REQUEST THAT CERTAIN PROPOSED AMENDMENTS BE PLACED ON THE 2018 ANNUAL MEMBERS MEETING AGENDA FOR A VOTE[1]
AND
SUMMARY OF MAJOR REASONS THE 2013 BYLAWS ARE ILLEGAL[2]

TO: PIPOA Board
FM: Karl L. Rubinstein
DATE: November 8, 2017

Introduction.

I provide this discussion in the hope you will not only study it, but will provide it to any attorney from whom you seek a second opinion about the legality of the 2013 Bylaws. As you know, I retained a well-qualified and highly regarded attorney who wrote to you with essentially the same opinions I have previously provided. Additionally, I spoke to other well-qualified attorneys, including corporate attorneys, who also agreed with these views. These attorneys were completely free to state their honest opinions and the reason their opinions and mine coincide is we all understand the truth, which is that the 2013 "Amendments" are invalid.

The Issues.

In September 2013, the PIPOA Board improperly "amended" the then existing 1994 Bylaws to delete the first part of Section 6 and to add the following sentence to a new Section 7 of what became the putative 2013 Bylaws: "These bylaws additionally may be amended at any regular or special meeting of the Board of Directors, after notice of such meeting has been provided to the membership…".

This attempted Bylaw amendment is invalid for numerous reasons, most of which I have discussed in a series of Essays, copies of which I can provide. Chief among these are the following:

1. **The lawfully enacted 1994 Bylaws expressly provided only the Voting Members could amend the Bylaws. This provision was and is consistent with controlling law.**

The PIPOA, via its attorney, asserts that the provisions of Texas Business Organizations Code ("BOC") 22.102, which became effective in 2010, not only authorized, but mandated, the Bylaw amendment giving the Board the power to amend. But this is clearly untrue. This statute reads:

[1] See attached Notice of Motion and Resolution to Amend Bylaws and Proxy Ballot
[2]Because the 2017 Bylaws rest on the authority of the 2013 amendment, they are also invalid. These are also invalid because the version filed with the County Clerk did not properly reflect the actual Bylaws supposedly adopted.

*Sec. 22.102. BYLAWS. (a) The **initial** bylaws of a corporation shall be adopted by the corporation's board of directors or, if the management of the corporation is vested in the corporation's members, by the members.*

*(b) The **bylaws may contain provisions for the regulation and management of the affairs of the corporation that are consistent with law** and the certificate of formation.*

(c) The board of directors may amend or repeal the bylaws, or adopt new bylaws, unless:

(1) this chapter or the corporation's certificate of formation wholly or partly reserves the power exclusively to the corporation's members;

(2) the management of the corporation is vested in the corporation's members; or

(3) in amending, repealing, or adopting a bylaw, the members expressly provide that the board of directors may not amend or repeal the bylaw.

By its very terms, this statute applies to the "initial" bylaws and sets out what the "default" rule is, meaning this would be the rule if the Bylaws were silent on the subject of who has the power to amend Bylaws. In 2013, the Texas Supreme Court ruled on this exact issue in the Case of Masterson V. Diocese[3]

*[W]hen Good Shepherd incorporated in 1974 the Non-Profit Corporations Act provided that "[t]he power to alter, amend, or repeal the by-laws or to adopt new by-laws shall be vested in the members, if any, but such power may be delegated by the members to the board of directors." See Tex. Rev. Civ. Stat. art. 1396-2.09. The current statutory scheme changes the **default rule** on who is authorized to amend the bylaws…. See Tex. Bus. Orgs. Code § 3.009; Tex. Rev. Civ. Stat. art. 1396-2.09 (**current version at Tex. Bus. Orgs. Code § 22.102**) ("The power to alter, amend, or repeal the by-laws or to adopt new by-laws shall be vested in the members . . . ").*

The Bylaws in the Masterson case contained the exact language of the PIPOA 1994 Bylaws (which was authorized by the prior statutes) and the Supreme Court stated clearly that BOC 22.102) is the "default rule," meaning the rule to be applied if the PIPOA Bylaws were silent on the subject. But they were not silent.

