCA proposed to address at significant length a member's obligation to pay the POA assessment and the legal and procedural consequences for failing to meet such obligations.¹⁷⁹ Specifically, the TPCA provided that a POA would acquire a lien on the member's lot and obtain authority to foreclose on the lien only if the CC&Rs expressly authorize such a lien.¹⁸⁰ The TPCA provided several safeguards relative to the foreclosure process. Most important, the sub-

173. See Tex. S.B. 699, 76th Leg., R.S. (1999), available at <http://www.capitol.state.tx.us> (last visited Oct. 10, 2001) (noting that § 207.065 addressed potential voting issues by authorizing a vote by written proxy).

174. See *id.* (noting that proposed § 207.061(i) provided for the removal of a director, either by provisions in the POA's governing documents or, if not provided, by the Texas Non-Profit Corporation Act).

175. See *id.* (noting that proposed § 207.068 requires a recorded management certificate from each POA, thereby putting the world on notice as to where the actual management of the POA lies). Furthermore, a POA would have to record an amended certificate within thirty days with any change of stated information. *Id.*

176. See *id.* (noting that § 207.069 required all board members to attend a class or view a videotape, approved by the attorney general, prior to voting as a board member); see also James L. Winokur, *Critical Assessment: The Financial Role of Community Associations*, 38 SANTA CLARA L. REV. 1135, 1180 (1998) (noting the serious lack of qualifications and competency of many POA board members, based upon the lack of standards or training required as a prerequisite to holding a board position).

177. See Tex. S.B. 699, 76th Leg., R.S. (1999), available at <http://www.capitol.state.tx.us> (last visited Oct. 10, 2001) (stating that proposed § 207.091 enumerated over a dozen pieces of required information for resale certificates). In particular, proposed § 207.091(b)(15) required: "a statement indicating whether the restrictions allow foreclosure of the association's lien on an owner's property for failure to pay assessments." *Id.*

178. *Id.* (noting proposed § 207.091(a)).

179. *Id.* (noting proposed §§ 207.121, 207.123, 207.125).

180. See *id.* (noting that proposed §§ 207.121(b), 207.125(a) allowed a POA to foreclose a lien under a court order or under recorded governing documents which provided for a lien and granted foreclosure authority).

chapter prohibited a POA from foreclosing “a lien for an assessment consisting solely of fines or attorney’s fees associated solely with fines.”¹⁸¹

Furthermore, subchapter E outlined the right of redemption after foreclosure.¹⁸² Such right prohibited the purchaser of the property at the foreclosure sale from transferring “the property to a person other than a redeeming owner during the [ninety-day] redemption period.”¹⁸³ Of peculiar note, was the additional provision that if the member attempted to redeem the property by making a partial payment, but failed to satisfy the total amount due, the POA must refund all partial amounts to the member.¹⁸⁴ However, upon failure to redeem, the TPCA required the POA or the third-party purchaser to record, in the county’s property records, an affidavit indicating the member’s failure to redeem.¹⁸⁵

In summary, the failure to pass the TPCA meant the elimination of a one-stop shopping list for POA boards. Comprehensive in nature, the TPCA would have provided a blue print for POAs and members alike. Consequently, the need still exists to establish comprehensive guidelines which reign in the power of POAs.

B. *Senate Bill 507*

Although the TPCA died in 1999, just two years later, the 77th Legislative session brought with it new found hope for Senator Carona and his new POA procedural reform. A less ambitious bill, Senate Bill 507, the Texas Residential Property Owners Protection Act (“TRPOPA”) was introduced during the 2001 Legislative session. TRPOPA, drawing from its predecessor, the TPCA, provides a reasonable beginning for POA regulation.¹⁸⁶ Acknowledging the frequent litigation to resolve conflicts between POA boards and members, the TRPOPA provides basic guidelines

181. *See id.* (noting that proposed § 207.125(j) addressed foreclosures related to non-monetary default); *see also Texas Planned Community Act, Hearings on Tex. S.B. 699 Before the House Comm. on Bus. & Indus.*, 76th Leg., R.S. Tape 2, at 56 (Apr. 20, 1999) (copy on file with the *St. Mary's Law Journal*) (testimony of Brenda McCoy) (explaining her compliance with deed restrictions, including the payment of dues, yet her POA considered her in non-monetary default).

182. *Tex. S.B. 699*, 76th Leg., R.S. (1999), *available at* <http://www.capitol.state.tx.us> (last visited Oct. 10, 2001) (referencing proposed § 207.127).

183. *Id.*

184. *Id.* (referring to proposed § 207.127(j)).

185. *Id.* (referring to proposed § 207.127(l)).

186. *See Texas Residential Property Owners Protection Act*, 77th Leg., R.S., ch. 926, 2001 *Tex. Sess. Law Serv.* 1751 (Vernon) (to be codified as an amendment to *TEX. PROP. CODE ANN.* §§ 209.001-.011).

for POA operations, as well as specific property owners' protections.¹⁸⁷ In essence, the TRPOPA embodies some of the consumer protections addressed in the TPCA, but in limited form.¹⁸⁸

As with the TPCA, the TRPOPA applies only to POAs that enforce restrictions and require mandatory membership.¹⁸⁹ Further, the TRPOPA draws from TPCA's six basic provisions: (1) management certificates,¹⁹⁰ (2) association records,¹⁹¹ (3) notice requirements,¹⁹² (4) hearing and alternative dispute resolution options,¹⁹³ (5) attorney's fees,¹⁹⁴ and (6) foreclosure and redemption.¹⁹⁵ Specifically, the TRPOPA requires a POA to record, in each county where it is located, a management certificate disclosing, in part, the address of the POA or its management company.¹⁹⁶ Yet, the TRPOPA does not impose liability against the POA for delay, unless such delay constitutes willful or grossly negligent conduct.¹⁹⁷

While the TRPOPA provides fewer, extensive guidelines relative to POA records than the TPCA, it mandates reasonable access to books and records under the corresponding Texas Non-Profit Corporation Act.¹⁹⁸ Regrettably, the reference to the Act injects "proper purpose" language

187. See SEN. RESEARCH CENTER, BILL ANALYSIS, Tex. S.B. 507, 77th Leg., R.S. (2001), at <http://www.capitol.state.tx.us> (June 18, 2001) (indicating the arguments for enacting S.B. 507).

