



A Report Related to the Licence Appeal Tribunal and the Ontario New Home Warranty Plan Act 2006 – 2013

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Introduction

Canadians for Properly Built Homes (CPBH) continues to monitor the results from the Licence Appeal Tribunal (LAT), given homeowners' complaints about the Tarion Warranty Corporation (Tarion) and homeowners' dismal results at the LAT when homeowners appeal Tarion's decisions. While the LAT hears cases related to other matters such as funeral homes and car dealers, this analysis is limited to home warranty on newly built homes provided by Tarion, i.e., the Ontario New Home Warranty Plan Act (ONHWP).

Key Findings

- Homeowners' overall success rates at the LAT continue to be very poor – only an 18% success rate in 2013. That translates to an 82% failure rate for homeowners (Table 3).
- There was only one settlement in 2013 - significantly lower than previous years (Table 1).
- Some Chairs have had 100% of their cases settled (Table 2).
- The vast majority of LAT hearings take place in Toronto (Table 4).
- Homeowners' success at the LAT in relation to major structural deficiency claims continues to be largely futile – only a 4% success rate – a 96% failure rate in the eight years of this analysis (Tables 5a – 5h).
- Tarion continues to always retain legal counsel for the LAT process (Table 6).
- Some homeowners are taking their legal disputes to the regular court system instead of the LAT.
- The LAT process is very expensive for all parties. The Builder Arbitration Forum is a cost reduction process for builders to challenge Tarion's rulings (and excludes the consumer). Other consumer protection agencies have internal committees/boards to assess consumer claims. Why has Tarion not established a Claims Review Committee/Board to simplify the process and reduce costs for everyone? It appears that this is another example of Tarion giving builders preference over consumers.
- Some homeowners have found that after they win at the LAT, the LAT's orders are not fulfilled. Typically, consumers are very surprised to find that the LAT has no "teeth" to ensure that its orders are followed.
- In 2013 an Ontario homeowner won his case in Ontario Small Claims Court against the initial purchaser of a newly built home for not disclosing a construction defect(s) when the home was sold on the real estate market. The particular construction defect(s) concerned heating, ventilation and air-conditioning (HVAC). The second homeowner referred to this act by the first homeowner as "patch and run". Here is a link to a published article in Real Estate Magazine (REM) that discusses "patch and run":
http://www.canadiansforproperlybuilthomes.com/html/HVAC/pdfs/Dec2006Patch_Run.pdf .
- In Oct. 2013, the **Action Committee on Access to Justice in Civil and Family Matters** published its report. This report may be found at: http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf . An article in the Toronto Star published Oct. 9, 2013 said: "...The report calls for an effort to reduce the financial and procedural barriers that frustrate people and deny justice, particularly to the growing number who try to represent themselves....". This certainly applies to Ontario's consumers who decide that they have to take legal action against Tarion to get what they paid for in relation to the largest purchase most consumers make: a home.

Conclusion

After eight years of this analysis, it is clear that Premier Wynne needs to take immediate action to replace the LAT for homeowners' disputes with Tarion -- with a fair, balanced, effective, efficient and cost efficient means for Ontario homeowners to resolve these disputes. This is in keeping with the report from the **Action Committee on Access to Justice in Civil and Family Matters**.

Questions to be investigated by the Ombudsman of Ontario, André Marin or the Auditor General of Ontario, Bonnie Lysyk

The Ombudsman of Ontario and the Auditor General of Ontario both have jurisdiction over the LAT. A key question that needs to be answered is whether the LAT is functioning (in relation to the ONHWP Act) the way it was initially intended.

The LAT's web-site says that it is focused on a "*fair, effective, timely and accessible dispute resolution*" (Retrieved Sept. 13, 2014). Specific questions include, but should not be limited to:

