

Don't Question My (Seller's) Authority!

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Attention real estate agents, brokers, lenders, and title insurance agencies! As the residential and commercial real estate markets continue to evolve and fluctuate in 2023 with the financial markets that impact and drive them, seller authority to convey land continues to be a hot topic. Confirmation of that authority, especially as it pertains to corporations and limited liability companies, remains a crucial hurdle to overcome prior to closing. Because of the opportunity for fraud or mistake, and their impact on drafting most of the closing documents, title insurance underwriters and agents require documentation on conveyance authority early in the pre-closing process. Proceed with special care if the proposed transaction consists of all - or substantially all - of the corporation's assets. Or, if ownership is comprised of family members strewn throughout the nation.

A corporate entity's authority to convey and encumber real property is heavily protected and governed by Mo. Rev. Stat. § 351.395. It states, in pertinent part, "No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation shall be invalid by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such conveyance or transfer." Pretty solid protection for the seller. It also serves to shield innocent third party purchasers from transactional shenanigans - undoubtedly the public policy that drove the statute's enactment years ago.

There are only three limited exceptions to Section 351.395 to challenge a corporation's capacity to act when conveying real property:

1. a proceeding by a shareholder to enjoin the sale before it is consummated (injunctive relief makes sense before closing because no party positions have dramatically changed, thereby the *status quo* is easier to maintain);
2. a proceeding by the corporation or a shareholder derivative suit on behalf of the corporation against its current or former directors and officers (promotes containment of the dispute within the company or, in the colloquial sense, it keeps it in the family); or
3. a proceeding by the attorney general (no doubt, a final resort).

This statute and its three exceptions took center stage in *Pullen v. Flowers*, 509 S.W.3d 131 (Mo. App. S.D. 2016). Very little other case law has ever addressed the statute or its application. In *Pullen*, minority shareholders of the seller corporation argued the sale of real property was void because the corporate formalities under § 351.400 were not observed. Both the trial and appellate court disagreed with their position and held the shareholders could not undo the sale of the property to an innocent third party purchaser. The sale and related conveyance were permitted to stand because the sellers did not avail themselves of the three remedies articulated in the statute.

For all of the foregoing reasons, be prepared as a corporate seller to provide a certified copy of a board or member resolution approving the sale.