188. See *The Texas Residential Property Owners Protection Act, Hearings on Tex. S.B. 507 Before the Senate Comm. on State Affairs*, 77th Leg., R.S. (Mar. 19, 2001) (copy on file with the *St. Mary's Law Journal*) (testimony of Senator Carona) (noting that the bill's name, Texas Residential Property Owners Protection Act, adequately and accurately reflects the sponsors' efforts to provide consumer protection in the area of POA law).

189. Texas Residential Property Owners Protection Act, 77th Leg., R.S., ch. 926, § 1, 2001 Tex. Sess. Law Serv. 1751, 1753 (Vernon) (to be codified as an amendment to TEX. PROP. CODE ANN. § 209.003(b)).

190. *Id.* (to be codified as an amendment to TEX. PROP. CODE ANN. § 209.004).

191. *Id.* (to be codified as an amendment to TEX. PROP. CODE ANN. § 209.005).

192. *Id.* at 1753-54 (to be codified as an amendment to TEX. PROP. CODE ANN. § 209.006).

193. *Id.* at 1754 (to be codified as an amendment to TEX. PROP. CODE ANN. § 209.007).

194. Texas Residential Property Owners Protection Act, 77th Leg., R.S., ch. 926, § 1, 2001 Tex. Sess. Law Serv. 1751, 1754-55 (Vernon) (to be codified as an amendment to TEX. PROP. CODE ANN. § 209.008).

195. *Id.* at 1755-57 (to be codified as an amendment to TEX. PROP. CODE ANN. §§ 209.009-.011).

196. *Id.* at 1753 (to be codified as an amendment to TEX. PROP. CODE ANN. § 209.004(a)).

197. *Id.* (to be codified as an amendment to TEX. PROP. CODE ANN. § 209.004(c)).

198. *Id.* (to be codified as an amendment to TEX. PROP. CODE ANN. § 209.005(a)).

that was not in Senator Carona's introduced version of TRPOPA.¹⁹⁹ Additionally, and unlike S.B. 699, the TRPOPA exempts from disclosure the files and records of a POA's attorney except where the POA seeks recovery of attorney's fees from the property owner.²⁰⁰

The TRPOPA adapted the notice of delinquency requirements of its failed predecessor, the TPCA.²⁰¹ This section requires the POA to provide written notice before certain POA actions, including levying fines against its members.²⁰² The TRPOPA even provides recourse for a POA member to resolve the disputed issue either by requesting a hearing before a committee appointed by the board, or by seeking alternative dispute resolution.²⁰³

Of particular note is the TRPOPA's provision concerning attorney's fees. Similar in part to the TPCA, the TRPOPA permits a POA to "collect reimbursement of reasonable attorney's fees and other reasonable costs" associated with enforcing restrictions, bylaws, or POA rules, but only if the POA gives written notice to the member of such fees.²⁰⁴ As an improvement from the TPCA, the TRPOPA requires the fees to be deposited into the POA's account or its managing agent's account, and not paid directly to a POA attorney.²⁰⁵ Additionally, the TRPOPA imposes

199. TEX. BUS. CORP. ACT ANN. art. 1396-2.23 art. 1396-2.23 (Vernon 1997 & Supp. 2001); Texas Residential Property Owners Protection Act, 77th Leg., R.S., ch. 926, § 1, 2001 Tex. Sess. Law Serv. 1751, 1753 (Vernon) (to be codified as an amendment to TEX. PROP. CODE ANN. § 209.005(a)); *see also* Telephone Interview with Bonnie Bruce, House Business & Industry Committee Clerk, Texas Legislature (Aug. 13, 2001) (indicating that Rep. Gary Elkins submitted the amendment to include the Non-Profit Corporation language because of the strong desires of his constituents).

200. Texas Residential Property Owners Protection Act, 77th Leg., R.S., ch. 926, § 1, 2001 Tex. Sess. Law Serv. 1751, 1753 (Vernon) (to be codified as an amendment to TEX. PROP. CODE ANN. § 209.005(b)).

201. *Id.* at 1753-54 (to be codified as an amendment to TEX. PROP. CODE ANN. § 209.006).

202. *Id.* (adopting similar notification safeguards as outlined in S.B. 699 concerning: (1) suspending a member's privilege to use any common area, (2) filing suit against a member, (3) charging a member for property damage, or (4) levying a fine against a member).

203. *Id.* at 1751, 1754 (to be codified as an amendment to TEX. PROP. CODE ANN. § 209.007).

204. *Id.* (to be codified as an amendment to TEX. PROP. CODE ANN. § 209.008(a)).

205. Texas Residential Property Owners Protection Act, 77th Leg., R.S., ch. 926, § 1, 2001 Tex. Sess. Law Serv. 1751, 1754 (Vernon) (to be codified as an amendment to TEX. PROP. CODE ANN. § 209.008(c)) (noting the requirement addressing the concerns that POAs typically contract with attorneys on a no fee basis such that POAs are unaware of the actual attorney fees that are, at times, extorted from members by the POA's attorneys); *see also Texas Planned Community Act, Hearings on Tex. S.B. 699 Before the State Affairs Comm.*, 76th Leg., R.S. Tape 4, at 25-26 (Mar. 11, 1999) (copy on file with the *St. Mary's Law Journal*) (testimony of Michael Walker) (requesting the Legislature to "not allow

an important cap on the amount of attorney's fees that a POA may include in its non-judicial foreclosure sale.²⁰⁶

Finally, and perhaps most significant, the TRPOPA addresses foreclosure and redemption issues.²⁰⁷ The bulk of these provisions draws similar, if not almost exact, language from the TPCA, discussed above.²⁰⁸ One notable exception provides for a longer redemption period, 180 days, in comparison to the TPCA's ninety-day period.²⁰⁹ In sum, the main criticism associated with both the TRPOPA and the TPCA lies in the foreclosure issue, to which this Comment now turns.

