

HOA Reform Proves to be a Tough Nut

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In 2003, Governor Jeb Bush vetoed legislation (Senate Bill 1632) which would have permitted units of government, such as local benefit and taxing units, to enforce private deed restrictions. Apparently, a number of communities around Florida have recorded restrictive covenants, but have no mandatory association with authority or finances to enforce them. In his veto statement, the Governor said:

"I recognize that homeowners' associations in Florida are facing a variety of difficult issues; however, I believe it is inappropriate and fundamentally unfair to use the government's taxation power to compensate for shortcomings in private contractual arrangements to the benefit of one party and to the detriment of another. Instead, I have asked Secretary Carr of the Department of Business and Professional Regulation to form a task force to examine the challenges that associations face. It is my hope that practical solutions to these issues, like those in this bill, can be found."

Further, Governor Bush reportedly took note of the desirability of addressing relationships in homeowners' associations based upon inquiries from citizens, as well as media reporting on high profile HOA disputes, such as the Jupiter, Florida case involving a battle between a property owner and his association over the right to fly the American flag.

As a consequence, Governor Bush asked the Department of Business and Professional Regulation Secretary, Dianne Carr, to appoint a task force with the following mission statement:

The Homeowners' Association Task Force, a cross-section of representatives involved with homeowners'

associations, was created at the Governor's request to harmonize and improve relations between homeowners, homeowners' associations and other related entities. The members will provide input and make recommendations for legislative change consistent with his vision for government and regulation.

Secretary Carr appointed a 15 member task force which held six meetings throughout the State of Florida in the latter part of 2003 through January of 2004.

The Task Force ultimately produced a 46-page Report, including proposed recommended legislation. The Report, including proposed legislation, can be viewed at www.myflorida.com/dbpr/os/hot_topics/hoa_task_force.

Equally important to what the Task Force ultimately recommended, are items which the Task Force recommended against. The more significant decisions in that regard include the following:

- **Government Regulation:** The Task Force voted that although alternative dispute resolution needs to be encouraged in homeowners' associations, extensive government regulation of HOAs, similar to the condominium system, is not desirable.
- **Warranties for Home Purchasers:** By one vote, the Task Force defeated a motion that would have recommended statutory warranties for individual home purchasers in HOA communities.
- **Covenant Enforcement by Government:** Espousing a similar philosophy to the Governor's

veto of Senate Bill 1632 (2003), the Task Force concluded that enforcement of covenants and restrictions is a matter of private contract, and should not be placed in the hands of local taxing or benefit districts. The Task Force likewise concluded that membership in a non-mandatory association could not be made mandatory without the consent of all affected parties.

Also relevant to a full understanding of the Task Force's work is a review of proposed legislation recommended by the Task Force which was not approved by the Legislature.

- **Disclosure:** The Task Force's recommendations and proposed legislation contemplated detailed disclosure to prospective purchasers, including disclosure of pending litigation in the association, the superiority of association's lien rights over homestead protection, and other important items. The recommended changes to the law also included a three-day "cooling off" period, similar to that which exists in condominium re-sales, so that potential buyers could think about what they were getting into before signing a binding contract. Reportedly at the insistence of lobbyists for the Florida realtors, this part of the proposed legislation was killed.

- **Common Area Warranties:** The Task Force's recommendations would have required developers to grant statutory warranties of merchantability and fitness for the common areas servicing the Community. Although this proposal would have provided much needed relief to Florida's consumers, it was killed by Florida's powerful lobby of developers and home builders.

- **Right to Speak at Board Meetings:** The HOA Task Force recommended that members of homeowners' associations be granted the right to speak at all meetings of the HOA's board. Apparently out of fear of filibuster in large associations, this proposal was scrapped during the legislative committee process.

- **Kickbacks:** The Task Force's proposed changes to the law would have made accepting kickbacks a felony of the third degree, and also the basis for permanent disqualification from board service. For reasons unknown, the Legislature did not consider this to be a necessary change in the law.