- Is the LAT truly a "fair, effective, timely and accessible dispute resolution"?
 - This is a legal process. Tarion always hires legal counsel. Often homeowners do not because they cannot afford to hire a lawyer. Is this fair?
 - How is the effectiveness of the LAT measured, and who is monitoring this?
 - How is the timeliness of the LAT measured, and who is monitoring this? Many homeowners describe the LAT as very slow and expensive.
 - Is the LAT accessible? The vast majority of hearings take place in Toronto. How does the LAT make itself accessible to homeowners who cannot afford to travel from rural areas?
 - The LAT allows Tarion to communicate by e-mail, but the vast majority of homeowners cannot communicate with the LAT via e-mail? Why is Tarion getting preferential treatment re e-mail – how is this fair to consumers? What other preferential treatment does Tarion get from the LAT?
- Why is it virtually impossible for homeowners to win major structural deficiency (MSD) claims at the LAT?
- Why do some LAT Chairs have their cases settled 100% of the time, while other LAT Chairs never have their cases settled? For example, is this because of the process that the Chair uses or a Chair's style? How does the LAT ensure that the processes and styles are reasonably consistent from Chair to Chair?
- What steps should be taken related to the LAT to appropriately respond to the report from the **Action Committee on Access to Justice in Civil and Family Matters**?

Questions for the Minister of Government and Consumer Services, David Orazietti

According to the Ministry's web-site: "...The ministry collects and assesses information about the delivery of Ontario's New Home Warranty Plan and provides Tarion with formal recommendations for program improvements based on issues that arise in the marketplace..." (Retrieved Sept. 13, 2014). This is information that Tarion already has, or could obtain given its role as Regulator.

In an Aug. 2014 letter responding to a homeowner who raised his concerns about Tarion, Minister Orazietti highlighted "notable improvements put in place by Tarion over the past several years". One of these items on Minister Orazietti's list was the significant reduction in the number of LAT appeals. But, as was subsequently pointed out to the Minister, the LAT is only one means by which consumers can try to resolve their issues with their builder and Tarion. Other options for consumers include: bypassing the LAT and going to Small Claims Court or the regular courts, homeowners giving up and fixing their homes themselves, and homeowners resorting to "patch and run", which refers to a situation where a consumer is unable to get an appropriate response for the construction defect from the builder/Tarion, and resorts to putting the home on the market without disclosing the construction defect to the next purchaser - an illegal activity.

- What evidence (other than what Tarion tells him/his Ministry) does Minister Orazietti have about why consumers' appeals to the LAT have dropped?
- How many homeowner disputes involving Tarion and/or the builders Tarion licenses have been/are being pursued through the regular courts rather than the LAT?
- Many homeowners cannot afford to retain the services of legal counsel and technical experts. However, Tarion always has funding to hire experts. What can be done to level the playing field?
- How much does Tarion spend on lawyers (in-house and external) to fight consumers at the LAT? Are these amounts appropriate, given Tarion's consumer protection mandate?
- When a claim is denied and a consumer appeals to the LAT, Tarion uses mandatory fees paid by consumers to defend the builder. Given that it is the builder's warranty, should the builder not be responsible for defending it?
- The Licence Appeal Tribunal (LAT) process is very expensive for all parties. The Builder Arbitration Forum is a cost reduction process for builders to challenge Tarion's rulings (and excludes the consumer). Other consumer protection agencies have internal committees/boards to assess consumer claims. Why has Tarion not established a Claims Review Committee/Board to simplify the process and reduce costs for everyone? It appears that this is another example of Tarion giving builders preference over consumers.

Questions for LAT Associate Chair, Gary Yee

- It has been almost a year since the report from the **Action Committee on Access to Justice in Civil and Family Matters** was published. What steps has the LAT taken to respond to the October 2013 report from the **Action Committee on Access to Justice in Civil and Family Matters**?
- What steps does the LAT plan to take to respond to the October 2013 report from the **Action Committee on Access to Justice in Civil and Family Matters**?

Analysis related to Prehearings & Orders

This analysis primarily focuses on consumers' cases at the LAT. Other than the total number of cases, builder registration issues have not been included in this analysis. Settlements include cash offers and offers to do the work, as well as offers that may not have been accepted by the applicant (the homeowner). It is interesting and important to note that the volume of cases, decisions, prehearings and orders and settlements have all declined significantly in the past eight years.

One cannot assume that this drop in cases, decisions, etc., is because any part of the process has improved over the years. The LAT is only one means by which consumers can try to resolve their issues with their builder and Tarion. As noted previously in this report, other options for consumers (homeowners) include:

- Consumers bypassing the LAT and going to Small Claims Court or the regular courts,
- Consumers giving up and fixing their homes themselves, and
- Consumers resorting to "patch and run", which refers to a situation where a consumer is unable to get an appropriate response for the construction defect from the builder/Tarion, and resorts to putting the home on the market without disclosing the construction defect to the next purchaser - an illegal activity.

