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Emotional distress by HOA

The Radcliffs, who lost their \$230,000 home in a foreclosure over \$120, filed a lawsuit against Copper Cove Lake Tulloch Homeowners Association, the collection agency Coast Assessment Service of Garden Grove, and the man who bought their home at auction. Also included as defendants are Yvette Villanueva-Ezell, association president and Norman Bailey, association secretary.

The suit alleges the association and Coast caused the Radcliffs "great and serious mental anguish and emotional and physical distress. "The Radcliffs' symptoms include inability to sleep, a sense of being overwhelmed and severe nervousness, court documents said.

Can such foreclosures be viewed as essentially punitive, violating the 14th Amendment's deprivation of property without due process? (See article below).

Do HOA foreclosures violate due process?

A US Supreme Court case on the topic of punitive damages has bearing on the Radcliff case mentioned above, and on other HOA foreclosure cases.

Here's what the USSC said in 2003:

"Compensatory damages are intended to redress a plaintiff's concrete loss, while punitive damages are aimed at the different pur-

poses of deterrence and retribution. The Due Process Clause prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor ... Punitive damages awards serve the same purpose as criminal penalties ... However, because civil defendants are not accorded the protections afforded criminal defendants, punitive damages pose an acute dan-

ger of arbitrary deprivation of property ..."

This was an insurance case, won by the insurance company, with a ratio of 145:1 in punitive damages. The foreclosure against the Radcliff's was for \$120 debt and the loss of home equity was some \$285,000, representing over a 2,000:1 punishment.



The HOA Citizen

In an HOA, your vote isn't necessary

A September 2004 Michigan Appeals Court decision addressed the validity of amending the CC&Rs with less than a unanimous vote.

The Court held to the position that homeowners are bound to amendment changes that are passed in accordance with the CC&Rs amendment provisions -- a less than

100% vote binds all others. Talk about lack of informed consent to such potentially wide-ranging impact on your home.

Citing another case, the Court considered the following as a possible consequence of allowing a less than unanimous vote:

"Taking these words to mean that particular lots could be excepted

[say from paying assessments] permits the obviously unintended result that 51 per cent of the owners could exempt their own property and leave the other 49 per cent encumbered or could even impose more strict restrictions upon certain lots."

Therefore, It went on to

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Special points of interest:

- Are HOA foreclosures a cruel and unusual punishment? p.8

Governator vetoes foreclosure bill

Although it had wide bipartisan support, Gov. Arnold Schwarzenegger vetoed a bill that would have stopped California's

37,000 homeowner associations from foreclosing on homes for small debts.

The legislation, by As-

semblyman Darrell Steinberg, D-Sacramento, and Sen. Denise Ducheny, D-San Diego, would have

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Muni to take over HOA obligations?

Excerpt: SOUTH ELGIN — The village board voted Monday night to require special service areas, or SSAs, for the Parkside Woods, Cambridge Bluffs and Prairie Pointe subdivisions. The SSAs are merely backups "if the homeowners associations don't do what they are supposed to with infrastructure," said Steve Super, director of community development.

Fred Pilot informs us:

"It is interesting indeed -- and this could end up becoming standard procedure in detached home CIDs aka planned communities given the lack of homebuyer interest in HOAs. They would initially be under developer control via developer controlled HOA, then the HOA dissolved and infrastructure maintenance responsibilities transferred to local government and financed via special tax district.

"I think this Illinois story shows that local government officials are recognizing that while they may require new development to be of the common interest variety, the lack of homebuyer support for HOAs calls into question their sustainability over the long term and consequently their ability to maintain associated infrastructure."

Comments:

It's all possible and when the local governments and state legislators run out of defenses to continue to protect these private governments, then, they too, will turn to this mechanism of "muni-zation". We just need to help these people see the light sooner rather than later.

Those who say, "we don't want government interference" seem to settle for private government interference that lacks any obliga-

tion to protect our rights — the HOA. Who else will protect our rights if not the government? Isn't that what we expect from our government?

The necessary and proper functions of government are spelled out in the Preamble to the Constitution:

"to establish justice, insure domestic tranquility (keep the peace), promote the general welfare (now extended to mean "health, safety and the general welfare"), and secure the blessings of liberty."

It's under the general welfare function that the conduct of persons in the states is regulated and controlled for their overall benefit. And that includes protecting one faction from the injustice of another faction; namely, the homeowners from the HOA board.

