

## OVERVIEW OF POA SPECIFIC 2013 TEXAS LEGISLATION

Prepared By:

Roy D. Hailey



8901 GAYLORD DRIVE, SUITE 100, HOUSTON, TEXAS 77024  
TELEPHONE 713/780-4135, FAX 713/780-4549  
[WWW.BUTLERHAILEY.COM](http://WWW.BUTLERHAILEY.COM)

For:

Texas Community Association Advocates

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### **CAUTION!!!**

This handout is intended as an overview of the major new POA specific laws (from the 83<sup>rd</sup> Texas Legislative Session) and their effective dates. It is not comprehensive. Not ALL new laws that may impact POAs are included. It is not intended to replace the advice of competent legal counsel or to address a particular situation. Legal knowledge may be required for the proper use of this material. Contact your POA's attorney for specific legal questions and guidance.

# OVERVIEW OF POA SPECIFIC 2013 TEXAS LEGISLATION

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- POA = Property Owners Association ▪ C = Condos ▪ SF = Single Family (all POAs that are not condos)
- TUCA = Texas Uniform Condominium Act (Chapt. 82, Texas Property Code)

SUBJECT	TEX. PROP. CODE (BILL NO.)	PROP. TYPE	EFF. DATE
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## 1.0 LAND USE

1.1 <u>Xeriscape Landscaping</u>	§202.007(a)(4), (d)(8), (d-1) (SB 198)	SF & C	9/1/13
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**Description:** A POA may not include or enforce a provision in a dedicatory instrument that prohibits or restricts an owner from using drought-resistant landscaping or water-conserving natural turf (collectively “xeriscape”), except as permitted by this new law.

**Specifics:**

- A POA may require an owner to submit a detailed description or a plan for the installation of the water-resistant landscaping or water-conserving natural turf to ensure “to the extent practicable, maximum aesthetic compatibility with other landscaping in the subdivision.”
- HOWEVER, a POA may not unreasonably deny or withhold approval or unreasonably determine the proposed installation is aesthetically incompatible with the other landscaping in the subdivision.

**Action Item:** Review existing POA dedicatory instruments and POA’s geographics (e.g. location of condo units, size of lots, setbacks, etc.) to determine need for rules. Unless a POA has rules that govern xeriscape, the POA may not be able to restrict xeriscape. In most cases, rules are recommended that (at a minimum) require prior submission and approval.

1.2 <u>Flagpoles</u>	§202.001(5), 202.011(b)&(c) (HB 680)	SF & C	6/14/13
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**Description:** A POA may not include or enforce a provision in a dedicatory instrument that prohibits or restricts an owner from installing a flagpole in the owner’s front yard to display flags of the United States, Texas or a branch of the military, except as permitted.

**Specifics:**

- Defines “front yard” as “a yard within a lot having a front building setback line with a setback of not less than 15 feet extending the full width of the lot between the front lot line and the front building setback line.”
- If an owner does not have a front yard (as defined), the owner may attach the flagpole to the front of the owner’s residential structure (if that portion of the residential structure is not maintained by the POA).

**Action Item:** Review existing POA dedicatory instruments and POA’s geographics (e.g. location of condo units, size of lots, setbacks, etc.) to determine need for flagpole rules. Unless POA has rules that comply with the new law, POA may not be able to dictate the location of flagpoles, because prior approval is not specifically mentioned (as in SB 198 and HB 35). In most cases, flagpole rules (or possible amendments to same) are recommended.

1.3 <u>Adjacent Lots</u>	§209.015 (HB 35)	SF	6/14/13
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**Description:** A POA may not adopt or enforce a provision in a dedicatory instrument that prohibits or restricts an owner of a lot upon which a residence is located from using an adjacent lot for “residential purposes”, except as permitted.

**Specifics:**

- An “adjacent lot” is defined a contiguous lot that (i) fronts on the same street, or (ii) is located either to the side or back of a corner lot.
- “Residential purposes” is defined as the location on the lot of any building, structure, or other improvement customarily appurtenant to a residence (versus a business use) and includes a garage, sidewalk, driveway, parking area, children’s swing or playscape, fence, septic system, swimming pool, utility line and water wall and if otherwise specifically permitted by the dedicatory instrument the parking or storing of a recreational vehicle.
- Prior approval of the POA or its ACC (as applicable) is required.
- For subsequent sales, the lots must be sold together or the adjacent lot returned to its original condition.

**Action Item:** Review existing POA dedicatory instruments and POA’s geographics (e.g. location of condo units, size of lots, setbacks, etc.) to determine need for rules.

2.0

**POA GOVERNANCE**

2.1	<b><u>Contracts with Board Members</u></b>	§209.002(4-a) & §209.0052 (HB 503)	SF	9/1/13
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**Description:** A POA board may not enter into a contract with a board member, relative of a board member or an entity in which the board member or relative owns more than 51%, except under certain circumstances.

**Specifics:**

- Not applicable during the development period, as defined, which is a “period stated in a declaration during which a declarant reserves: (a) a right to facilitate the development, construction, and marketing of the subdivision; and (b) a right to direct the size, shape, and composition of the subdivision.”
- Applies to contracts with:
  - Board members;
  - persons related within the 3<sup>rd</sup> degree by consanguinity or affinity to the board member;
  - a company in which a current board member has a financial interest in at least 51% of profits, or;
  - a company in which a person related to a current board member within the 3<sup>rd</sup> degree by consanguinity or affinity has a financial interest in at least 51% of profits.
- A POA may enter into an enforceable contract with one of these parties ONLY IF:
  - one of these parties bids on the contract, AND the POA has received at least 2 other bids from persons not associated with one of the parties (if reasonably available in the community);
  - the board member is not:
    - given access to the other bids,
    - does not participate in any board discussions regarding the contract, and
    - does not vote on the award of the contract;
  - the material facts regarding the relationship or interest are disclosed to or known by the board and the board, in good faith with ordinary care, authorizes the contract by an affirmative vote of a majority of the board members who do not have an interest governed by this subsection, and
  - the board certifies that the other requirements of this subsection have been satisfied by a resolution approved by the affirmative vote of a majority of the board members who do not have an interest governed by this subsection.