Therefore, BOC 22.102 does not permit the Board to amend prior Bylaws that already stated only the Voting Members could amend the Bylaws. It is absurd to argue that the Board can shoehorn in a power expressly withheld from them by the existing 1994 Bylaws just because the language of the existing Bylaws doesn't contain the precise text of 22.102 (c) (3) when the existing language is to the exact same effect, and the Texas Supreme court has ruled 22.102 contains only the default rule.

[3] 422 SW3rd 594 (Tex. 2013)

Further, BOC section 22.102 (b) clearly states the Bylaws may contain provisions **consistent with law.** "Consistent" doesn't mean identical, it means not contrary to. And Section 6 of the 1994 Bylaws was certainly consistent with the existing law because the essential meaning of its text is exactly the same as 22.102 (c) (3): The Voting Members can amend, and the Board cannot. This explains one reason why the Supreme Court determined Section 22.102 only stated the default position, meaning it applies only if the existing Bylaws are silent.

This position is supported by Gregory S. Cagle in his thoroughly researched and documented treatise, Texas Homeowners Association Law 3rd Ed, (2017) Two Harbors Press, ISBN 13:978-1-63413-989-2. where at page 132, he states:

> *[certain] provisions of the Texas Non Profit Corporation law [BOC Chapter 22] serve as "gap-fillers," or default rules, that apply only in the event a Nonprofit ('s) …Governing Documents fail to address an applicable issue…**In such instances the particular statutory provision is not applicable if the substance of such provision is already addressed in the…governing documents."*** (bolding added)

Note, like the Supreme Court, Mr. Cagle understands that only the "substance" of the statutory provision needs to be addressed, and the use of the exact text is not necessary. Section 6 of our 1994 Bylaws already stated the substance, indeed the exact meaning, of the default provision of 22.102.

After months of this discussion, the Board's attorney has provided no citation to any case decision, to no authoritative treatise, nor to anything else to support his opinions. He merely states his opinions and expects them to be accepted. But how can they be accepted in the face of plain language and authority to the contrary? Further, and very regrettably, he leaves a long trail of mistakes behind him.

2. No proper notice was given to the Voting Members:

Even if the Board had the power to amend, which I deny, it nevertheless was required to follow the provisions of the 1994 Bylaws that required amendments to be done at a Members meeting, after due notice. This alleged "amendment" was not done at a members meeting, but at a board meeting. Further, no notice was given of the fact the Board intended to turn the 1994 Section 6 on its head by seizing the amendment power from the Voting Members and arrogating it to the Board.

Diligent search of the PIPOA records by several persons, including me, MayBeth Christiansen, Becky Perrin, and others, failed to turn up any evidence that notice was given to the Voting Members that the Board intended to amend the Bylaws to give itself the power to amend. As a matter of logic, isn't this entire notion nonsensical--the Board had to amend the Bylaws in order to have the power to amend the Bylaws because the existing Bylaws withheld that power from the Board? Really?

The only mention by the Board about "Bylaws amending" in 2013 began at the April 23rd Board meeting when the Board was discussing the extent of its power to enforce the "ACC Covenants:"

> ***NEW BUSINESS****: ACC enforcement: - There was a great deal of discussion regarding enforcement of ACC and covenants. Jeff felt our By-Laws give the Board more power especially under section 2.06. Maybeth will contact John Bell and Charlie Zahn for their reading of the issue.*

This plainly relates to the Architectural Control Committee ("ACC") and most likely compliance issues. After this entry, the phrase "Bylaws amending" appears in four more agendas as "**Old** Business," with no further explanation. These cryptic entries were certainly not the extensive notice then mandated by existing Section 6 of the 1994 Bylaws or by the provisions of Property Code 209.0051 (h) (10) which in fact bars the board from adopting amendments to the Dedicatory instruments, which includes Bylaws, without notice to the owners. No proper notice was given of the intent to amend the Bylaws at any time.

