

A Reprint from *Tierra Grande*

POA Legislation Protects Buyers

By Judon Fambrough

Many residential subdivisions are governed by property owners' associations (POAs), sometimes referred to as homeowners' associations. These associations have power to govern and enforce the guidelines outlined in their bylaws, deed restrictions and other instruments. Most can levy assessments.

Prior to 1999, purchasing a lot or home within a POA-governed residential subdivision presented potential financial problems. In some cases, after buying property, buyers discovered that delinquent assessments existed against the property. In other instances, the POA's financial problems imposed financial burdens on the buyer.

Mandatory disclosure of the problems was not required. Also, because the issues were not recorded in the deed records, title companies were unaware of them at closing. Although the buyers could sue the sellers for nondisclosure, doing so would not protect the property from foreclosure or from being burdened with liens.

To remedy these problems, the 76th Texas Legislature added two statutes to the property code. The first requires mandatory disclosure (see "Statutory Disclosure," next page) whenever the property owner is subject to membership

in a POA (Section 5.012). The second requires subdivisions governed by POAs that are entitled to levy regular or special assessments to deliver, among other things, a "resale certificate" to the owner upon request from the owner, owner's agent or title company (Chapter 207).

Real estate practitioners need to be aware of the statutory requirements and how they can benefit the buyer and possibly the seller. Some but not all of the statutory requirements appear in the promulgated contract forms.

Mandatory Disclosure

Effective Jan. 1, 2000, anyone selling no more than one dwelling unit subject to membership in a POA must give the purchaser written notice "substantially similar" to the one in Section 5.012.

The notice may be given separately, placed in the contract or included with other notices delivered to the purchaser

before entering a binding agreement. If placed in the contract or included with other notices, the title, street address, date of the notice and purchaser's signature may be omitted but not the name of the residential community.

TREC's promulgated "One-to-Four Family Residential Contract" (Form 20-7) attempts to satisfy the 5.012 requirement in Paragraph E(2). However, real estate practitioners may wish to insert the name of the residential community to ensure compliance.

Form 20-7 urges real estate practitioners to attach the "Addendum for Property Subject to Mandatory Membership in an Owners' Association," Form 36-5 (the addendum), "for buyers concerned about these matters." This form is discussed later.

The disclosure requirements in Section 5.012 do not apply to a transfer:

- under a court order or foreclosure sale;
- by a trustee in bankruptcy;
- to a mortgagee by a mortgagor or successor in interest or to a beneficiary of a deed of trust by a trustor or successor in interest;
- by a mortgagee or a beneficiary under a deed of trust who has acquired the land at a sale conducted under a power of sale under a deed of trust or a sale under a court-ordered foreclosure or has acquired the land by a deed in lieu of foreclosure;

- by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship or trust;
- from one co-owner to another co-owner of an undivided interest in the real property;
- to a spouse or a person in the lineal line of consanguinity of the seller;
- to or from a governmental entity;
- of only a mineral interest, leasehold interest, or security interest; or
- of a real property interest in a condominium.

The purchaser's sole remedy for failure to receive notice before entering a binding contract is the right to terminate. Termination must occur within seven days after receiving the notice but no later than the date the transfer occurs as stated in the contract, whichever occurs first.

Subdivision Information

Chapter 207 of the property code, effective Sept. 1, 1999, comes into play when the subdivision's POA has the power to levy regular or special assessments. The subdivision, acting through its POA, must provide specific information when requested by the owner, owner's agent or title company. A pending sale is not required, but generally it triggers the request. The TREC addendum mentioned earlier appears to track the statutory requirements through the initial request for the information. For reasons explained later, the buyer or the buyer's attorney may wish to draft separate provisions.

The heart of the chapter, Section 207.003, requires the POA to provide specific information after receiving a written request from the owner, the owner's agent or the title company. The purchaser or his or her agent cannot make the request but may be the recipient. The POA must provide the following information, referred to as the "subdivision information" in both the statute and the addendum:

- current copy of the subdivision's restrictions,
- current copy of the bylaws and rules of the POA and
- resale certificate containing 15 specific items.

