



Outside Counsel

Condominiums and the New Power of Attorney Law

Expert Analysis

By now, most New York attorneys are presumably aware of the significant changes to the power of attorney law which took effect on Sept. 1, 2009. In ways both apparent and yet to be discerned, the new law affects areas of legal relationships that were likely not within the legislators' intent. One of those areas is the realm of condominiums. This article discusses the visible impacts that the new law will have upon every residential and commercial condominium throughout the State of New York.

The Statute

On Jan. 27, 2009, Governor David Paterson signed legislation modifying the General Obligations Law with respect to powers of attorney. That legislation, known as Chapter 644 of 2008, originally had an effective date of March 1, 2009. However, due to the proximity of the effective date to the signing date, and the inadequate time for attorneys and the public to familiarize themselves with the new law, the effective date was amended to Sept. 1, 2009.¹

The first change made by Chapter 644 was to the title heading of title 15 of Article 5 of the General Obligations Law. Previously, that title heading was "statutory short form power of attorney." The new title heading is "statutory short form and other powers of attorney for financial estate planning." Although a strict grammatical reading of the phrase "financial estate planning" in relation to the rest of the title heading would suggest that the new law was solely intended to relate to that subject matter, i.e., financial estate planning, the text of the statute is not so limited.

The prior form was known as a durable power. The new form, effective for all transactions in New York beginning on Sept. 1, 2009, is called a statutory short form power of attorney (SSF



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Power).² A power of attorney executed prior to Sept. 1 remains valid and unaffected by the new law if such power of attorney was valid at the time of its execution.³

One of the key differences between the old law and the new law is the requirement that the power of attorney (POA) be signed, dated and duly acknowledged before a notary public not only by the principal but also by the agent (formerly known as the attorney-in-

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fact).⁴ This requirement presumably reflects the Legislature's intent to make the agent completely aware of and bound by the various instructions and warnings appearing on the new SSF Power. The POA does not have to be signed simultaneously by the principal and the agent. We will consider below this new requirement mandating the agent's signature and its significance within the context of condominiums.

Non-Statutory Short Form

A non-statutory short form POA is one which does not match up in form and content with that presented in the statute. A "principal" under the statute is defined as "an individual who is eighteen years of age or older who executes a power of attorney"⁵ A natural person can execute a non-statutory form of POA only

if that form meets the requirements of new GOL Section 5-1501B. That section requires that a non-statutory power, executed in New York, must be typed in 12-point font or legibly printed. In addition, as with an SSF Power, in order to be valid a non-statutory form of POA executed in New York State must contain the exact wording of the sections in the SSF Power captioned "Caution to the Principal" and "Important Information for the Agent."⁶

These sections give greater warnings to the principal, underscoring the significance of signing a durable POA. They also explicitly inform the agent about the agent's obligations and provide a reminder of the agent's fiduciary duties. The agent's responsibilities are more fully set forth in Section 5-1505 of the new law, which section is referenced within the cautionary sections of the statutory form.

An issue has also been raised as to whether Chapter 644 requires the concurrent execution of a statutory major gifts rider (SMGR) to validly transfer a principal's interest in real property or a cooperative apartment to a bona fide purchaser for value. While it is unlikely that this was the legislative intent, prudence suggests that, given the lack of statutory clarity, an SMGR should be signed with an SSF Power in all such instances. It is important to note that the principal's signature on the SMGR must not only be acknowledged before a notary public, but must also be witnessed by two disinterested witnesses.⁷

Condominiums and POAs

The New York Condominium Act is contained in Real Property Law Article 9-B, Sections 339-d through 339-kk. Section 339-d(7) defines the "declaration" as "the instrument by which the property is submitted to the provisions of this article, as hereinafter provided, and such instrument as from time to time amended, consistent with the provisions of this article and of the by-laws."

Section 339-n of the Condominium Act describes the contents of the declaration. In addition to particulars set forth in that subsection, the declaration may also contain "[a]ny further details in connection with the property which the person or persons executing the declaration may deem desirable

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to set forth⁸ as well as “[t]he method by which the declaration may be amended, consistent with the provisions of this article.”⁹

Typically, as part of those “any further details,” the declaration contains a form of such unit owner POA annexed as an exhibit to the declaration, often as Exhibit E. That form usually contains provisions regarding the board of managers’ purchase of a unit from a selling unit owner; the board’s commencement and resolution of tax certiorari proceedings on behalf of unit owners; the board’s execution of declarations or other instruments affecting the condominium deemed necessary by the board to comply with laws, ordinances, etc.; and the board’s granting of consents such as waivers of the right of first refusal.