Table 1: Overview of the Output of the LAT

	2013	2012	2011	2010	2009	2008	2007	2006
Total # of Cases Heard at LAT	23	33	51	58	101	145	235	267
# of Decisions	20	18	10	21	16	20	29	54
# of Prehearings & Orders	3	15	39	30	46	85	147	136
# of Settlements	1 (not confidential)	9 (none of these Settlements Deemed Confidential)	17 (6 – 35% of these Settlements Deemed Confidential)	25 (7 – 28% of these Settlements Deemed Confidential)	30 (5 – 17% of these Settlements Deemed Confidential)	13 (1 – 8% of these settlements deemed confidential)	40 (9 - 23% of these settlements deemed confidential)	29 (3 – 10% of these settlements deemed confidential)

Key Information by LAT Chair

Table 2- Please note in green the Chairs that have had 100% of their cases settled.

Chair	#of cases	# of settlements	% cases settled	# of confidential settlements	# of decisions
Benninger	9	9	100%	0	0
Blais	4	0	0	0	4
Caryll	8	8	100%	0	0
Cassidy	4	0	0	0	4
D'Amours	3	0	0	0	3
Dann	20	14	70%	0	6
Diamond	4	1	25%	0	3
Flude	28	9	32%	5 (56%)	19
Gahir	3	1	33%	1 (100%)	2
Garbe	8	1	13%	0	7
Higdon	1	1	100%	0	0
Israel	17	3	18%	0	14
Kennedy	1	1	100%	0	0
Kennelly	9	8	89%	1 (13%)	1
Koprowski	19	3	16%	0	16
Laurin	7	2	29%	0	5
MacKlin	1	1	100%	0	0
Bennet-Martin	2	2	100%	0	0
McCauley	1	0	0	0	1
McIntosh	5	1	20%	0	4
McQuaid	3	1	33%	0	2
Budwith-Mingay	2	1	50%	0	1
Pannu	1	0	0	0	1
Penner	9	6	67%	5 (83%)	3
Proulx	4	1	25%	0	3
Sanford	32	17	53%	7 (41%)	15
Selby	22	11	50%	0	11
Spencer	19	15	79%	5 (33%)	4
Sproule	18	6	33%	3 (50%)	12
Sweeney	15	8	53%	5 (63%)	7
Wallace	17	4	24%	0	13
Weary	23	5	22%	0	18
Wright	7	7	100%	0	0
Unknown		17			
		164	31 (19%)		

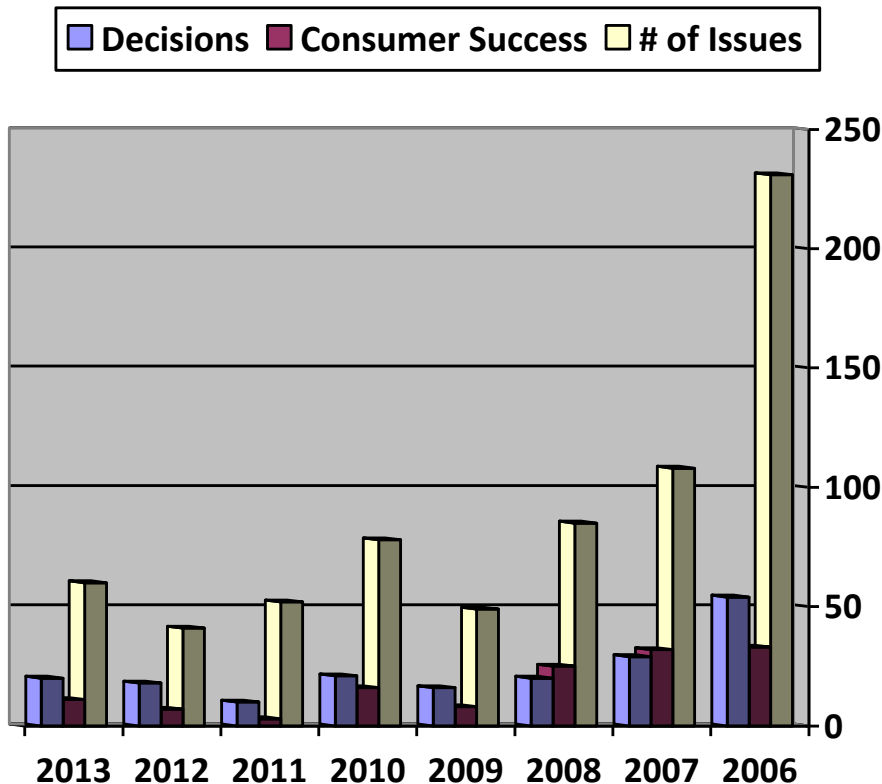
Analysis related to Decisions: Overall Success of Homeowners at the LAT

