Rutgers Panel on Homeowner Association problems

This is a report written several years ago by Ed Hannaman who works for the Department of Community Affairs for the State of New Jersey. Ed wrote this paper for a Rutgers Panel on Homeowner Association problems. Thank you Ed for allowing On the Commons to publish it. – *OTCadmin*

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The State's relation to Homeowner Associations originates generally in the State's power to authorize the creation of tenancies in common and the joint ownership of real property. These options marked a departure from the traditional apartment and single family home and allowed creation of shared property developments, condominiums and cooperatives. The relative newness of this area is evident from the fact that "horizontal" property was not statutorily authorized until 1963 and the successor Condominium Act was not effective until 1970.

Municipalities began zoning for denser residential uses and, through their Planning Boards, exercised review and approval authority over individual developments. They are empowered to have developers contribute to off site reasonably necessary infrastructure improvements. Developers took full advantage of the opportunity to build more residences on less land. In recognition of the need to balance unit owner tax payments against municipal services, the legislature created a continuing obligation under a "Municipal Services Act" to provide or reimburse associations for basic street clearing, waste removal and recycling services. Reimbursement is limited to the municipal cost of providing the services directly.

Beginning late in 1978, the State began participating in most new developments through the Planned Real Estate Development Full Disclosure Act (PREDFDA). In an effort to fully inform prospective purchasers about the planned development, the act required developers to create and the State to review and accept a Public Offering Statement fully and fairly disclosing all relevant information pertaining to the project and including the master deed, covenants and restrictions and bylaws. The developer remains in control until 75% of the units are sold. During this time the developer must file annual reports and the State has inherent power to insure compliance with the POS and address owner complaints. Once the developer sells 75% of the units, unit owners assume complete control of their association board. At this point, the State assumes responsibility for ensuring that the association created to manage the common property adheres to applicable statutes and regulations designed to afford owners certain rights.

It should also be noted that municipalities determine completion of the development by issuing certificates of occupancy for structures and by accepting streets dedicated for public use for which the developer has posted completion bonds. Interestingly, these do not appear to have diminished suits by owner controlled boards against developers. Fortunately this area is beyond the scope of this paper.

As with the field itself, the regulatory oversight of projects is relatively new. Since

1978 the State has registered 3,550 developments (some of which have multiple associations within them) containing some 375,000 units. Pursuant to the PREDFDA, projects that are not cooperatives, age restricted or condominiums and contain fewer than 100 units or minimum common elements can be exempt from registration. If the developer is confident of a statutory exemption, the State PRED records will not reflect existence of the projects (e.g., those with fewer than 100 single family homes). The State has issued close to 9,200 exemptions thus far. Unlike PREDFDA statistics, however, those generated for exemptions do not include the number of units in the project.

It is possible to approximate the number of units exempted from a sampling of the applications. Roughly 74% are for 2 unit condominiums with an additional 19% for projects with 3-9 units. Thus, the fewer than 10 category accounts for close to 93% of exemptions or 8,556 projects with an estimated total of 22,356 condominium units. [The total represents 13,616 from the two-unit category and 8740 in the 3 to 9 unit category, figuring an average of 5 units each.] The remaining 7% (644 projects) represent non-condominium homeowner association projects. These can range from those containing a handful of homes (Lenders frequently want documentation from the State confirming the status of even a statutorily exempt project) to projects containing hundreds of homes (exemptions have been issued for projects in excess of 400 units). Because most individual lot projects submitted do contain greater than 99 homes a conservative estimate would be 150 homes for each of the 644 projects resulting in 96,600 single lot units.

The roughly 494,000 units (375,000 registered and 118,956 exempt) recorded subsequent to PREDFDA's 1978 inception, however, represent only part of the actual number. Considering that condominium type projects began 15 years prior to PREDFDA and homeowner associations have existed since colonial times, the numbers available disclose only a portion of the units and associations in New Jersey. During the period from 1978 to 2001 the number of association residential units increased by an average of 33,000 each year. While this no doubt reflects periods of building booms consistent with an increasing population in what is one of the most populous and the most densely populated state in the union, there are hundreds of uncounted associations representing tens if not hundreds of thousands of additional units. A review of warranty data reveals that fully 40% of all private residential construction necessitates the formation of associations. With a post 1978 base of about 494,000 units, obviously more than one million people reside in some type of New Jersey homeowner association.