TREC Form 37-3 reproduces this required information.

The resale certificate must be signed and dated by the POA's officer or authorized

agent. Typing or printing the officer's or agent's name on the form does not appear to meet the statutory definition of an effective resale certificate (Section 207.001). The POA may charge a reasonable fee to assemble, copy and deliver the information, and to prepare and deliver an update.

The POA must deliver the information to the person specified in the written request (most likely the owner) in person, by mail or by an alternative method specified in the written request. If no person or location is specified, the POA need not comply.

The POA is not required to inspect the property before issuing the resale certificate or an update unless required by the subdivision's dedicatory instrument, which is the governing instrument covering the establishment, maintenance

The subdivision, acting through its POA, must provide specific information when requested by the owner, owner's agent or title company.

and operation of the residential subdivision or any similar planned development.

Timely Information Delivery

According to the TREC addendum, the timely delivery of the subdivision information to the buyer (within the time inserted in the blank) gives the buyer the right to terminate the contract for any reason within seven days after receipt or before closing, whichever occurs first. The buyer would be entitled to a full refund of the earnest money.

If the information is delivered, the statute mandates that the POA may not deny the validity of any statement placed in the resale certificate. Any liens held by the POA against the property and not disclosed in the resale certificate terminate automatically. The buyer, the buyer's agent, lender and title company

(but not the seller) are released from any debts or claims held by the POA against the property that are not disclosed in the certificate.

Failure to Deliver Subdivision Information

The TREC addendum gives the buyer the right to terminate the contract at any time prior to closing and recover the earnest money if the information is not delivered in a timely manner. The addendum gives the owner no remedies for the POA's non-performance, but the statute does. The addendum appears to require only one request for the subdivision information while the statute discusses two.

The owner has no statutory recourse until two written requests are tendered for the subdivision information. If the POA fails to deliver the requested information within ten days after receiving the first request, the owner, agent or title company may submit another either by certified mail, return receipt requested, or in person. If the POA does not respond before seven days after the second request is mailed or personally delivered, the owner may judicially secure one or any combination of the following:

- court order directing the POA to furnish the required information,
- judgment against the POA for no more than \$500,
- judgment against the POA for court costs and attorney fees or
- judgment authorizing the owner or its assignee to deduct the amounts awarded under the second and third items mentioned above from future regular or special assessments.

The owner's agent, title company and officer or agent of the POA (but not the seller) are not liable to the buyer for a delay or failure to deliver the subdivision information.

New Rules Regarding Updating Resale Certificates (2009 Amendment)

Effective Sept. 1, 2009, Section 207.003 was amended to address the subdivision's duty to update the information contained in a prior resale certificate.

Not later than seven days after receiving a written request, the POA must deliver an updated resale certificate containing the following information:

- A statement of whether the POA waives its right to exercise its

power under a right of first refusal or other restraint on the property if any exists.

- The status of any unpaid assessments, dues or other payments attributable to the owner's property.
- Any changes that may have occurred to the information initially provided in the prior resale certificate.

The statute qualified the duty of the POA to provide this information to some degree. First, the request for the update must come from the party who made the initial request for the original resale certificate. Second, the request must be made by this party within 180 days after the original resale certificate was issued. Third, the POA may charge a reasonable fee to prepare and deliver this information.

The failure of the POA to comply with this request within the seven-day period parallels the same remedies for failing to provide the initial resale certificate within seven days as outlined in this article.

Affidavit Preparation, Extinguishment of Debt

In addition to the legal remedies mentioned previously, the statute provides a unique remedy (Section 207.004[c]). If the information is not received before seven days after the second request is sent or delivered, the owner may prepare and present to the purchaser an affidavit stating that the owner, owner's agent or title company made two written requests for the subdivision information and the POA did not respond.