Moreover, there was no reasonable expectation that the Voting Members were obligated to read all the Board Minutes, none of which were sent out to the Voting Members. However, if one did carefully read these minutes, beginning with the very first one, the message would have been that as **New Business** the Board was strictly focused on the possible need to amend the Bylaws to strengthen their power to run the compliance program via the ACC provisions in our covenants. All further mention of Bylaws in the agendas is under the heading of **Old Business**, meaning these relate **back** to the original entry that refers to the compliance issue and the ACC. There is never any notice to Members the Board was considering changing the rule as to who could amend the Bylaws.

In fact, the reference in the minutes of the September 24th Board meeting (filed after the fact in October) was simply that the Bylaws were "up-dated."

> *By-laws Amending – There was a discussion about the amendments to the by-laws. Nancy moved to approve the amended by-laws, Jack seconded the motion and they were approved. Nancy asked Maybeth to be sure to thank John Bell for the work on bringing them* ***up to date****.*

Even this after-the-fact comment about the amendments, intentionally or unintentionally, disguised what was done by referring to the action as merely "bringing them up to date." This is not a fair description of what they did, which was to completely reverse who had the power to amend the Bylaws.

It is also important to recall that in 2013, the PIPOA sent out regular newsletters. These would have been a logical vehicle for notice if they had any intent to give proper notice. But none contained any such notice. The PIPOA Board also sent out mass emails that it refers to as "blasts" to Voting Members. No "blasts" gave notice. Indeed, the "blast" sent out Saturday,

September 14, 2013 only states: “Tuesday, September 24-- POA Board Meeting at the POA office.” That’s no notice.

The Board sometimes posts pending agenda’s in a glass fronted case at the PIPOA office. There is no evidence showing whether the September agenda was actually posted there, but if it was, here’s what it said about the Bylaws:

> 6. OLD BUSINESS a. Parks b. Encantada culverts c. **By-laws amending** d. Shade Structure/Goodrum e. Covenants and Compliance committee d. Whitecap median

This is not sufficient notice even assuming it was posted. The term “By-laws amending” could mean simply that the idea might be discussed, or the methodology might be a concern, or just about anything touching on the topic. It certainly doesn’t comply with the specific requirements of the then valid Bylaws or with the Property Code provisions. This is particularly true when the only actual mention of what they were up to was the one in the April Minutes, which referred to ACC issues. And in any case, these minutes were not circulated to the Members.

And beyond all this, we cannot doubt the Board knew or had good reason to know they were breaching the Bylaws when we read this direct quote from the May 2013 Board minutes: “The decision on how to pass them [the Bylaws] will await John Bell’s direction as it **might** be possible for the Board to pass as members of the Association have given their proxies to various Board Members for the year.” This proves the Board knew or should have known the Voting Members had the exclusive power to amend the Bylaws. And they knew or should have known owners were entitled to notice, but wondered if they might get around this by reason of proxies given for the prior Board Election. However, those proxies only granted authority to vote for board members; no other proxies existed.

3. The 2013 Bylaws Were Never Filed with the Nueces County Clerk and are Therefore Invalid:

Diligent search of the Nueces County records proves the 2013 Bylaws, which are a “dedicatory instrument” were never filed in the Nueces real property records as required by Texas Property Code section 202.006, which reads: “A property owners' association shall file all dedicatory instruments in the real property records of each county in which the property to which the dedicatory instruments relate is located…A dedicatory instrument has **no effect** until the instrument is filed in accordance with this section.”

Lately the Board’s attorney (again with no reference to case law or any other authority) has floated the idea that Bylaws aren’t “dedicatory instruments,” and didn’t need to be filed, but they surely are:

> Sec. 209.002. DEFINITIONS. In this chapter:

(1) "Assessment" means a regular assessment, special assessment, or other amount a property owner is required to pay a property owners' association under the dedicatory instrument or by law.

(2) "Board" means the governing body of a property owners' association.

(3) "Declaration" means an instrument filed in the real property records of a county that includes restrictive covenants governing a residential subdivision.