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"then the HOA dissolved and infrastructure maintenance responsibilities transferred to local government"

... your vote not necessary

(Continued from page 1)

say, "We conclude that the logic of the many courts cited [] is sound and should be followed here: Non-uniform covenant amendments require the unanimous consent of the affected prop-

erty owners.

Permitting non-uniform amendments and exemptions by majority or supermajority vote would destroy this crucial aspect of covenants and thus undermine the entire system of private regulation of real prop-

erty in Michigan.

The fundamental premise that makes people willing to bind themselves to the burdens of restrictive covenants is that the resulting benefits are assured; each property owner relies on the fact that all are

"That 51 per cent of the owners could exempt their own property and leave the other 49 per cent encumbered"

... governor vetoes bill

(Continued from page 1)

made associations use small claims court to collect unpaid debts under \$2,500, ending a practice of threatening to foreclose while adding \$1,500 to \$2,000 in attorneys fees and other collection costs to the bill.

Debts over \$2,500 could still have been collected through non-judicial foreclosure. But the new law would have significantly restricted foreclosure practices in associations. It proposed to make association

boards personally approve foreclosure proceedings instead of delegating to others, make new buyers pay at least 65 percent of a foreclosed home's value and gave homeowners 90 days to buy back their property.

Efforts by homeowner groups to pass similar legislation in other states - such as Texas, Florida and Arizona, which contain more than half the nation's 260,000 homeowners associations - have also repeatedly failed.

"I think he recognized

the unintended financial havoc that this legislation could have created," said Tom Skiba, chief executive officer of the Community Associations Institute, a Virginia-based industry group that mounted a major lobbying effort this month with Schwarzenegger. "This had potential to damage the entire economy of California."

The fear tactics prevail — officials accept the falsehood that only HOAs will be built, sold and bought by home buyers.



Growing HOA dissatisfaction

[From the Christian Scientist Monitor by Mark Sappenfield]

For decades, such associations have occupied a murky niche as more than a private business but less than a local government - collecting taxlike "assessments" but subject to little public oversight. Yet as more Americans move into homes governed by associations, there are

signs of a mounting revolt.

"In my view, there is an imbalance of power between homeowners' associations and homeowners," says California state Rep. Darrell Steinberg (D), who sponsored a bill that would have banned foreclosures unless the resident owed more than \$2,500 in assessments. "There is an

unfairness in giving homeowners' associations that much authority."

"There have been many complaints to the Legislature and the government during the past couple of years," says William Sklar, who was co-chair of a Florida task force convened by Gov. Jeb Bush (R) to deal with the issue.



Do the HOA lobbyists represents you?

[Excerpt from letter to Glassman/Vanitizian column in the L.A. Times]

Two different management companies of two different associations where I owned units wrote several letters to the Assembly and Senate supporting bills that make my life as a deed-restricted homeowner oppressive and have resulted in diminished owner rights.

The letters were written on association letterhead and signed by the management company owners or managers. The letters did not state that the board instructed them to write, nor did they reflect that they were written on behalf of the association.

I showed owners and board members copies and they were mad. Those letters give the

impression that the management company speaks for our association. It doesn't. It also gave the impression that the board and owners asked them to write. We didn't.

REPLY:

The company and all its employees must act only for the association's benefit, meaning with board consent.



Call for city codes to regulate HOAs

The Arizona Republic printed a letter from a Chandler, AZ resident proposing steps by the city to regulate HOAs.

The writer makes the argument for municipalities to develop a code that creates HOA boards in a different way. Many cities mandate HOAs, yet they do nothing to help them do the right things. Civic-minded citizens must be given both the incentive and the tools they require in order to serve their community in an efficient and fair fashion.

Furthermore, he calls for a city code would require board members be educated in the proper operation of HOAs, provide a mandatory monitoring function and an ombudsman to mediate disagreements. Prospective board members with

personal issues or vendettas would be weeded out quickly.

Covenants, Conditions and Restrictions (CC&Rs) should be reasonable and common among HOAs: CC&Rs should not vary so strongly from HOA to HOA.

The code, he adds, should also provide a basic set of CC&Rs to be used throughout the municipality. A citizens commission with diverse membership would develop this basic set of CC&Rs. Individual developers, with city approval, could add a CC&R addendum to the basic set to govern "special requirements" as they exist within their development.

