

Task Force Requests State Action

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On December 8, 2003, the Governor's Task Force on Homeowners' Associations held the fourth of its six meetings in Tampa. As noted in a previous column (see Task Force Still has Work To Do, November 20, 2003), I serve on that Task Force.

About fifty members of the public turned out for the gathering, with approximately twenty-five people addressing the Task Force about their HOA problems.

Many of the speakers addressed challenges experienced by voluntary HOAs. The speakers were seeking support for legislation that would permit municipal taxing units (MSBU's) to enforce deed restrictions, when there is no mandatory membership association in place.

The remaining speakers addressed a variety of topics regarding issues in HOAs. The most common themes were lack of disclosure, misrepresentations, construction problems, and other problems related to the development of the community and the developer's control of the association during the sales process.

A large group of homeowners from the Nature's Watch development in Pinellas County testified before the committee. Each of the homeowners related similar horror stories about major construction deficiencies in that development. Apparently, while some homes are not affected by the problems, other homes are at a near state of collapse. The residents complained that although the homeowners had elected their own board, a court has apparently taken over the situation. The judge has appointed a receiver to operate the Community, and at least in the eyes of most of those who testified, the receiver has acted with little regard for the wishes of the homeowners or its board.

After hearing public input, the Task Force set out on its mission to address the day's agenda. The Task Force formally adopted the following positions:

- **Use of MSBUs for Enforcement of Private Deed Restrictions in Voluntary Associations.** With one dissenting vote, the Task Force voted against using governmental entities for private contract disputes, including enforcement of deed restrictions.

- **Remedies for Misrepresentations.** By unanimous vote, the Task Force voted to recommend legislation which would provide home purchasers with a statutory right of rescission (contract cancellation) or the right to recover damages, when the purchaser has relied upon false and misleading representations of a developer. The group voted to recommend legislation similar to that found in the condominium statute, which permits rescission, or an action for damages, if misrepresentations are made in sales brochures, newspaper advertisements, and similar promotional materials. Such a law would improve the current situation in two respects. First, the proposal includes the right for the prevailing party in a misrepresentation action to recover attorney's fees. Secondly, unlike a claim for fraud (which is available under current law), the homeowner would not need to prove intent by the developer.

- **Warranties.** By unanimous agreement, the Task Force approved a motion that would require developers to grant warranties of fitness and merchantability for the common area improvements of an HOA community, similar to the provisions of the condominium law. Presumably these warranties would extend to common improvements like roads, drainage infrastructure, and recreational facilities. Significantly, the Task Force does not appear to have the inclination to extend similar warranty rights to the home itself, as is the case in condominiums. However, the issue of home warranties was not submitted to a vote, and was placed on the agenda for a formal vote at the January 9, 2004 meeting of the Task Force, which will be held in St. Augustine.

With the last two of its six hearings scheduled for January (January 9, 2004 in St. Augustine and January 28, 2004 in Tallahassee), the Task Force has come a long way, but at least in my opinion, there is much left to address.

Perhaps the most significant issue before the Task Force is alternative dispute resolution in HOAs, such as arbitration and mediation. I expect this to be the feature topic at the January 9 meeting in St. Augustine.

Assessment Refund goes to Owner at Time of Issue

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QUESTION: My condominium association levied a special assessment of \$7,000.00 per unit for the structural renovation. Fortunately, the work was completed for less than the assessed amount, and the board ultimately refunded \$2,000.00 to each unit owner. I sold my unit during this process and the buyer of my unit got the \$2,000.00. What is your opinion in this type of situation? G.G. (via e-mail)

ANSWER: Section 718.116(10) of the Florida Condominium Act says that proceeds collected from a special assessment may only be used for the purposes for which the assessment was levied. After the work is done, the board has two options. The Board can either refund the money to the unit owners, or credit the surplus toward future assessments. Apparently, your board chose the former option, the refund.

In my opinion, the refund proceeds are “common surplus,” and run with the title to the unit. Accordingly, whoever held the title on the date the refund check was issued would be entitled to the money.

In cases where it is expected that a special assessment may be due in the future, or when a refund is expected, the parties can allocate responsibility and entitlement in their contract and closing documents. If that is not done, whoever holds the title when the right to the refund or obligation to pay the assessment vests is the party responsible for payment of the assessment, or entitled to receipt of the refund, as the case may be.

QUESTION: We live in a duplex with a neighbor who lives here two or three weeks a year. We live here six months a year. We are each responsible for maintaining our side of the home, including the roof and some of the grounds. There is a 20-foot high black olive tree on our common property line. The roots of the tree are lifting

Other issues that are scheduled to be debated before the group submits its report to the Governor include: whether the state should begin regulating HOAs as it does for condominiums; rights of HOA owners to receive official records and financial information; fiscal duties of the HOA board; and possibly re-visiting the details surrounding the permissible extent of control, if any, over the right to fly the American Flag.

Stay tuned. ☺

and cracking both of our concrete driveways. Leaves and bird droppings fall on both driveways. We would like to replace the tree with less-damaging shrubbery. Do we have any recourse? E.P. (via e-mail)

ANSWER: I am assuming from your question that the tree sits on or near the property line between you and your neighbor.

Florida’s courts have held that the owner of land is privileged to trim back his neighbor’s tree to the property line, both as to overhanging branches and subterranean roots, even if it kills the tree. I am not aware of any case law which holds the “tree owner” liable for damage to a neighboring property, since the neighbor is given the right to trim at the property line. Obviously, the best solution is to call your neighbor and see if you can work something out.

QUESTION: My question concerns the turnover of a condominium association from the developer. At my previous condominium, it was like pulling teeth trying to get the developer’s attention on certain items after turnover. My question is whether unit owners have to accept turnover by the developer at the time of the developer’s choosing, or can we wait until engineering inspections and financial audits have been made? L.D. (via e-mail)

ANSWER: Transition of control of the association (called turnover) is the point where unit owners other than the developer elect the board. An audit of the association’s financial records is required ninety days after turnover, and must be paid for by the developer. Therefore, there is no reason to delay turnover waiting for an audit, since the audit cannot be commissioned until turnover occurs.

With respect to warranty items, accepting a condominium turnover does not mean that you accept the property “as is.” In fact, under Florida law, that is when the association obtains “standing” (legal authority) to address any deficiencies with the developer.

Accordingly, although there may be exceptions to the rule, unit owners should not seek to delay turnover. In fact, if the developer is obligated by law to turn over the association (based upon the number of units sold), the owners could not legally reject the turnover anyway.

QUESTION: Is it common practice in a small homeowners association to list candidates for the board on a proxy? Although we still take nominations from the floor at the annual meeting, we did list on the proxy form those who submitted their names into nomination. Now, some owners are crying foul play. D.C. (via e-mail)

ANSWER: Unlike condominiums, where proxy voting in the election of directors is prohibited, the use of proxies in HOA elections is permissible, and in fact the norm.

Unfortunately, the current statutory election procedure in homeowners' associations can wreak havoc at annual meetings, since nominees from the floor rarely stand much chance at election due to the use of proxies in the vote. Unless your bylaws prohibit proxy voting in the election of directors, it appears that your procedures are proper. ⚖️

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