

## **THE REASONS WHY A COMMUNITY SHOULD ADOPT THE GEORGIA PROPERTY OWNERS ASSOCIATION ACT**

The Georgia Property Owners' Association Act ("POA") was adopted in 1994 to expand the powers of homeowners associations. The POA does not, however, apply automatically. Instead, the developer of a community or the members of a community's homeowners association must "opt-in" to be governed by the POA. The "opt-in" process generally takes place either by the developer when the developer initially creates the declaration of covenants for the community, or by the members of the homeowners association through an amendment to the declaration.

However, developers of most communities do not submit their communities' covenants to the POA because there is a provision in the POA that assessment cannot be waived. This means a developer would need to pay assessments on each lot it owns, regardless of whether or not the lot has been developed and sold. There is now an exception in the POA that allows developers to waive assessments, as long as they also waive their voting rights, but most developers still do not submit their covenants to the POA. Accordingly, it is usually after the developer finishes development of a community, or is close to finishing, that the members of the homeowners association are able to submit the declaration of covenants to the POA by "opting-in" through an amendment to the declaration. The specific amendment process within a community's declaration of covenants must be followed for the "opt-in" to occur. For example, if the declaration of covenants states that the declaration may be amended by the consent of two-thirds of the association members, the consent of such two-thirds will be needed in order to submit the declaration of covenants to the POA. Some of the benefits of the POA include the following:

### Automatic Statutory Liens

After submitting to the POA, the association will no longer be required to file liens at the county courthouse for unpaid assessments or other charges. Instead, the POA creates an automatic statutory lien against a delinquent owner's lot. In other words, the association will no longer have to file individual liens against lots in order to secure unpaid assessments; rather, the POA provides that the declaration of covenants itself serves as notice that there is a lien for any unpaid assessment or other charges. As a result, closing attorneys, title examiners, purchasers or owners will generally 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. (Note that even though the POA creates automatic statutory liens, there are situations when a notice of the statutory lien should be recorded in the land records.)

### Joint and Several Liability to Pay Assessments

The POA includes another provision that generally strengthens an association's assessment collection powers. That is, the POA provides that unless the declaration of covenants states otherwise, the grantee (or buyer) of a house is jointly and severally liable with the grantor (or seller) for all unpaid assessments. That means that 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 that dispute.)

### Late Fees and Interest

Submission to the POA allows the association to charge a late fee of the greater of \$10.00 or ten percent (10%) of the amount due, and interest at a rate of ten percent (10%) per annum on unpaid assessments and charges. These provisions must also be stated within the declaration of covenants, so as part of the amendment process, we generally will include these provisions to strengthen the community's collection powers.

### Attorney's Fees and Costs of Collection

The POA authorizes the recovery of the association's costs of collection of the delinquent assessments, including reasonable attorney's fees actually incurred. If your community's declaration of covenants does not already use the term "attorney's fees actually incurred," we generally will include that provisions as part of the amendment process.

### Specific Assessments

The POA provides that to the extent provided in the declaration of covenants, a board may specifically assess expenses to an owner if the conduct of the owner or the owner's tenants or guests caused the expense. For example, if an owner or owner's child damages common property that the association then pays to repair, or an owner causes the association to incur attorney's fees in covenant enforcement against the owner, then those amounts may be specifically assessed against the owner.

### Tenants

The POA also clarifies that all owners and tenants (i.e., people who rent a house in the community from the owner) must comply with all the provisions of the declaration of covenants and the association's rules and regulations.

### Fines and Suspension

The POA 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 of covenants. We will therefore 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

Prior to 1993, Georgia law at Code Section 44-5-60 generally provided that covenants expire after twenty years. That statute was amended in 1993 to permit covenants to automatically renew, but the Georgia courts have held that covenants in communities that were recorded prior to 1993 do not receive the benefit of the new 1993 law. One of the extremely important benefits of the POA is that it has a provision that states Code Section 44-5-60 shall not apply to any covenants contained in any instrument submitted to the POA. That means that if a community's covenants were recorded prior to 1993, submission to the POA now would eliminate the possibility that the covenants will expire after twenty years. Also, as part of the amendment process when we submit a community's covenants to the POA, we will generally include an amendment that the covenants will be for a perpetual duration.

Note that the issue of pre-1993 covenants expiring after twenty years is still an issue that is being decided by the courts. There have been many interesting decisions in the last few years addressing this issue. One of the more interesting cases is a Georgia Court of Appeals case from 2002 that states that although pre-1993 restrictive covenants expire after twenty years, affirmative covenants, such as the obligation to pay assessments, do not expire under Code Section 44-5-60. The issue of which covenants are restrictive and which covenants are affirmative is still an open issue for the courts to decide. Our opinion is that to best protect the community, opting into the POA to eliminate the provisions of Code Section 44-5-60 is the best option to avoid this ongoing issue in the courts of covenant duration.

#### Additional Restrictions

In addition to addressing covenant duration, Code Section 44-5-60 states that no change (i.e., amendment) 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. For example, if your community passes an amendment to restrict the number of houses that may be leased at any one time, Code Section 44-5-60 could potentially be asserted that the leasing restriction will not be enforceable against any homeowner who voted against the amendment because such owner did not agree to the amendment in writing.

In response to such an assertion, the board of directors could argue that the covenants themselves have an amendment provision and that all homeowners have agreed to the amendment provision when they purchased their property. This is a good argument and makes sense legally. The better option, however, would be to eliminate the owner's assertion altogether. To that end, as stated above, one of the important benefits of the POA is that it states that Code Section 44-5-60 shall not apply to any covenants contained in any instrument submitted to the POA. Accordingly, if your community's covenants were created by the developer pursuant to the POA, or if your covenants have been amended to submit them to the POA, the limitations within the above Code Section 44-5-60 do not apply. That means the approved amendment to limit leases in the above example would be enforceable against the entire community, including those homeowners who voted against the amendment.

Fortunately, the amendment process to obtain the consent of the association members to opt into the POA can often be done by going door to door, depending upon the specific amendment provisions within a community's governing documents. While owners rarely oppose submitting to the POA, associations often face the problem of overcoming owner apathy. Developing a strategy to adopt the POA can therefore be the key to obtaining the necessary approval of the owners needed to amend the community's declaration of covenants. Please contact us at your convenience if you would like to learn more about amending your community's declaration of covenants to submit to the POA and developing an amendment strategy.