C. Foreclosure Debate - Homestead Property and the Association Lien

Among our most cherished liberties, the Texas Constitution provides protection to homestead property from foreclosure by creditors.²¹⁰ The Texas Constitution provides the homestead with protection from forced sale with limited exceptions for such things as: (1) purchase money debt, (2) unpaid property taxes, and (3) labor and materials associated with homestead improvements.²¹¹ Unless otherwise codified in one of the ex-

POA lawyers to foreclose . . . fabricated, contingent attorney fees" but allow for the reimbursement of attorney fees actually paid by the POA).

206. Texas Residential Property Owners Protection Act, 77th Leg., R.S., ch. 926, § 1, 2001 Tex. Sess. Law Serv. 1751, 1754-55 (Vernon) (to be codified as an amendment to TEX. PROP. CODE ANN. § 209.008(f)) (setting the limits of reimbursement to one-third "of all actual costs and assessments" or "\$2,500"). This provision addresses the concerns of attorneys who represent homeowners in foreclosure proceedings. See Thom Marshall, *Legal Fees Nearly Cost Man a Home*, HOUS. CHRON., Oct. 13, 2000, at A33, 2000 WL 24518384 (noting a need for a cap on attorney fees).

207. *Id.* at 1751, 1755-57 (to be codified as an amendment to TEX. PROP. CODE ANN. §§ 209.009-.011).

208. Compare Texas Residential Property Owners Protection Act, 77th Leg., R.S., ch. 926, § 2001 Tex. Sess. Law Serv. 1751, 1755-57 (Vernon) (to be codified as an amendment to TEX. PROP. CODE ANN. §§ 209.009-.011) (noting the enacted foreclosure provisions), with Tex S.B. 699, 76th Leg., R.S. (1999), available at <http://www.capitol.state.tx.us> (last visited Oct. 10, 2001) (noting proposed §§ 207.125(j), 207.126-.127).

209. Compare Texas Residential Property Owners Protection Act, 77th Leg., R.S., ch. 926, § 1, 2001 Tex. Sess. Law Serv. 1751, 1755 (Vernon) (to be codified as an amendment to TEX. PROP. CODE ANN. § 209.011(b)) (noting the actual enacted foreclosure provision), with Tex. S.B. 699, 76th Leg., R.S. (1999), available at <http://www.capitol.state.tx.us> (last visited Oct. 10, 2001) (noting the proposed § 207.127(a)).

210. See Henry B. Gonzalez, *The Texas Homestead: The Last Bulwark of Liberty*, 26 ST. MARY'S L.J. 339, 339 (1995) (discussing the unique liberty of homestead protection which "reflect[s] the specific influences of events, cultures, and individuals on the development of legal principles and political values in the state").

211. See TEX. CONST. art. XVI, § 50 (providing further exceptions for: (1) home equity loans, (2) reverse mortgages, and (3) owelty partitions).

ceptions, the Constitution invalidates liens on homesteads for all other purposes.²¹²

Drawing upon the invalidity of other liens not specifically codified, opponents of the TPCA adamantly voice the unconstitutionality of the bill's foreclosure provision.²¹³ Recognizing the everyday occurrence of foreclosures without notice, these opponents view the foreclosure provision in the TPCA, and consequently those of TRPOPA, as an "illegal hammer."²¹⁴ One opponent also opines that foreclosure by POAs constitutes unjust enrichment and advocates other methods for POA's to collect delinquent maintenance fees.²¹⁵

A few influential Texas Supreme Court Justices have criticized the failure to preserve the homestead right in Texas. Justices Mauzy and Gonzalez indicated their support of a general public policy against foreclosure in their dissent in *Inwood North Homeowners' Ass'n v. Harris*.²¹⁶ Essentially, the dissent by Mauzy and Gonzalez concluded that the majority groundlessly created an exception applicable to the Texas homestead law.²¹⁷ The dissent argued that the majority's opinion violated the historically entrenched public policy of the state - "to protect homestead property from creditors' claims."²¹⁸ Arguing against the majority's

212. See *Inwood North Homeowners' Ass'n v. Harris*, 736 S.W.2d 632, 637 (Tex. 1987) (Mauzy, J., dissenting) (discussing the invalidity of all other liens on the homestead).

213. See *Texas Planned Community Act, Hearings on Tex. S.B. 699 Before the House Comm. on Bus. & Indus.*, 76th Leg., R.S. Tape 2, at 46 (Apr. 20, 1999) (copy on file with the *St. Mary's Law Journal*) (testimony of Harvella Jones, founder of the Homeowner's Advocate) (advocating the need to correct error in the law created by the Texas Supreme Court's decision in *Harris*).

214. See *Texas Planned Community Act, Hearings on Tex. S.B. 699 Before the House Comm. on Bus. & Indus.*, 76th Leg., R.S. Tape 2, at 62 (Apr. 20, 1999) (copy on file with the *St. Mary's Law Journal*) (testimony of Johnnie Jones) (voicing the need for a ballot vote to properly enact an amendment to the State Constitution); see also Julie Mason, *Lawmakers Unable to Restrain Homeowners' Associations*, HOUS. CHRON., May 28, 1999, at A37, 1999 WL 3992878 (reporting that "lawmakers heard stories from around the state of association boards meeting secretly, foreclosing on members' homes for just a few hundred dollars in unpaid dues").

215. See *Texas Planned Community Act, Hearings on Tex. S.B. 699 Before the House Comm. on Bus. & Indus.*, 76th Leg., R.S. Tape 2, at 69 (Apr. 20, 1999) (copy on file with the *St. Mary's Law Journal*) (testimony of Steve Thomas Solcich) (suggesting the use of garnishment).

216. See *Harris*, 736 S.W.2d at 637 (Mauzy, J., dissenting) (advocating the unconstitutionality of a POA's foreclosure on homestead property for the collection of unpaid assessments).

