

The Benefits of Submitting to the Georgia Property Owners' Association Act OCGA 44-3-220 through OCGA 44-3-235

The Georgia Property Owners' Association Act ("POA") was adopted to expand the powers of homeowners associations. The POA does not apply automatically. Instead, the members of a community's homeowners association must "opt-in" to be governed by the POA. The "opt-in" process takes place by the members of the homeowners association approving an amendment to the Declaration. Some of the benefits of submitting to the POA include the following:

Automatic Statutory Liens

After submitting to the POA, the Association will:

- No longer have to file individual liens at the courthouse for unpaid assessments;
- Have automatic statutory liens against delinquent owners' lots;
- Have a declaration that serves as notice of lien for any unpaid assessment or charges;
- As a result, closing attorneys, title examiners, purchasers or owners can contact the association for a statement of any amounts owed to the association prior to concluding a sale or refinance of the lot. If the association is not paid out of the proceeds of the sale or refinance, the lien continues against the lot and will generally have priority.
- Have the ability to foreclose its lien without having to pay off superior liens which makes foreclosure an affordable collection option for the chronic delinquent.
- Ability to automatically lien annual assessments, special assessments, specific assessments, including fines for violations of the governing documents, and all other charges assessed by the association in accordance with the governing documents.
- The automatic statutory lien also allows for late charges of the greater of \$10.00 or ten percent (10%) of the amount due, interest at the rate of ten percent (10%) per annum on unpaid assessments and charges, and the association's costs of collection of delinquent assessments, including reasonable attorney's fees actually incurred.
- Opt to file notice of lien in the courthouse if it so chooses but it is not necessary.

Joint and Several Liability to Pay Assessments

- The grantee (or buyer) is jointly and severally liable with the grantor (or seller) for all unpaid assessments.
- If the automatic statutory lien is not paid at the closing, the association can proceed against the new owner who will be personally liable for all amounts owed prior to the closing. (Note that the new owner can then seek reimbursement from the previous owner, but the association would not be involved in the dispute.)
- If the closing attorney neglects to request a payoff statement or if a lot is sold or conveyed without a payoff statement being requested, the grantee shall be jointly and severally liable with the grantor for all unpaid assessments and charges accrued against the lot up to the time

of conveyance. Generally, in the event a sale goes through without a payoff being requested, the new owner can make a claim against his or her title insurance for recovery of amounts owed to the association for which the new owner was liable.

- Under common law (the HOA set up), the only way an HOA has the right to file a lien against a delinquent owner's property is if the declaration provides for such a right to file a lien and such declaration is recorded in the land records of the superior court of the county in which the property is located. The lien right must be included in the declaration because "the purchaser is charged with legal notice of the covenants, even if it is not stated in his own deed" and even if he did not affirmatively consent thereto.
- Unlike POA liens, an HOA lien is not automatically updated to cover increasing amounts that may be owed to the association. Accordingly, an association's lien must be updated periodically to protect the association's lien rights and provide proper record notice.

▪ **Foreclosure:**

- Associations subject to the POA have an automatic, statutory lien under the law. That lien is superior to all other liens on the lot except these liens:
 - ad valorem taxes;
 - first priority mortgages;
 - mortgages recorded before the declaration was recorded; and
 - secondary purchase money mortgages given by someone other than the seller.
- Typically, under the HOA scenario, lien holders have needed a first priority lien in order to proceed with foreclosure, meaning the association had to pay off all liens which were superior to its lien. This usually meant that the association would have to pay off, at a minimum, the first mortgage. Because many associations could not overcome this financial hurdle, foreclosure was an impractical option.
- However, associations submitting to the POA have the statutory ability to get court orders to foreclose their liens without first paying off superior liens, like first mortgages. Those liens still remain on the property after the foreclosure sale and become the responsibility of the buyer at the sale, but they do not have to be paid off before the foreclosure sale. This provides a much more effective foreclosure power for these communities struggling with serious delinquencies.
- BUT - There is a \$2,000 threshold prior to being able to obtain an order to foreclose.

▪ **Tenants:**

- All owners and tenants must comply with all lawful provisions of the Declaration and the Association's rules and regulations.

▪ **Statement of Account**

- Any lot owner, the mortgagee of a lot, a person having executed a contract for the purchase of a lot or a lender considering the loan of funds to be secured by the lot are entitled to request, in writing, a statement from the association or its management agent setting forth all sums due and payable together with all late charges and applicable interest that have been assessed against the lot.
- This payoff statement serves as an accounting of the lien against the property.

- If the association or its management agent fails to provide a copy of the payoff statement within five business days after a written request for a payoff statement, the lien is considered extinguished and has no further force or effect as to the title or interest acquired by a purchaser or lender, if any, of the lot and their respective successors and assigns. The amount specified on any payoff statement provided is binding on the association and the lot owner. In the event the association or its management agent neglects to include on the payoff statement any specific assessments, such as fines or special assessments that have accrued against the lot unit, the association will not be able to collect these amounts.

▪ **Fines and Suspension**

- Gives the association a statutory power to assess fines against violators and to suspend the common area use rights of violators, provided the ability to fine and suspend are stated in the declaration.
- Generally include such provisions as part of the amendment process.
- Fines constitute a lien against the violator's lot, and the ability to fine significantly strengthens the association's powers to enforce the covenants and the rules and regulations.

▪ **Perpetual Duration**

- The Covenants will be for a perpetual duration.

▪ **Declaration Amendments:**

- The Court of Appeals recently ruled that, pursuant to O.C.G.A. 44-5-60(d)(4), which says that "notwithstanding any other provision of this Code section or of any covenants with respect to the land, no change, in the covenants which imposes a greater restriction on the use or development of the land will be enforced unless agreed to in writing by the owner of the affected property at the time such change is made," a leasing restriction that was approved by some members of a community did not apply to any owners that had not approved the amendment. Historically, Georgia courts have upheld Declaration amendments adding leasing restrictions, as well as other amendments adding new property use restrictions, so long as the Declaration's amendment procedure was followed properly. To the best of our knowledge, this is the first time a Georgia court has ruled in this way.
- However, if a community is submitted to the POA, the POA provides for amendments to the association's legal documents with approval of 2/3 of the owners, unless the association wants to keep its ability to approve amendments with the majority vote, and the POA expressly excludes O.C.G.A. Section 44-5-60(d) (4) from applying to communities that are subject to the POA.