(4) "**Dedicatory instrument" means each governing instrument covering the establishment, maintenance, and operation of a residential subdivision.** The term includes restrictions or similar instruments subjecting property to restrictive covenants, **bylaws**, or similar instruments governing the administration or operation of a property owners' association, to properly adopted rules and regulations of the property owners' association, and to all lawful amendments to the covenants, **bylaws**, rules, or regulations.

The leading commentary on Homeowners laws, says the same. See, chapter 6, paragraph 6.5, page 299, "Texas Homeowners Association law, 3rd Ed. By Gregory S. Cagle, explains that Bylaws are "Dedicatory Instruments" and must be filed to be valid.

And, the later problematic 2017 Bylaws were filed. So why did the PIPOA file these if filing wasn't necessary?

4. Diligent Search Indicated the 2013 Bylaws Weren't Even Signed:

Diligent search of the PIPOA files by staff and several property owners has found only an unsigned copy of the 2013 Bylaws. Apparently, they were never lawfully executed, let alone filed.

5. The Big Cheat:

Perhaps the worst thing about the then PIPOA Board's arrogation to itself of the right to amend the Bylaws is what I call "The Big Cheat," meaning that even if we forget all of the above, and concede for the sake of argument, that Business Organizations Code Section 22.102 did require the 1994 Bylaws to be amended to conform with its provision, the Board's action remains invalid. First, no provision of the BOC strikes out the notice requirements set out in Section 6 of the 1994 Bylaws, nor does any part of the BOC strike out the mandate that amendments be made at a Members meeting as opposed to a Board meeting. But even setting aside these fatal errors, and assuming BOC Section 22.102 had to be somehow incorporated into the PIPOA Bylaws, the fact remains that the statute provides **three** choices, one of which, 22.102 (c) (3), would have retained the clear meaning of the existing 1994 Bylaws and barred the Board from amending the Bylaws. This means the Voting Members should have had the chance to pick the option they wanted, and since historically the Board was not allowed to amend the Bylaws, there is no reason to believe the Voting Members would have chosen any option other than (c) (3) which would have, even under the Board's attorney's argument, preserved the status quo. But, the members of

the then Board robbed the Voting Members of this choice by not providing straightforward and clear notice.

Conclusion and Request.

I have prepared this memorandum, not only for the current Board, but also for any attorney you might retain for a second opinion as to the advice you are getting from your current attorney. Looking back over the last several years we see a long string of mistakes, overreaching, and errors committed by or with the advice of counsel. I can elaborate on these if you wish. In the face of these errors, you would be well-advised to seek a second opinion from a truly independent attorney. Further, I ought to be allowed to explain my views to him or her so that we can be sure (s)he has a balanced presentation.

One solution to the mess the illegal Bylaw amendments has created, is to enact the two proposed Bylaw Amendments that for over six months I have been asking Brent Moore, John Bell, and others to agree to place on the agenda for the 2018 Annual Meeting. It takes only two Board members to make this happen. So far, I have received no answer to this request and, after so long a time, it seems clear I cannot expect an answer. I now appeal to the full board (or any two of you) to step up and agree to put these two proposed amendments on the Annual Meeting agenda and also to send out the attached Notice of Motion and Resolution to Amend Bylaws and Proxy Ballot along with the other voting materials to be sent out by the Board in connection with the election of new Board Members.

These proposed amendments are designed to correct the illegality of the 2013 Bylaw amendments in Section 7 and also to correct the unreasonable provision in Section 2.03, allowing the Board to remove other duly elected Board members without cause. Board members should only be subject to removal by the Board for cause and I have provided a reasonable definition of "cause." You are not asked to agree or disagree with these proposals, but only to put them on the agenda for a fair up or down vote. In my opinion, the failure to agree to this simple request constitutes a lack of good faith and fair dealing with the Voting Members you represent; Voting Members some of you will be asking to re-elect you.

Respectfully submitted,

_/S/_ Karl L. Rubinstein__

Karl L. Rubinstein, Voting Member