If the number of units is difficult to fix with certainty, the number of associations is difficult to even reasonably estimate. Although condominiums may be registered with the Bureau of Housing Inspection (if inspection is not required neither is registration), its database does not differentiate between types of residential dwelling units (fees for apartments and condominiums are the same). Those formed as corporations do file with the State but have not been separately identified as association corporations. There is currently no requirement for associations to register with DCA or any other regulatory agency. Associations may be created or dissolved without affecting a central database. Prior to the incorporation of basic owner rights into PREDFDA in 1993, there was no basis for State involvement in a development once the developer departed. Ultimately, the expansion and refinement of owner rights in a 1996 amendment to the Condominium Act caused the State to staff a position to address owner concerns.

Bills pre-filed in 2002, proposed an expansion of both owner rights and the State's

authority to enforce them. At the time this paper was written, the existing authority was limited to three areas: the owner's right to have a non-binding review by a neutral party of a grievance involving the association or another owner, referred to as alternative dispute resolution; a right of access to records required to be kept in accordance with generally accepted accounting principles; and the right to advance notice of, attendance at, and minutes from meetings in which the elected board votes on matters binding the association.

With the only publicity being a reference in the statute to the power of the Commissioner of the Department of Community Affairs to enforce the three owner rights referenced above, the State has been receiving a steady stream of complaints on a daily basis. Many are referred from elected officials at various levels, the Attorney General's office and the State's Department of Consumer Affairs. Although there have been thousands of complaints, in the approximately 6 years since the program began, we estimate that less than one third have been within the State's currently limited jurisdiction. The volume and nature of complaints combined with the limited staff has resulted in a backlog ranging from 45 days to 5 months for the provision of a substantive response. It is often difficult to determine the nature of the complaint or whether jurisdiction exists. Complainants have difficulty accepting that the State can solve some problems but not others in communities it sanctioned. Where jurisdiction exists, problems are rarely resolved quickly. Moreover, a complaint on one item frequently expands once owners learn of their additional rights. Thus, a typical complaint remains active for many months and may not be resolved for years. At any given time approximately 700 complaint cases remain active.

In the absence of user- friendly jurisdictional guides for owners or societal familiarity with life in the expanding association concept, it may be expected that owners would be unaware of their rights and obligations or the State's current jurisdictional limits. It is obvious from the complaints that owners did not realize the extent association rules could govern their lives. This is especially true in individual lot associations in which the board is formally granted only common area jurisdiction but can enforce bylaws providing a myriad of restrictions on private property use and even individual conduct. *Acting out of frustration, complainants routinely send municipal, State and federal officials send long, often rambling, disjointed letters detailing an array of complaints in the hope of some relief.* One major concern with PREDFDA implications is that our references to public offering statements, master deeds or by-laws are often met with a complainant's protestations that they were unaware of them completely (especially on re-sales), found them too tedious or lengthy to bother reading or misunderstood them (e.g. believing developer maintenance standards continued for owner controlled boards).

Overwhelmingly, however, the frustrations posed by the duplicative complainants or by the complainants' misunderstandings are dwarfed by the pictures they reveal of the undemocratic life faced by owners in many associations. Letters routinely express a frustration and outrage easily explainable by the inability to secure the attention of boards or property managers, to acknowledge no less address their complaints Perhaps most alarming is the revelation that boards, or board presidents desirous of acting contrary to law, their governing documents or to fundamental democratic principles, are unstoppable without extreme owner effort and often costly litigation.

Problems presented by complainants run the gamut from the frivolous (flower

restrictions and lawn watering), to the tragically cruel (denial of a medically necessary air conditioner or mechanical window devices for the handicapped), to the bizarre (president having all dog owners walk dogs on one owner's property, air conditioners approved only for use from September to March). Curiously, with rare exceptions, when the State has notified boards of minimal association legal obligations to owners, they dispute compliance. In a disturbing number of instances, those owners with board positions use their influence to punish other owners with whom they disagree. The complete absence of even minimally required standards, training or even orientations for those sitting on boards and the lack of independent oversight is readily apparent in the way boards exercise control.