217. See Randy B. Warmbrodt, Case Note, *Inwood North Homeowners' Ass'n, Inc. v. Harris*, 736 S.W.2d 632 (Tex. 1987), 19 ST. MARY'S L.J. 435, 446-47 (1987) (discussing the Texas Constitution's prohibition against creating a lien on a homestead unless specifically provided).

218. *Harris*, 736 S.W.2d at 637, 638 (Mauzy, J., dissenting).

application of restrictive covenant principles to find a contractual lien superior to the claimed homestead right, the dissent pointed out the majority's flawed reliance on the decisions of other courts.²¹⁹ In part, Justice Mauzy noted that the constitutions of other states were either void of homestead protection provisions or expressly provided for a forced sale under the circumstances of "nonpayment of taxes or assessments."²²⁰ In summary, the dissent profoundly concluded: "the developer and/or the homeowners' association has no superior right in homestead property for property assessments."²²¹ Justice Mauzy stated to hold otherwise abrogates the Texas Constitution.²²²

In essence, the *Harris* decision pitted one public policy, the stability of service-providing POAs financed by all common owners, against another important policy, an individual's homestead protection. In *Harris*, the POA prevailed at the expense of homestead laws.²²³ Yet, as the *Harris* dissent fervently announced, the homestead, a "sacred constitutional protection should not be sacrificed on the altar of economic gain."²²⁴ Consequently, the Legislature should seize the opportunity to reevaluate foreclosure provisions embodied in proposals and acts without undue pressure by POA governing boards, their attorneys and professional management companies.²²⁵ This Comment now turns to a proposal that addresses the foreclosure issue.

VI. A PROPOSAL - A COMPREHENSIVE PLAN

Without doubt, Texas must expand the TRPOPA to embody the additional, comprehensive provisions of the TPCA to direct and control POA boards. Law makers initially acknowledged the need to regulate POAs

219. *Id.* at 639.

220. *See id.* at 639-40 (Mauzy, J., dissenting) (discussing the court's reliance on decisions out of Arkansas, Alabama, and Mississippi).

221. *Id.* at 641.

222. *See id.* at 641-42 (mandating that a voting procedure is required to amend the Constitution).

223. *See* Randy B. Warmbrodt, Case Note, *Real Property—Homestead—Covenant to Pay Assessments Enforced by Foreclosure Provision Is Superior to After-Acquired Homestead Exemption*, 19 ST. MARY'S L.J. 435, 453 (1987) (suggesting that the *Harris* court construed the homestead doctrine in such a way as "to give protection to common owners").

224. *Harris*, 736 S.W.2d at 642 (Mauzy, J., dissenting).

225. *See* TEX. SEN. STATE AFFAIRS COMM. MINUTES 3-5, 76th Leg., R.S. (Mar. 11, 1999) (incorporating into the committees' minutes pages 1-10 of the witness list for S.B. 699 which is comprised of numerous POA board members and attorneys, many representing the Community Association Institute); *see also* Julie Mason, *Lawmakers Unable to Restrain Homeowners' Associations*, HOUS. CHRON., May 28, 1999, at A37, 1999 WL 3992878 (quoting the director of a homeowner rights foundation who stated that S.B. 699 is deceptive, "catering to industry partisans and duping the homeowners").

with uniform laws in the 1970s and 1980s.²²⁶ Subsequently, the development of uniform laws for POAs continued to flourish.²²⁷ It appears the 76th Legislature availed itself to the guidelines afforded by the Uniform Planned Community Act ("UPCA") in its effort to pass the TPCA.²²⁸ However, the enactment of the TRPOPA, the most recent POA legislation, constitutes but a small step in developing a comprehensive plan.

A. *Necessary Additions and Modifications to Senate Bill 507*

1. Declarant Provisions

Although the TRPOPA is a commendable first-step, in future legislative sessions, Texans should advocate additions and modifications to the TRPOPA drawing upon existing uniform acts and the TPCA. Following incorporation of the TPCA's comprehensive provisions, the Legislature should address the various deficiencies in the TRPOPA. First, the TRPOPA is void of developer/declarant provisions.²²⁹ While providing

226. See Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 641 (1993) (discussing the history of the movement toward uniform acts governing common interest communities under the auspices of the National Conference of Commissioners on Uniform State Laws ("NCCUSL")).

227. See *id.* at 642-43 (outlining the development of various uniform acts). The Uniform Condominium Act ("UCA") of 1977 began a nine-year process to develop uniform laws applicable to this growing form of governance, followed by the Uniform Planned Community Act ("UPCA") in 1980. *Id.* at 642. In 1981, the Model Real Estate Cooperative Act ("MRECA") addressed cooperatives. *Id.* at 643. Finally, the Uniform Common Interest Ownership Act ("UCIOA"), adopted in 1982, provided uniformity and balance among the three forms of ownership. *Id.* As of this writing, the UPCA of 1980 has been substantially adopted by Pennsylvania and most recently, in 1999, by North Carolina. See generally UNIF. PLANNED CMTY. ACT OF 1980, 7B U.L.A. 1 (2000) (including a table of jurisdictions where the act was adopted). Additionally, the UCIOA of 1982 and 1994 has been substantially adopted by seven states including: Alaska, Colorado, Minnesota, Nevada, West Virginia, Connecticut, and Vermont. See generally UNIF. COMMON INTEREST OWNERSHIP ACT OF 1982, 7-II U.L.A. 1 (1997 & Supp. 2001) (referring to the table of jurisdictions where the act was adopted); UNIF. COMMON INTEREST OWNERSHIP ACT OF 1994, 7-I U.L.A. 471 (referring to the table of jurisdictions where the act was adopted) (1997 & Supp. 2001). Finally, the Uniform Law Commissioners' MRECA of 1981 has been substantially adopted in Virginia. See generally UNIF. LAW COMMISSIONERS' MODEL REAL ESTATE COOP. ACT OF 1981, 7B U.L.A. 312 (referring to the table of jurisdictions where the act was adopted) (2000).