In 2013, 20 decisions were issued by the LAT. It is important to note that a decline in decisions cannot be interpreted as consumers' satisfaction with Tarion. Homeowners have other means of settling their disputes including going to regular courts and or fixing the construction defects themselves. As in previous years, in 2013, homeowners continued to experience a very low rate of success (Table 2 summarizes these results).

Table 3: Success of homeowner claims at the LAT

	2013	2012	2011	2010	2009	2008	2007	2006
Total Decisions	20	18	10	21	16	20	29	54
# of issues presented by homeowners	60	41	52	78	49	85	108	241
Success of homeowners based on total issues presented	11 (18.3%)	7 (17.1%)	3 (5.8%)	16 (21.5%)	8 (16.3%)	25 (29.4%)	32 (29.6%)	33 (13.7%)

Graph 1: Total LAT Decisions compared to # of Issues and Homeowner Success



Analysis related to Decisions: Location of LAT Hearings

All parties (homeowners and Tarion) must pay for their own travel and related costs related to the LAT. Once again, in 2013, the vast majority (75%) of the LAT hearings took place in Toronto.

Some homeowners have complained to CPBH that the location of the hearing was a key factor in their decision not to pursue their claims at the LAT. Table 4 provides these results of the analysis of the number of hearings by location.

Table 4: Decisions: By Location

Location of hearing	2013 # of hearings	2012 # of hearings	2011 # of hearings	2010 # of hearings	2009 # of hearings	2008 # of hearings	2007 # of hearings	2006 # of hearings
Belleville		1 (5%)	1 (10%)	-	-	-	1 (3.5%)	-
Chatham	1 (5%)	-	-	-	-	-	-	-
Hamilton	1 (5%)	-	-	1 (4.75%)	-	-	-	-
Kingston		-	1 (10%)	-	1 (6.25%)	1 (5%)	-	-
Kitchener	1 (5%)	-	-	-	-	-	-	-
London	1 (5%)	-	2 (20%)	-	1 (6.25%)	-	-	1 (1.5%)
Ottawa	1 (5%)	2(10%)	-	1 (4.75%)	1 (6.25%)	-	2 (7%)	7 (13%)
Peter-borough		1(5%)	-	-	-	-	-	-
Sault St Marie		1(5%)	-	-	-	-	-	-
Sudbury		-	-	1 (4.75%)	1 (6.25%)	-	1 (3.5%)	-
Toronto	15 (75%)	12(68%)	6 (60%)	17 (81%)	12 (75%)	17 (85%)	23 (79%)	43 (80%)
Windsor		-	-	-	-	1 (5%)	2 (7%)	1 (1.5%)
Telephone		1(5%)	-	-	-	1 (5%)	-	2 (4%)
Unknown		-	-	1 (4.75%)				
Total	20 (100%)	18 (100%)	10 (100%)	21 (100%)	16 (100%)	20 (100%)	29 (100%)	54 (100%)

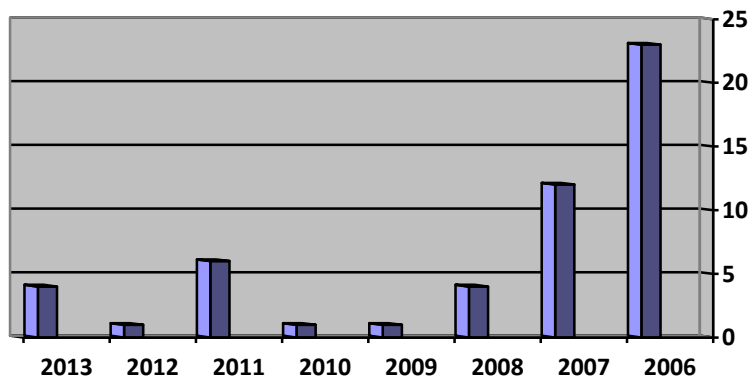
Analysis related to Decisions: Success of Major Structural Deficiency Claims

In eight years of analysis, there have been 52 major structural deficiency (MSD) claims. Two of these claims have been successful – one in 2010, and one in 2007. Therefore, these analyses indicate a 96% failure rate for homeowners pursuing MSD claims at the LAT over the eight year period.