These "special requirements" have been proposed under my own "Muni-zation" plans as special taxing district

ordinances, thereby allowing for restricted use of amenities and "tailored rules and regulations" for each community, yet not inconsistent with the laws of the land.

With keen insight, the write states that, "If Chandler would take responsibility for the HOAs it creates and make these three changes, we could keep the good aspects of HOAs and cure the bulk of the problems. Further state legislation will only muddy the waters by creating a hodgepodge of 'fixes' that don't really address the real problems."

[For more details on the Muni-zation proposal, see my site at <http://pvtgov.blogspot.com>

And scroll down.]

"Many cities mandate HOAs, yet they do nothing to help them do the right things."

Florida's OPPAHA to review HOAs

[From Jan Bergemann, President of Cyber Citizens for Justice, a Florida based service at <http://ccfj.net>]

After a lengthy telephone conversation with the very helpful staff of OPPAGA yesterday, I received an e-mail outlining the next steps of the review. In order to solve the problem of soliciting testimony, that would often require lengthy travels - - inconvenient especially for our elderly friends -- the decision has been made to create an interactive website where you all can easily file your grievances from your home.

It will help to finish the review in a shorter time span. It seems that many of the complaints against the DBPR are going in similar directions. This new website will help all of us to air our grievances, but will allow OPPAGA to get an easier handle on the problems.

Please read the below letter carefully, so you know what is intended with this review. We don't want a witch hunt, we want improvements that will help us in the future. Besides filing your grievances please make proposals for improvements as well. Your help will be very important for the success of this review!

OPPAGA has begun its review of the Department of Business and Professional Regulation's Division of Land Sales, Condominiums, and Mobile Homes. Our review will evaluate the division's performance of its primary functions and will include an assessment of its processes for handling consumer complaints related to condominiums, as well as timeshares, mobile homes, and yacht- and shipbrokers.

Although OPPAGA will not be taking public testimony, citizen

input is very important to us. In addition to listening to the tapes of public testimony before the House Select Committee on Condominium Association Governance, we will be soliciting feedback from citizens to assist us in identifying specific areas of concern.

For this purpose, we are developing a website to allow us to obtain formal input from citizens regarding the division's performance. We expect to have this website completed in November and will contact you with the details about how the public can provide us with the information needed for our review.

We have also created a special mailbox to facilitate receipt of e-mail specific to this review. Accordingly, any future correspondence should be sent directly to the project team at LSCMH@oppaga.fl.gov

"we are developing a website to allow us to obtain formal input from citizens ."



Litigious associations benefit the lawyers

[Deb Rich wrote in the SF Chronicle last month]

What makes life in CIDs particularly litigious is the fact that people who buy a home in a CID essentially pledge their private property as a guarantee of their good behavior (as defined by the CC&Rs and as interpreted by the association board). Homeowners associations have a contractual right to place liens on the properties and homes of residents to enforce compliance with the CC&Rs.

"Homeowners associations, being private organizations, cannot violate the Constitution, no matter what they do. They can tell you to take down your Christmas decorations, your American flag, whatever," says Evan McKenzie, political science professor at the University of Illinois,

Chicago, and lawyer.

CIDs and CC&Rs are here to stay. Why? Because every day more of us want homes and because cash-strapped towns and cities can't afford to resist a developer who pitches a proposal in which the developer agrees to put in the infrastructure that the city itself used to have to install -- the sewage lines, the roads, the parks.

It's a win-win deal; the city gets to collect property tax from the new homeowners without having had to front the money for development, and the developer gets to pass on the cost for the infrastructure and its upkeep to the home buyers in the form of dues and special assessments.

Homeowners associations are run by a board of directors composed of elected volunteers from among the property owners. However,

few homeowners, despite their volunteer spirit, have experience running a multifaceted operation, managing finances, negotiating contracts and smoothing the ruffled feathers of feuding neighbors. Even fewer have time for a second job or have the commitment necessary to spend evenings checking whether the height of the Jones' new fence meets association code.

And the home buyers? Well, the home buyers get a shiny new neighborhood. And the home buyers get the job of keeping it polished.

Comment: Unlike a municipal government, and even though a homeowner can vote, the HOA/CID is undemocratic without checks and balances or a separation of powers that makes is highly susceptible to cliques.

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