The affidavit releases the buyer, lender and title company (but not the owner) from liability for:

- money owed to the POA and unpaid on the preparation date of the affidavit, and
- debts owed to or claimed by the POA that accrued before the preparation date of the affidavit.

Furthermore, any liens held by the POA against the property to secure the delinquent debts and claims terminate automatically on the preparation date.

The preparation of the affidavit primarily benefits the buyer, lender and title company. To some degree, it benefits the owner by eliminating any liens held by the POA against the property but no personal liability. The affidavit could forestall a pending foreclosure by the POA by eliminating the underlying lien even though the property never sells.

By eliminating the liens, the POA loses its security to collect against the property. Thus, the owner may be able to settle the debt for a reduced amount at closing while he or she has money in hand.

Recommendations for Purchasers

At times, buyers may wish to purchase the property if the existing POA debts and liens can be eliminated. This option does not appear possible using the TREC addendum. Consequently, the buyer or the buyer's attorney may wish to prepare a separate document with the following provisions.

- The owner must submit a written request to the POA for the subdivision information immediately upon entering the sales contract. The request must state the person to whom and the place where the information will be delivered. The POA must respond using a completed TREC Form 37-3.
- If the information is not made available within ten days after the POA receives the initial request, the owner must immediately tender another. If the information is not forthcoming before seven days after that second written request is sent by certified mail or delivered personally, the owner must prepare an affidavit, in recordable form, in compliance with the Texas Property Code (Section 207.004[b][2]). The affidavit, containing a legal description of the property, must be signed before a notary and delivered to the buyer. The affidavit must show

the preparation date as well as the signature date.

- The buyer may terminate the contract within seven days after receiving the affidavit and be entitled to a full refund of the earnest money. Alternatively, the buyer may record the affidavit, give a copy to the title company and proceed to closing.
- Time is of the essence for compliance with the provisions.

These provisions extend the contract by seven days at most beyond the provisions in the TREC addendum. At the same time, they give the buyer the option of going forward with the contract when the POA fails to provide the information after the second request. The seller's preparation and presentation of the affidavit eliminates all claims, debts and liens held by the POA against the property. It does not eliminate any of the seller's personal liability.

The seller benefits by eliminating the existing POA liens even if the buyer elects to terminate the contract after the preparation of the affidavit. If the buyer proceeds to closing, any savings based on the owner's settlement with the POA could reduce the sales price accordingly. ♣

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THE TAKEAWAY

Two new property code statutes address issues relating to property owners' associations (POAs). One requires mandatory disclosure when a property owner is a member of a POA. The second requires POAs of subdivisions that have the power to levy assessments to provide information including subdivision restrictions, bylaws and a resale certificate to the owner, owner's agent or title company.

Statutory Disclosure Required by Section 5.012, Property Code

As a purchaser of property in the residential community in which this property is located, you are obligated to be a member of a property owners' association. Restrictive covenants governing the use and occupancy of the property and a dedicatory instrument governing the establishment, maintenance, and operation of this residential community have been or will be recorded in the Real Property Records of the county in which the property is located. Copies of the restrictive covenants and dedicatory instrument may be obtained from the county clerk.

NOTICE OF MEMBERSHIP IN PROPERTY OWNERS' ASSOCIATION CONCERNING THE PROPERTY
AT

(street address) (name of residential community)

You are obligated to pay assessments to the property owners' association. The amount of the assessments is subject to change. Your failure to pay the assessments could result in a lien on and the foreclosure of your property.

Date: _____

Signature of Purchaser



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Tierra Grande (ISSN 1070-0234) is published quarterly by the Real Estate Center at Texas A&M University, College Station, Texas 77843-2115. Subscriptions are free to Texas real estate licensees. Other subscribers, \$20 per year. Views expressed are those of the authors and do not imply endorsement by the Real Estate Center, Mays Business School or Texas A&M University. The Texas A&M University System serves people of all ages, regardless of socioeconomic level, race, color, sex, religion, disability or national origin. Photography/Illustrations: Real Estate Center files, p. 1.