With all due disrespect to South and Central American dictatorships, in the category of "Banana Republic" (BR) -elections section, complaints have disclosed the following acts committed by incumbent boards: leaving opponents' names off the ballots (printed up by the board) by "mistake"; citing some trivial "violation" against opponents to make them ineligible to run; losing nominating petitions; counting ballots in secret-either by the board or their spouses or someone in its employ-such as the property manager; deciding to appoint additional board members to avoid the bother of elections; soliciting proxies under the guise of absentee ballots; holding elections open until the board obtains the necessary votes to pass a desired action; declaring campaign literature by their opponents to be littering; using association newsletters to aggrandize their "accomplishments" but forbidding contrary opinions by owners (one case requiring court action involved the board campaigning for local elected officials but forbidding owners from advocating for an opponent); routinely refusing to release owner lists to candidates-despite the board mailing owners (at association expense) their positions (it has become routine for the State to refer candidates to the municipal tax office to obtain the names of their fellow association owners); rejecting candidate platforms or editing them to conform to the board's idea of fair comment which includes eliminating any criticism of the board.

Two recent election-related developments merit special notice. In one northern New Jersey cooperative, a board president who was the former developer had himself declared "president-for-life" by the "association" attorney. That board also voted to amend the association bylaws to forbid any recall elections. The other recent example is notable in that it demonstrates election concerns extend beyond board abuses. After an election, a property manager (hired by the previous board) unilaterally objected to the outcome. He would not recognize the legitimacy of the newly elected board members and refused to turn over any association records to them (the newly elected board will be forced to seek a court order).

When one considers the extreme difficulty an opponent has of unseating an incumbent board, beginning with trying to overcome natural owner apathy, the idea that an election is a viable remedy is more of a theoretical than an actual possibility. It is useful to contrast the association situation with that of the democracy in which they exist. In associations, as in all dictatorships, there is only one party- the ruling party. Challengers may, at times, be tolerated. But challengers in totalitarian regimes are rarely successful. (Interestingly enough, board members, and especially presidents, tend to have long reins and fervently cling to power, even handpicking successors.). By contrast, in our democracy, in addition to a free press independently reporting events, we have two very independent and active parties providing a constant "loyal opposition". Consider whether a member of

one party could be elected if incumbents in the other could use public resources to oppose him, deny him access to newsletters circulated among the voters, deny him voter lists, review and reject his campaign literature and finally- count the votes themselves. The current remedy for fraudulent elections requires owners to petition for action in Superior Court (at their own expense) if the association is a Title 15A non-profit corporation. The corporate status may have beneficial aspects for liability or business but it does not provide realistic remedies for protecting owners who view themselves as neighbors rather than stockholders for profit (even in cooperatives). Unlike those with membership in other types of corporations, people in associations cannot sever their connection by resigning or selling shares-they must uproot themselves and their families from their homes.

A "BR" dispute resolution section would reveal what informed logic would suggest. Boards allowed to create their own dispute resolution systems do so with an eye to a positive outcome-for their position. Fewer than 50 of the thousands of complaints received involve owner versus owner disputes. Virtually all are owner versus board for the board violating governing documents. Owners are disheartened when they find the system designed to protect them consists of a procedure written by the board and implemented by those selected and appointed by the board. Invariably, the association attorney participates by presenting the board's position thereby placing lay owners at a distinct disadvantage. In many instances, the board improperly establishes itself or the attorney as the hearing examiner or as an appellate reviewer. In one matter concerning an owner's dispute of a violation, the hearing consisted of him being required to prove garbage wasn't his. In another, the ADR chairperson was the spouse of the board president against whom the complaint was lodged (notably, the association attorney resisted forcing a recusal and only relented after a prolonged exchange of letters and calls.)

Complaints disclose that The "BR" meeting section is replete with instances highlighting boards' penchants for keeping even their official actions secret. A number of boards believe their one meeting a year is sufficient, despite the statutory mandate to meet in public for every binding vote. It is common for complainants to refer to binding actions, especially contracts and rule impositions, taken without public meetings. Because there is no mandate for on site meeting rooms, some meet in board members' units and bar unwanted residents. Boards are required to keep minutes of meetings and although many do, it is unusual for them to contain more than a note of an action and vote with no comments. Boards compound this deficiency by resisting disclosing them in a timely fashion as required by law.