**Action Item:** Ensure all board members are aware of this new procedure, prior to entertaining any bids on POA work from an interested board member, board member’s relative or an entity in which the board member or relative owns more than 51% of the entity that is bidding.

2.2	<b>BOARD VACANCIES</b>	§209.00593(a) (HB 3176)	SF	6/14/13
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**Description:** A POA board may appoint a person to fill a vacant position on the board for any reason.

**Specifics:**

- Previously a vacant board member position on a board could only be filled by the board if it was caused by resignation, death or disability.
- Now, a board can appoint to a board member vacancy for any reason for the remainder of the unexpired term.
- HOWEVER, if a board member’s term has expired that board member must be elected (not appointed).

**Action Item:** In cases of a vacancy on the board, understand who may be appointed and under what circumstances.

3.0

**MANAGEMENT CERTIFICATES**

3.1	<b><u>Single Family POAs</u></b>	§209.004(a-1) (HB 3800)	SF	9/1/13
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**Description:** All county clerks must record and index POA management certificates in the county's real property records as "Property Owners' Association Management Certificates".

**Specifics:** New management certificates must be filed on or after 9/1/13 and no later than 1/1/14.

**Action Item:** Ensure a new management certificate is prepared and filed on or after 9/1/13 and on or before 1/1/14.

3.2	<b><u>Condominium POAs</u></b>	§82.116(a-1)&(a-2) (HB 2075)	C	9/1/13
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**Description:** All county clerks must record and index POA management certificates in the county's real property records as "Condominium Association Management Certificates".

**Specifics:** New management certificates must be filed on or after 9/1/13 and no later than 1/1/14.

**Action Item:** Ensure a new management certificate is prepared and filed on or after 9/1/13 and on or before 1/1/14.

4.0

**OTHER CONDOMINIUM POA SPECIFIC NEW LAWS**

4.1	<b><u>Fining</u></b>	§82.102(a)(12) (HB2075)	C	9/1/13
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**Description:** Notice and opportunity to be heard prior to fining must be in compliance with Section 82.102(d).

**Specifics:** Section 82.102(d) requires (i) the notice to: describe the violation; state the amount of the fine; advise the owner has 30 days to request a hearing before the board to contest the fine, and (ii) an owner be given a reasonable time to cure the violation to avoid the fine, unless the owner has been given notice to cure a similar violation in the preceding 12 months.

**Action Item:** Review notices to owners regarding fines to ensure compliance.

4.2	<b><u>Ability to Borrow Money</u></b>	§82.102(f)&(g) (HB 2075)	C	9/1/13
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**Description:** Provides a statutory procedure for condominium POAs to borrow money and secure same with its right to future income (assessment).

**Specifics:**

- Previously, the right to assign a condominium POA's lien rights and right to future income (assessments) was required to be in the declaration.
- Now, that right is provided by Section 82.102(g) of TUCA.
- If the association's dedicatory instrument requires as vote of members, that process must be followed, however, the Board may determine how the vote is to be taken, either:
  - by written consent, or
  - electronically, by absentee ballot or in person or by proxy at a meeting.
- If the vote required by the dedicatory instrument is higher than 67% of all voting interests, the threshold will be 67%, if lower, then the lower percentage.

**Action Item:** Prior to borrowing money, review dedicatory instruments to ensure compliance.

4.3 <b>Insurance</b>	§82.111(c), (i)-(m) (HB2075)	C	9/1/13
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**Description:** Improves upon the insurance provisions in TUCA.

**Specifics:**

- Boards may determine "commercially reasonable" deductibles.
- Previously, the owners of every unit and limited common element that were damaged or destroyed (in addition to 80% of every owner) had to agree not to rebuild.
- Now, only the 80% must agree.
- Voting not to rebuild may be accomplished electronically or by written ballot (if no meeting called), or in person or by proxy if a meeting is called.
- Costs of repair or replacement in excess of insurance proceeds is a common expense.
- If the cost to repair is less than the deductible, the party who would be responsible for the repair (absent insurance) will be responsible for the repair.
- If costs to repair exceed the amount of insurance coverage:
  - the allocation of the expense in the dedicatory instrument will control;
  - if the dedicatory instrument is silent:
    - (i) the board by resolution may determine the payment (which resolution is a dedicatory instrument that must be recorded in the county's real property records); or
    - (ii) if the board does not approve a resolution the costs are a common expense.
- If damages are due wholly or partly to the act or omission of an owner or the owner's guest or invitee, the association can assess the expense in excess of insurance proceeds against the owner's unit.

**Action Item:** Review dedicatory instruments to ensure compliance and make determination if any amendments are necessary to bring same into compliance.

4.4 <b>Right of Redemption</b>	§82.113(g) (HB2075)	C	9/1/13
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**Description:** The right of redemption in a condominium POA foreclosure is extended to foreclosures where the unit is purchased by a 3<sup>rd</sup> party.

**Specifics:**

- Previously, an owner had a 90 day right of redemption after a condominium POA foreclosure, ONLY if the condominium POA purchased the property.
- Now, the 90 day right of redemption applies regardless of who purchases the unit.

**Action Item:** Be aware of expanded right of redemption.