On Jan. 28, 2008, Toronto Star columnist Bob Aaron wrote about a significant case involving an MSD claim in which the homeowners were unsuccessful at the LAT, but then decided to pursue their claim at Divisional court. However, according to Aaron’s Toronto Star column: “*....Suddenly, about a week before the court hearing – and nine years after the house was purchased – the case was quietly settled and disappeared from the court docket. When I tried to find out how it had been resolved, I was told by all parties the settlement was subject to a “will not disclose” agreement....*”. The headline of Aaron’s column was **“Is secrecy a major structural defect in buyer protection”**. For the full article, as well as the LAT’s web-site information concerning this case, go to: <http://www.aaron.ca/columns/2008-01-26.htm> Aaron’s column raises important issues about how both Tarion and the LAT have dealt with homeowner claims.

It is interesting to note the significant drop in MSD claims from 2006 to 2013. Is this because consumers are not finding MSD construction defects, consumers are able to resolve their MSD claims elsewhere, or because consumers have given up pursuing MSD claims at the LAT?

Graph 2 – MSD Claims Submitted by Homeowners: 2006 to 2013



Tables 5a to 5h provide some details related to major structural deficiency claims from 2006 to 2013.

Table 5a: LAT – Summary of Major Structural Claims in 2013

# of Items	LAT Chair	Accepted by the LAT?
1	Flude	No
1	Sweeney	No
1	Spencer	No
1	Flude	No

Table 5b: Summary of Major Structural Claims in 2012

# of Items	LAT Chair	Accepted by the LAT?
1	Dann	No

Table 5c: Summary of Major Structural Claims in 2011

# of Items	LAT Chair	Accepted by the LAT?
1	Garbe	No
4	Sweeney	No
1	Sproule	No

Table 5d: Summary of Major Structural Claims in 2010

# of Items	LAT Chair	Accepted by the LAT?
1	Selby	Yes

Table 5e: Summary of Major Structural Claims in 2009

# of Items	LAT Chair	Accepted by the LAT?
1	Sproule	No

Table 5f: Summary of Major Structural Claims in 2008

# of Items	LAT Chair	Accepted by the AT?
1	Sanford	No
1	Flude	No
2	Selby	No

Table 5g: Summary of Major Structural Claims in 2007

# of Items	LAT Chair	Accepted by the LAT?
10	Sherman	No
2	Koprowski	1 item- yes

Table 5h: Summary of Major Structural Claims in 2006

# of Items	LAT Chair	Accepted by the LAT?
2	Sanford	No
1	Sherman	No
2	Koprowski	No
15	Laurin	No
2	Israel	No
1	Sproule	No

Analysis related to Decisions: Representation by Lawyers and Technical Support

It is critical for homeowners to recognize that going to the LAT is typically a complicated legal process. Homeowners and Tarion can choose to be represented by legal counsel, and/or technical support (such as home inspectors and engineers) --- at their own expense.

Regarding Homeowners Hiring Professional Counsel

2006 LAT Chair: *"...The risk applicants take in not seeking professional counsel is that they do not appreciate all the elements of the case that they have the onus of proving. It is no ones' fault, but their own. The same elements of the claim must be proved and the same onus met regardless of whether or not a party has counsel..."*

Note: In the above statement, "applicants" means "homeowners".

Table 6 provides a summary over the last eight years. Table 7 displays homeowner success rate when represented by a lawyer. It is important to note that Tarion (denoted by T below) is always represented by a lawyer, while homeowners (denoted by HO) often represent themselves (Table 6). Many homeowners have cried foul about this uneven playing field.