The "BR" finance area reflects many boards' beliefs that financial information is best minimally disclosed- if at all. The lack of disclosure is aggravated by the routine avoidance of independent audits. The State's notice informing associations of the statutory obligation to allow owners access to financial records is routinely met with opposition. Often, the association counsel is employed to dispute or delay access, advocating the board's desire not to reveal the financial details or to reveal them as little as possible. One must include in this category the numerous complaints about boards ignoring bylaw limitations on their expenditures. One creative approach is to interpret a restriction on, for example, expenditure in excess of $15,000 without owner approval, as a license to sign a $50,000 contract and pay it off in $15,00 installments. Although the law specifically cites an owner's right to see unit owner records- boards routinely deny the request. It has

been revealed that board members have given themselves credit for monthly payments- in recognition of their service or failed to pursue a lien procedure when they are in arrears. One board threw itself (and family members) expensive dinner/theatre parties in New York- traveling there by limousine, naturally. An example of boards' reluctance to share information is their refusal to disclose insurance policies.

Under the heading "Personal cruelty"; boards have denied or actively delayed approving requests for ramps by owners confined to wheelchairs, finally dickering over the approved color when they could no longer deny approval. Boards have invoked provisions baring pets-years after approvals were given –even extending the ban to indoor cats in single- family homes and have issued daily fines. Owners had the choice of discarding family pets or moving. In contrast, but in keeping with the familiar theme, should a board member purchase a dog, the rule banning pets will be ignored. Board members have designated parking spaces for themselves on common areas, denying access to owners otherwise entitled and in one instance having the owner's car towed.

As a preface to what may charitably be called "The Joy of Free Attorneys" one must note that association legal costs are borne by all the members. It is the board, however, and usually the president, that decides when and how to use the attorney. Attorneys, who often consider the board to be the association, accept that anything the president does or desires is by definition in the interest of the association. This legitimately applies to discretionary determinations and actions truly for the common good (e.g., defending a liability suit) but extends to denying owners rights to ADR or to financial record access as well as to board failures to comply with bylaws. By no stretch of logic could a board's violation of owner rights or bylaw requirements be deemed to be in the best interests of the association. The economics of the situation, however, allow board members the complete freedom to use the association attorney as they would a personal attorney if they decide to ignore laws or governing documents and thereby act with virtual impunity.
As an interesting sidelight, one must note the frequency with which boards have their attorneys handle routine owner inquiries and complaints about board conduct. It appears boards are unable to write simple letters to fellow owners and demonstrates an amazing failure to consider costs. It is not uncommon for owners complaining about a board's blatant violation of the bylaws to receive letters from the association attorney demanding that they cease or face a lawsuit. One board used its attorney to actively resist providing statutorily mandated ADR until faced with a suit by the Attorney General. Had the board felt like continuing to pursue its disregard of owner rights, its members can advance that position, confident in their obligation to pay only a tiny fraction of the costs. While an attorney's services are basically free to the board, owners are not so fortunate. (The scope of the burden merits illustration. At a modest attorney -billing rate of $200/hr, board members in a 350- unit association are paying an hourly rate of 57 cents to advance their position. The disputing owner pays that plus the full $200). Unless the issue centers on one of the three matters within the State's jurisdiction, or many owners can be rallied to oppose a board's improper action, owners entitled to relief are advised of the necessity of instituting legal action to stop the board from violating their rights. Owner complaints about the unfairness of the economic disparity are common as is their frustration in paying a portion of their own association's counsel fees to oppose them.

The scope of the complaints received is extremely disturbing *for two reasons. It*

reveals both institutional failures and a seriously flawed premise. Opponents often allege that there are many good associations- and no doubt there are. Some owners don't follow reasonable rules-and for that the association has ample remedy. The extent of the rules, however, can be daunting and selective enforcement common. Despite years of fairness, under the current system, all that is required is the election of a few despots or one president to turn a free and open association into a dictatorship at a whim. *The premise in a democracy is that power is apportioned rather than centralized. Those who enact laws do not enforce them and the enforcer doesn't judge. That is not the case in associations, most of which decline to even have, no less share power with, owner committees.* Significantly, owners never elect the developer. That person or entity, completely outside of their control, initially determines their obligations- in long complicated legal documents.

Evidence supports what human nature suggests, namely, that people looking for a home focus on fundamentals such as the structure itself, amenities, the neighborhood, monthly association fees, taxes and schools. They are not aware of the implications in the hundreds of pages of legalistic details in ponderous governing documents or the possibility that a neighbor could be empowered to dominate their domestic life. It seems more realistic and reasonable to require developers to allow owners to decide on the details of their own obligations once they assume control. It is unreasonable to expect individuals to study thick legal documents and form super majorities to revise myriad often incredibly trivial restrictions established by developers.

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