Next week we will begin a look at those initiatives from the Task Force which were adopted by the Legislature, and which became law on June 23, 2004, as well as other new legislation affecting homeowners' associations. ⚖️

Homeowner at Disadvantage in Dispute with Board

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Question: About two years ago, I moved into a community that is operated by a homeowner's association. The documents state that the HOA is responsible for landscape maintenance, landscape replacement, and irrigation. Since I have lived here, the only thing the association has done is mow my lawn. I have had little or no irrigation. The association admits that the system is poor, but does not want to spend the money to fix it. I have been watering my lawn myself to try to save the plants that I put in at my own expense. One member of the board is watering his lawn by illegally turning on the system at the street. We have requested breakdowns of where the money is being spent per unit and have not received the information from the

board or the management company. What can we do? Can those of us who have not been given value for our money get refunds? Quite a few of us are willing to put in new irrigation units and pay our own bills. Is there a way this can be done? V.A. (via e-mail)

Answer: Disputes involving the appropriate degree of maintenance in a community usually involve the classic "shades of gray." In general, the board is afforded a fairly wide degree of latitude. For example, if the association controlled the watering schedule and thinks two times per week is enough to water the lawns, while you think three times would be better, the association would win that argument.

However, there is a point where the line is crossed and the board's discretion is superceded by the documents. For example, if the documents require the association to provide irrigation to your home, I believe the association has an obligation to provide a reasonably functional irrigation system, whether they want to spend the money or not. Of course, this sometimes creates a "Catch-22," since some HOAs cannot levy special assessments for capital improvements without approval of the members (often two-thirds), and some people may not be willing to spend the money and therefore will not vote for the assessment. Of course, this is all driven by your community's particular documents.

It goes without saying that members of the board should not abuse their positions to receive greater benefits than anyone else. A board member has a fiduciary duty to the homeowners, which by law requires the fiduciary to put his or her personal interests beneath those of the association and its members. However, as a practical matter, the only remedy short of a lawsuit is to expose the abuse and seek removal of the director (although any director can be removed without cause), or finding someone else to do the job at the next election.

Your other possible remedies arise from a law signed by Governor Bush last week, which will be explored in my column over the next several weeks. The new law applicable to homeowners' associations gives you a couple of additional options that you would not have under present law.

First, you now have an expanded right to inspect official records of the association, including the records you inquired about. Under the old law, only a set number of documents constituted "official records" of the association.

Secondly, the new law gives you the opportunity to circulate a petition in the community. If twenty percent of the members of the association sign the petition, you can require the board to take up the irrigation issue at a special meeting of the board. Although the board would not be obligated to act in any particular manner, you could at least bring the matter to public debate through the petition process. Good luck.

Question: I purchased a townhouse in a four unit townhouse development in 2000. The association for the townhouses was created in 1980, but dissolved in 1983. I own one of the two interior units. The owners on both end townhouses have put up fences which run to the rear property line. This prevents me from getting to the rear of my home. Does this have to remain "common area" or can it be "annexed" by the end townhouses? A.B. (via e-mail)

Answer: Even though the association which is supposed to govern the community has apparently been dissolved for some twenty years, I would assume that there still are recorded restrictive covenants that run with the land. You should have gotten a set of these documents with your closing papers, or they should be recorded with your local recording office. These covenants should define what is "common area" and what is individually owned property.

In most situations, every owner is granted an easement for enjoyment of common areas and the end owners usurping that area may well impair the legal rights of the two interior owners.

However, there may be an appropriation in the governing documents for what your neighbors did. Further, depending upon the specific facts of the case, your neighbors may be able to claim adverse possession, sometimes known as "squatter's rights" which accrues in Florida after seven years. There are very specific things that must occur for one to acquire property interest by adverse possession. Your problem involves a number of complex legal issues. If you cannot work it out directly with the two end owners, you should consult a local real estate attorney to determine if the matter is worth your while to pursue legally.

Question: We purchased a single family home that is covered under a master association covenant. After closing, we received an invoice from the association for a resale working capital contribution. Our closing statement indicates that an estoppel letter was issued to the association. We purchased title insurance with the acquisition of our home. Who should pay? J.G. (via e-mail)

Answer: It depends. It sounds like someone made an error, and in situations like this, the party who made the error usually is the one who has to pay for it.

I would check with your title company and if they wrote title insurance without waiting for a response to the estoppel letter, they may be on the hook. ⚖️

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