228. Compare UNIF. PLANNED CMTY. ACT OF 1980, 7B U.L.A. 1 (2000) (providing five separate articles for guidance on the creation and management of planned communities, the protection of members, and administration and registration of such), with Tex. S.B. 699, 76th Leg., R.S. (1999), available at <http://www.capitol.state.tx.us> (last visited Oct. 10, 2001) (noting that the titles are nearly identical).

229. See generally Texas Residential Property Owners Protection Act, 77th Leg., R.S., ch. 926, § 1, 2001 Tex. Sess. Law Serv. 1751 (Vernon) (to be codified as an amendment to

numerous declarant provisions, the UPCA provides excellent guidance which affords the developer desirable flexibility, which is not in the current the TRPOPA.²³⁰ It is possible that the Texas Legislature is hesitant to incorporate these provisions for fear of stifling real estate development. Whatever the reason, concern lies in the vast number of early-stage and embryonic POAs that potentially remain in the governing hands of the developer until he sells a substantial number of lots.²³¹ Consequently, the TRPOPA should provide guidelines relative to the developer/declarant to ensure a balance of consideration to all parties affected by POA governance.

Specifically, the need exists for the developer to give the consumer adequate and accurate information relative to the anticipated size of the completed project and common area facilities. The Texas Legislature can also look to the uniform acts for guidance on these issues.²³² In part, the UPCA requires disclosure by the declarant of the POA's maximum number of units and "a description of any real estate which is or must become common elements and limited common elements."²³³ Additionally, the UPCA provides for adding unspecified land to the POA as long as the Declaration reserves the right to do so, and the additional "land does not exceed 10% of the real property that was originally described in the Dec-

TEX. PROP. CODE ANN. §§ 209.001-.011) (noting S.B. 699 reference that a POA board is limited in its ability to amend or extend the restrictive covenants as by proposed § 207.031).

230. See DENNIS P. ANDERSON & GURDON H. BUCK, ATTORNEYS AND LENDERS' GUIDE TO COMMON INTEREST OWNERSHIP ACTS: CONDOMINIUMS, COOPERATIVES, AND PLANNED COMMUNITIES 7 (1989) (describing the goals of the uniform acts as: (1) to provide uniformity in the legal characteristics of various ownership forms, (2) to clarify previous ambiguities, and (3) to provide greater flexibility).

231. See Clayton P. Gillette, *Mediating Institutions: Beyond the Public/Private Distinction - Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1383 (1994) (noting the developer's voting and restrictive covenant control until the transfer to the POA board); see also Patrick K. Hetrick, *Of "Private Governments" and the Regulation of Neighborhoods: The North Carolina Planned Community Act*, 22 CAMPBELL L. REV. 1, 60 (1999), WL 22 CAMPBLR 1 (indicating declarant control over POAs).

232. UNIF. PLANNED CMTY. ACT OF 1980 § 2-105, 7B U.L.A. 36-37 (2000) (enumerating the different elements required in declarations). The UPCA provision, "Contents of Declaration," provides for such information and would promote valuable consumer rights and further protection. See Patrick K. Hetrick, *Of "Private Governments" and the Regulation of Neighborhoods: The North Carolina Planned Community Act*, 22 CAMPBELL L. REV. 1, 2, 28 (1999), WL 22 CAMPBLR 1 (discussing the deficiencies of North Carolina's 1999 Planned Community Act). Consumer-oriented information required by the UPCA includes, in part, a statement concerning the maximum number of units that are reserved for development, the identification of all real estate designated as common or limited common elements and a description of the development rights reserved by the declarant. *Id.* at 28.

233. UNIF. PLANNED CMTY. ACT OF 1980 § 2-105(4), (6), 7B U.L.A. 36 (2000).

laration."²³⁴ In summary, these proposed additions afford the consumer better guarantees, since they will realize the marketed concept they purchased.

2. Minority Voting Protection

Secondly, when incorporating provisions of the TPCA, the TRPOPA should exclude the prohibition on cumulative voting to provide necessary safeguards for minority voters.²³⁵ Minority membership voting rights give *all* members more practical and substantial voting power, thereby mandating more member POA control and recourse.²³⁶ If the Legislature relies upon the UPCA, it will acknowledge that a prohibition of cumulative voting is non-existent in the UPCA.²³⁷ Specifically, these rights potentially give minority interest owners a voice in POA governance by providing a means for them to elect a minority director.²³⁸ Cumulative voting could assist in preventing an unfair and unequal distribution of power and create a greater sense of cooperation and a fairer playing field.

Furthermore, the TRPOPA must provide cumulative voting rights irrespective of possible contrary provisions contained in a POA's governing documents. The TRPOPA should guarantee cumulative voting rights even in light of POA bylaws that expressly prohibit cumulative voting.²³⁹ This is necessary because developers are not likely to have considered minority protection while drafting the original governing documents. Additionally, once a developer exits the POA, control transfers to a

234. See DENNIS P. ANDERSON & GURDON H. BUCK, ATTORNEYS AND LENDERS' GUIDE TO COMMON INTEREST OWNERSHIP ACTS: CONDOMINIUMS, COOPERATIVES, AND PLANNED COMMUNITIES 47 (1989) (describing the purposes of the "wild card" option as allowing for major boundary adjustments resulting from inaccuracies on original plats).

235. Tex. S.B. 699, 76th Leg., R.S.(1999), available at <http://www.capitol.state.tx.us> (last visited Oct. 10, 2001) (referring to § 207.065(c)).

236. See LARRY D. SODERQUIST ET AL., CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES, MATERIALS, PROBLEMS 292 (4th ed., Michie) (1997) (noting that cumulative voting gives those minority voters a chance to exercise their votes effectively).