The usual form of unit owner POA is a non-statutory form POA, and is ordinarily recorded immediately after the recording of a unit deed, which invariably results from a sale of the unit. The primary practical purpose of granting the POA to the board of managers is to give the board the authority to act on behalf of all unit owners with respect to managing the condominium’s daily business, without the need to constantly obtain written authorizations or consents from such unit owners.

Effect on Condominiums

Historically, the only signatory to a unit owner POA has been the unit owner, as the grantor. However, as noted above, the new law (i) requires the agent under a non-statutory POA to sign, date and acknowledge the POA and (ii) mandates that the unit owner POA include the text of the sections in the SSF Power captioned “Caution to the Principal” and “Important Information for the Agent.” Thus, it appears that the form of every unit owner POA contained in every condominium declaration will have to be amended in order to comply with the obligations imposed by the new statute. We respectfully submit that the Legislature neither intended nor foresaw this result as a consequence of enacting the new law.

How is a declaration amended? Here is where what has been referred to as The Law of Unintended Consequences enters the process, because the declaration cannot simply be amended through action of the board of managers.¹⁰ As stated above, Section 339-n of the Condominium Act provides that the declaration may also contain “[a]ny further details in connection with the property which the person or persons executing the declaration may deem desirable to set forth,” including “the method by which the declaration may be amended.”

The vast majority of condominium declarations with which we are familiar provide for amendment of the declaration by a supermajority vote of unit owners, either 66⅔ percent or 75 percent. Such a process is neither quick nor easy. So the Legislature

has created work for condominium boards of managers, their managing agents and their lawyers, not to mention generating recording fees to municipal officials in order to record amendments to condominium declarations. Since the city register and county clerks will presumably reject submissions of unit owner POAs made after Sept. 1 that do not comply with the new law, the pragmatic impact is that updated unit owner POAs will have to be used even though the related declaration has not yet been amended.

Moreover, additional practical consequences of the new law’s effect must also be considered. Unlike the sale of a cooperative apartment, which involves a hybrid of real and personal property and usually closes at the office of the managing/transfer agent, the sale of a condominium unit involves pure real property. Therefore, a traditional unit sale closing involves a title closer and typically occurs in the seller’s attorney’s office. Until now, the unit owner POA was normally prepared by the seller’s attorney (or copied from the exhibit to the declaration), presented to the seller at closing, signed by the seller, and delivered to the title closer for recording with the unit deed.

What happens now, after Sept. 1, when the unit owner POA not only must conform to the new law but also must be signed by the agent? Who is the agent for this purpose? Strictly speaking, the agent is the board of managers.¹¹ But no member of the board of managers is present at the customary closing of the sale of a condo unit. This suggests that the new form of unit owner POA will have to be prepared in advance of closing by the condominium’s managing agent (at the seller’s unexpected expense), signed by the board and either (i) delivered by the managing agent pre-closing to the seller’s attorney with an invoice or (ii) physically brought to the closing by the managing agent, with an invoice for not only the POA’s preparation but also a separate attendance fee.

Conclusions

As a result of the new POA law, condominium boards of managers, in conjunction with their managing agents and attorneys, will have to rapidly prepare a new form of unit owner POA, obtain supermajority votes of unit owners in order to amend their declarations regarding that new form, and arrange for the declaration amendment to be recorded. Pending such recordation, managing agents should provide the new form to sellers’ counsel and to title closers for submission to the appropriate recording office.

While it is possible that remedial legislation may eventually be introduced and enacted to specifically exempt condominium unit owner POAs from the application of the new law, until that time the condominium community will have to abide by the statute’s mandates.

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1. Chapter 4 of 2009.
2. General Obligations Law §5-1501(15).
3. Chapter 644 of 2008, §21.
4. General Obligations Law §5-1501(B)(1)(c).
5. General Obligations Law §5-1501(11).
6. General Obligations Law §5-1501(B)(1)(d).
7. General Obligations Law §5-1514(9)(b).
8. Real Property Law §339-n(8).
9. Real Property Law §339-n(9).
10. John Faso, 2006 Republican gubernatorial candidate, told an interviewer for The New York Times that “[t]he New York State Legislature passes many bills, but the law that’s passed most frequently is the law of unintended consequences.” Mr. Faso went on in that interview to say that, as a legislator, he was often “trying to prevent the unforeseen consequences and needless burdens that hastily drawn or poorly conceived legislation could create.” The New York Times, Oct. 22, 2006, p. 1.
11. We have been advised by at least one title underwriter that an officer of the condominium will be able to sign on behalf of the condominium as agent.