Table 6: Legal and Technical Representation/Reports at the LAT

	HO 2013	T 2013	HO 2012	T 2012	HO 2011	T 2011	HO 2010	T 2010	HO 2009	T 2009	HO 2008	T 2008	HO 2007	T 2007	HO 2006	T 2006
Represented at the hearing by Legal counsel	4 20%	20 100%	3 17%	18 100%	0	10 100%	5 24%	21 100%	1 6%	16 100%	4 20%	20 100%	4 14%	29 100%	3 6%	54 100%
Represented at the hearing by technical support	8 40%	8 40%	4 22%	8 44%	5 50%	7 70%	7 33%	17 81%	3 19%	7 44%	7 35%	8 40%	7 24%	8 28%	6 11%	12 22%
Provided a technical report(s) only (no representation in person at the hearing)	1 5%	1 5%	0	0	1 10%	0	8 38%	0	3 19%	1 6%	5 (25%)	3 15%	5 17%	0	3 6%	0

Table 7: Homeowner Success Rate When Represented by a Lawyer

	2013	2012	2011	2010	2009	2008	2007	2006
Overall homeowner success rate	18.3%	17%	5.76%	21%	16.33%	29%	30%	14%
Homeowner success rate of decisions in which the homeowners were represented by legal counsel	10%	0%	n/a (note1)	27%	0%	89%	43%	12%

Note 1: No homeowners were represented by legal counsel in the 2011 decisions.

Some additional interesting findings

Decision #5485 - In this case, counsel for Townwood Homes argued the homeowner’s expert wasn’t independent because he is a competitor of the company that installed the original floor.

“...The Homeowner called Mr. Amir Aslani, who is certified by National Wood Flooring Association as a wood flooring inspector and installer, as an expert witness. Mr. Cohen, counsel for Townwood Homes, moved to have Mr. Aslani denied qualification as an expert on the grounds that Mr. Aslani lacks the requisite independence. Mr. Cohen submitted that Mr. Aslani has a conflict of interest in that he is a competitor of the company which installed the hardwood floor at the Homeowner’s house. Mr. Cohen submitted both case law and a self-authored paper on the subject of expert independence and the Tribunal is grateful for his assistance. Mr. Cohen and Mr. Reinhart both submitted that, regardless of the ruling on whether or not Mr. Aslani was properly qualified as an expert, his evidence should be given little or no weight because, they assert, he has lost the independence required of an expert and has become biased in favour of the Homeowner. The Tribunal reserved ruling both on the question of Mr. Aslani’s qualifications as an expert and on the weight that should be given to his evidence...”

Case #7865 – In this case, the applicant (homeowner) had an engineer’s report but the engineer didn’t testify and therefore the LAT said that the report’s “evidentiary value is reduced”.

“...The onus is on the Applicants to prove, on a balance of probabilities, that there has been a breach of warranty. The Applicants relied on the Hellyer and Kurkjian engineering reports to substantiate their claims, reading portions of the reports into the record. Notwithstanding the Applicant’s specific focus on the 2013 Kurkjian report in his closing statement, he clearly stated in his earlier testimony that he wants all of the repairs recommended in the Hellyer report to be completed.

Mr. Hellyer was not called as a witness at this hearing. His initial inspection of the Applicants' home took place on January 10, 2012, only five days after Mr. Krimmer's January 5, 2012 inspection. While the short time between these two inspections allows the Tribunal to reasonably assume that the condition of the Applicants' home when Mr. Hellyer made his observations was unlikely to have changed substantially from that observed by Mr. Krimmer, the fact that Mr. Hellyer was not available to explain those observations means their evidentiary value is reduced..."

Case 6337 – In this case, both Tarion and the 'Added Party' – the developer, were determined to have been "unreasonable" and were charged and fined by the LAT.

"...Where the Tribunal finds a party has acted unreasonably, frivolously, vexatiously, or in bad faith, the Tribunal may order that party to pay the costs of another party or parties to the proceedings subject to rule 14.4 respecting the amount of costs that may be ordered by the Tribunal panel..."

Final Notes

- The information used for this analysis of these Decisions was obtained from the LAT's web-site, as well as the CanLII web-site. Additional information was provided by homeowners. This analysis does not include the results of other responsibilities of the LAT such as the adjournments, motions, dismissals, builder registration, etc., that were included on the LAT web-site.
- Effective 2008, the LAT discontinued providing the homeowners' names on its web-site.