237. UNIF. PLANNED CMTY. ACT OF 1980 § 3-110, 7B U.L.A. 83 (2000).

238. See LARRY D. SODERQUIST ET AL., CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES, MATERIALS, PROBLEMS 292-94 (4th ed., Michie) (1997) (discussing the procedure for straight voting and cumulative voting). Under straight voting, a member votes his allotted shares in blocks. *Id.* at 292. For example, in an election of three board members, each member is entitled to cast his full shares three times, once for each candidate favored by the member. *Id.* With cumulative voting, the same member is permitted to cast his full vote for a single candidate, allowing the member to potentially give a minority candidate three votes, rather than one. *Id.*

239. See Jim Slaughter, *Community Associations and the Parliamentarian*, NATIONAL PARLIAMENTARIAN: OFFICIAL PUBLICATION OF THE NATIONAL ASSOCIATION OF PARLIAMENTARIANS, at <http://www.parliamentarians.org/NP/NP2000q1ComAssoc.htm> (last visited Oct. 15, 2001) (stating that statutes often include procedures for cumulative voting).

board selected by a majority, which is unlikely to amend the bylaws for minority protection. Therefore, a genuine effort to provide a voice to minority positions requires cumulative voting.

3. Property Owners Association Records

Simply, the TRPOPA must provide members reasonable access to all POA records, without reference to the corresponding Texas Non-Profit Corporation Act. The UPCA clearly states that “[a]ll financial and other records shall be made reasonably available for examination by any unit owner and his authorized agents.”²⁴⁰ Yet, the TRPOPA provision injects the Texas Non-Profit Corporation Act requirement of a “proper purpose” prior to examining records.²⁴¹

Why should the Legislature introduce ambiguous and potentially manipulative language into this straightforward concept? It can only be suggested that the past testimony of POA boards, POA management companies, and POA attorneys drowned-out the voices of POA members regarding this issue.²⁴² Members with legitimate concerns over the misappropriation of POA funds should not have to rely on the courts to obtain the right to examine POA records.²⁴³ Moreover, a blanket, open record policy will instill the POA board with a sense of responsibility and accountability.

Additionally, the Legislature can turn to similar governing laws, both in and out of state, for guidance on this issue. For instance, the Texas Uniform Condominium Act (“TUCA”) requires that “[a]ll 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.”²⁴⁴ Furthermore, laws in other jurisdictions, such as North Carolina’s Planned Community Act (“NCPCA”), provide a further example of clear, simple language providing access to

240. UNIF. PLANNED CMTY. ACT OF 1980 § 3-118, 7B U.L.A. 96 (2000).

241. TEX. BUS. CORP. ACT. ANN. art. 1396-2.23 (Vernon 1997 & Supp. 2001); Texas Residential Property Owners Protection Act, 77th Leg., R.S., ch. 926, § 1, 2001 Tex. Sess. Law Serv. 1751, 1753 (Vernon) (to be codified as an amendment to TEX. PROP. CODE ANN. § 209.005(a)).

242. See *Texas Planned Community Act, Hearings on Tex. S.B. 699 Before the House Comm. on Bus. & Indus.*, 76th Leg., R.S. Tape 2, at 52 (Apr. 20, 1999) (copy on file with the *St. Mary's Law Journal*) (testimony of Sylvia Silva) (discussing the refusal of her daughter’s POA board to allow examination of the POA records).

243. See *id.* (indicating that her daughter’s third attorney finally reviewed the POA’s records in the judge’s chamber).

244. TEX. PROP. CODE ANN. § 82.114(b) (Vernon 1995) (noting that this section continues by excluding from examination the records and files of an association attorney).

POA records by members.²⁴⁵ Based upon the UPCA, the TUCA and the NCPA, the Legislature should delete the "proper use" language embodied in the TRPOPA, as open record laws should not be hindered at the discretion of controlling entities like POAs.

4. Reserve Provisions

As POAs age, a significant factor in their continued viability is sound financial planning for the repair or replacement of common area facilities and road systems.²⁴⁶ As many POA boards are inattentive of the need to set aside reserve funds, and since there is the potential for these financial burdens to fall on local governments following difficult financial times for POAs, legislative intervention is advisable.²⁴⁷ Consequently, the TRPOPA should require POAs to establish and maintain reasonable reserves. Furthermore, where a POAs seeks to make additional or special assessments, reserves will soften the financial impact upon its members.²⁴⁸ Thus, reserves provide members more financial flexibility.

Currently, the TRPOPA is void of any provision relative to reserves. The TPCA lends only minimal guidance addressing reserves under the Protection of Purchasers subchapter that requires a resale certificate to disclose "the amount of reserves, if any, for capital expenditures."²⁴⁹

245. See N.C. GEN. STAT. § 47F-3-118 (1999) (providing that "[a]ll financial and other records shall be made reasonably available for examination by any lot owner and the lot owner's authorized agents").

246. See James L. Winokur, *Critical Assessment: The Financial Role of Community Associations*, 38 SANTA CLARA L. REV. 1135, 1178-79 (1998) (commenting that the failure of numerous POAs to establish reserve funds requires legislative intervention to ensure a continuation of the quasi-public facilities upon which our society relies).

247. See ROBERT JAY DILGER, NEIGHBORHOOD POLITICS: RESIDENTIAL COMMUNITY ASSOCIATIONS IN AMERICAN GOVERNANCE 158-59 (1992) (commenting that many local governments enacted laws allowing them to provide services when POAs run into financial problems, although these governments are not required to do so); see also U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 6 (1989) (suggesting that when hard times hit POAs, local governments are left to step-in); James L. Winokur, *Critical Assessment: The Financial Role of Community Associations*, 38 SANTA CLARA L. REV. 1135, 1166 (1998) (noting that some POA members prefer to individually invest these funds, rather than pay them to a POA whose investments typically earn lower rates of return).

248. Cf. *Hodas v. Scenic Oaks Prop. Ass'n*, 21 S.W.3d 524, 528 (Tex. App.—San Antonio 2000, pet. denied) (involving a POA's harsh financial special assessment upon its members).

249. Tex. S.B. 699, 76th Leg., R.S., (1999), available at <http://www.capitol.state.tx.us> (last visited Oct. 10, 2001) (referring to proposed § 207.091(b)(6)); see also James L. Winokur, *Critical Assessment: The Financial Role of Community Associations*, 38 SANTA CLARA L. REV. 1135, 1168 & n.164 (1998) (noting Alaska's statute requiring disclosure of a reserve fund).

While the TUCA provides that a condominium “declaration may allow the accumulation of reserve funds for an unspecified period to provide for any anticipated expense,”²⁵⁰ the Legislature should look to other state actions concerning this important issue.²⁵¹ The Texas Legislature can gain valuable insight from an analysis of Illinois’s reserve legislation.²⁵²

The Illinois model effectively combines the “impetus to maintain reserves with flexibility for associations to explicitly elect a different financing strategy for maintaining common capital assets.”²⁵³ Reasonable reserves may hinge upon a number of factors including: (1) the estimated useful lives of the facilities, (2) the estimated replacement and repair costs, (3) the rates of return on the funds earmarked for reserves, (4) the financial impact on the unit owners, and (5) the association’s ability to finance these costs.²⁵⁴ The statute further provides for a waiver of the reserve requirement if supported by a majority vote and accompanied with a bold face disclosure on the POA’s financial statements.²⁵⁵

Although the Community Association Institute and other entities involved with POAs oppose statutes that mandate reserves, the Illinois model offers the needed flexibility to accommodate the varying needs existing in different POAs.²⁵⁶ As one commentator noted, allowing members who either see fit to have no reserve or establish grossly inadequate reserves to address this issue “‘in their *unfettered* discretion,’ as CAI’s policy asserts[,]” is illogical.²⁵⁷ Consequently, for the protection of both local governments and financially unsophisticated POA members, the mandatory establishment of reserve legislation is of paramount importance and deserves inclusion in future legislation.

5. Fiduciary Duty

Finally, and most importantly, to genuinely provide property owner protection, the TRPOPA must impose a fiduciary duty on POAs and their governing boards and officers. While neither the TRPOPA nor S.B.

250. TEX. PROP. CODE ANN. § 82.112(f) (Vernon 1995).

251. See James L. Winokur, *Critical Assessment: The Financial Role of Community Associations*, 38 SANTA CLARA L. REV. 1135, 1167-68 & n.164 (1998) (discussing reserve fund legislation enacted in Hawaii, Illinois, California and Alaska).

252. See *id.* at 1167-68 (explaining Illinois’s intermediate approach to the regulation of condominium reserves).

253. *Id.* at 1179-80.

254. See *id.* at 1168 (outlining factors that determine a reasonable reserve fund).

255. See *id.* (describing waiver requirements, including a statement that insulates the board from liability for inadequate reserves).

256. See James L. Winokur, *Critical Assessment: The Financial Role of Community Associations*, 38 SANTA CLARA L. REV. 1135, 1179 (1998) (noting the CAI’s opposition for legislation, yet urging POAs to budget reserves and disclose the information).

257. *Id.*

699 include duty language, the Legislature can gain necessary insight from Texas's own TUCA.²⁵⁸ Specifically, the TUCA applies a good-faith judgment standard while mandating that “[e]ach officer or member of the board is liable as a fiduciary of the unit owners for the officer’s or member’s acts or omissions.”²⁵⁹

However, a Community Association Institute representative asserts that the Texas Non-Profit Corporation Act already embodies such a duty.²⁶⁰ Yet, in promulgating general standards for directors, the Act only requires a director to discharge his duties “in good faith, with *ordinary care*, and in a manner the director reasonably believes to be in the best interest of the corporation.”²⁶¹ As such, this author suggests that Texas’s residential property owners deserve more. Considering the POA’s significant powers to impose the financial, economic, and psychological burden of foreclosure, a fiduciary duty is only rational and appropriate. Further, the Legislature can achieve an additional degree of consistency in the treatment of condominium owners and property owners by establishing a fiduciary duty for residential property owners’ protection.²⁶²

B. *Repeal of Foreclosure Right*

Returning to the sensitive foreclosure issue, this author stands with Representatives Dutton, Yarbrough, and Lindsay in their initial efforts to protect the homestead against forced sale relative to the settlement of an encumbrance for a member’s obligation to pay POA assessments.²⁶³ Al-

258. See TEX. PROP. CODE ANN. § 82.103(a) (Vernon 1995) (establishing a fiduciary relationship between the POA board members and unit owners).

259. *Id.*

260. See *The Texas Residential Property Owners Protection Act, Hearings on Tex. S.B. 507 Before the Senate Comm. on State Affairs, 77th Leg., R.S.* (Mar. 19, 2001) (copy on file with the *St. Mary's Law Journal*) (testimony of Connie Heyer) (attempting to clarify the fiduciary issue for the Senate committee).

261. TEX. BUS. CORP. ACT. ANN. art. 1396-2.28 (Vernon 1997) (emphasis added).

262. See *The Texas Residential Property Owners Protection Act, Hearings on Tex. S.B. 507 Before the Senate Comm. on State Affairs, 77th Leg., R.S.* (Mar. 19, 2001) (copy on file with the *St. Mary's Law Journal*) (testimony of Senator Carona) (reasoning that the prohibition on foreclosure sales relative to attorney’s fees and fines is consistent with what the Legislature did with the Texas Uniform Condominium Act).

263. See Tex. S.J. Res. 53, 77th Leg., R.S. (2001), available at <http://www.capitol.state.tx.us> (last visited Oct. 15, 2001) (“proposing a constitutional amendment permitting an encumbrance to be fixed on homestead property for an obligation to pay certain property owners’ association fees without permitting the forced sale of the homestead”); Tex. H.R.J. Res. 37, 76th Leg., R.S. (1999), available at <http://www.capitol.state.tx.us> (last visited Oct. 15, 2001) (“proposing a constitutional amendment permitting an encumbrance to be fixed on homestead property . . . without permitting the forced sale of the homestead”); Tex. H.R.J. Res. 46, 76th Leg., R.S. (1999), available at <http://www.capitol.state.tx.us> (last visited

though joint resolutions to eliminate the foreclosure remedy were unsuccessful, the very existence of such proposed legislation echoes the *Harris* dissent's concern over the foreclosure of homestead property for a POA assessment absent constitutional authority.²⁶⁴ As suggested by Justice Mauzy in *Harris*, trying the case ex parte resulted in an improper burial of the constitutional protection for the homestead against forced sale.²⁶⁵ Allowing the TRPOPA to codify the *Harris* decision without required constitutional action appears to nail the coffin shut without a proper hearing before the people.²⁶⁶

Concern lies in the potentially vast number of homeowners who remain uninformed about the TRPOPA and the *Harris* decision.²⁶⁷ Essentially, the TRPOPA's foreclosure provisions warrant repeal and a properly adopted constitutional amendment is needed to generate public debate and knowledge of the issue.²⁶⁸ Such a debate would draw out the various viewpoints for full discussion and better allow the issue to reach the far corners of the state.

It is quite possible that the debate will result in the majority deciding that a POA's ability to foreclose is necessary to ensure the continued viability of POAs across Texas, as voiced by a POA vice president at a committee hearing on S.B. 699.²⁶⁹ Conversely, Texans might view the discussion of other forms of remedy, such as the garnishing of wages and/

Oct. 15, 2001) ("proposing a constitutional amendment prohibiting an encumbrance to be fixed on . . . homestead property for an obligation to pay certain property owners' association fees").

264. See *Inwood N. Homeowners' Ass'n v. Harris*, 736 S.W.2d 632, 637 (Tex. 1987) (Mauzy, J., dissenting) (stating that the majority "created a remedy in the name of 'public policy' in direct contravention of the Constitution of the State").

265. See *id.* at 641-42 (discussing the strict construction of the Texas Constitution requires a proposed amendment to pass by at least 100 members of the House of Representatives and at least twenty-one votes of the Senate, and a majority of all the people).

266. See *id.* at 642 (articulating the need for a respectful hearing before our "precious and cherished rights and liberties . . . are snatched from us and succeeding generations").

267. See Thom Marshall, *Legal Fees Nearly Cost Man a Home*, HOUS. CHRON., Oct. 13, 2000, at A33, 2000 WL 24518384 (stating that homeowners, generally speaking, are not aware of the foreclosure damages associated with POAs).

268. This author suggests that the same procedure should be followed as that of the constitutional amendment related to home equity loans. See Richard A. Opper, Jr., *Boon or Boondoggle? Home Equity Loan Proposal a Hot Issue in Texas*, DALLAS MORNING NEWS, Oct. 22, 1997, at 1A, 1997 WL 11529688 (noting Texan votes to amend the Texas Constitution "to end the state's ban on home equity lending, a prohibition as old as the state itself and unique in the United States").

269. See *Texas Planned Community Act, Hearings on Tex. S.B. 699 Before the House Comm. on Bus. & Indus.*, 76th Leg., R.S. Tape 1, at 65 (Apr. 20, 1999) (copy on file with the *St. Mary's Law Journal*) (testimony of Sandy Denton) (suggesting that a constant cash flow is necessary to provide services).

or tax refunds, as an equally viable, yet more compassionate means of providing the necessary revenues for POAs.²⁷⁰ Considering Texas's historically conservative position relative to the homestead, a new homestead exception is unlikely. However, the debate and decisions on the appropriate remedy must be placed in the hands of all Texans.

VII. CONCLUSION

The appeal of POAs to homeowners, developers, and local governments continues to fuel their growth, thus increasing the number of people affected by the free reign of POAs. Consequently, abuse by POA boards is on the increase and concern over unfettered POA activities is apparent. In large part, POAs stand in the shoes of local governments, which should prompt the Legislature to establish greater restrictions on POA power.²⁷¹

In response, the Texas Legislature must expand the TRPOPA to provide a more comprehensive, one-stop shopping plan for the governance of POAs. The time for free-reign has passed. Accordingly, an analysis of the TRPOPA reveals several significant deficiencies that the Legislature should address in future sessions.

First, a comprehensive plan must include the developer, the initial creator of the POA. Thus, provisions relating to the addition of land to the POA and assurances concerning the maximum number of units and common area facilities are essential to protect the consumer. Second, the protection of the minority's voice is necessary and requires cumulative voting. Possible minority views can form because of a developer's indiscriminate ability to add land greater than the original property resulting in a fractionation within the POA. Third, POA members must have a clear and unambiguous right to access POA records. To provide this right, the Legislature must eliminate all references to a "proper purpose."

270. See *Texas Planned Community Act, Hearings on Tex. S.B. 699 Before the House Comm. on Bus. & Indus.*, 76th Leg., R.S. Tape 2, at 69-70 (Apr. 20, 1999) (copy on file with the *St. Mary's Law Journal*) (testimony of Steve Thomas Solcich) (commenting that foreclosure is an unnecessary remedy with other viable remedies available).

271. See ROBERT JAY DILGER, *NEIGHBORHOOD POLITICS: RESIDENTIAL COMMUNITY ASSOCIATIONS IN AMERICAN GOVERNANCE* 158 (1992) (commenting that social scientists advocate governmental regulation of POAs to ensure all members the ability to attend meetings, to influence decisions and to keep its board accountable to their desires). Such governmental regulation should include: (1) notification of general and board meetings, (2) prohibition of closed meetings, (3) voting based "on the one person, one vote principle," and (4) disclosure of POA governing documents, including mandated reserve studies, to all current and prospective purchasers. *Id.*; see also Shirley L. Mays, *Privatization of Municipal Services: A Contagion in the Body Politic*, 34 DUQ. L. REV. 41, 59 (1995) (noting that when decision-making and policy-setting is left in private hands, money exalts over individual freedoms).

2002]

COMMENT

365

Fourth, Texas's comprehensive plan should require the establishment and maintenance of appropriate reserves. This is necessary to eliminate the shift in the financial burdens associated with infrastructure costs to municipalities when POAs run into financial difficulty. Fifth, a clearly defined fiduciary duty owed by POA board members to their membership is essential for residential property owners' protection. Finally, the issue of the POA's foreclosure right against the homestead for the nonpayment of assessments must be presented to the voters according to constitutional amendment procedures. As such, Texas's cherished homestead laws relative to this issue deserve widespread debate prior to enacting legislation eradicating homestead rights. In summary, the Texas Legislature must address these issues to achieve a balanced and constitutionally sound plan to govern POAs – one within the true meaning and spirit of property owners' protection.

