

## **Benefits of 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, however, does not apply automatically. Instead, the developer of a community or the members of a community's homeowners association must submit to be governed by the POA. The "opt-in" process generally takes place by the members of the homeowners association through an amendment to the declaration. 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.

### ***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.

## ***Foreclosures***

Homeowner associations subject to the POA have an automatic, statutory lien under the law. That lien is superior to all other liens on the unit or lot except these liens:

- ad valorem taxes;
- first priority mortgages;
- mortgages recorded before the declaration was recorded;
- lessor's liens (GCA only); and
- secondary purchase money mortgages given by someone other than the seller.

This lien priority is important because it determines how foreclosures are handled. Under Georgia law, lien holders like community associations have always had the ability to foreclose their liens. However, because of this lien priority, it has been a remedy beyond the reach of most associations. Typically, lien holders have had to have 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, on July 1, 2004, this hurdle was removed for many associations. On this date, the law changed. Under the new law, associations submitted to the POA now 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.

Under the POA, the association must provide notice to the delinquent owner 30 days prior to proceeding with the foreclosure action. If the owner fails to pay the total balance owed to the association, or work out payment arrangements, within the 30-day period, the association may foreclose its lien.

Community association lien foreclosures proceed through the judicial foreclosure process. This process is initiated by the filing of a foreclosure lawsuit. Foreclosure lawsuits are filed in the Superior Court of the county in which the property is located, asking for both a money judgment and an order to foreclose without first paying superior liens.

Before filing the suit, the association should complete a full title search on the property. Since the purchaser at the foreclosure sale will take ownership of the property subject to superior liens, the purchaser will evaluate whether buying the property at the foreclosure sale is a good deal. The association needs to perform the same kind of evaluation. Most prospective buyers at the foreclosure sales are investors looking to quickly resell the property for a profit. This means that the investor will look for enough equity in the property to make money even after paying off the association's lien and any mortgages and unpaid tax liens on the property, and selling the property at a discount to ensure a quick sale. A full title search on the property helps the board evaluate whether people are likely to bid at the foreclosure or whether the association should bid at the sale. If the board determines that it wishes to move forward, the lawsuit is filed seeking a money judgment against the delinquent owner and a court order allowing the association to foreclose its lien.

In some cases, however, the foreclosure lawsuit may not yield payment to the association, such as where there is little equity in the property and no prospective bidders. For some associations, it still may make sense to pursue foreclosure to get rid of a chronic delinquent. This is because foreclosure results in the owner losing title to the property. Once the unit owner loses title, the amount of the delinquency no longer increases monthly or annually. The personal obligation against the

delinquent owner remains. Many associations are pleased with this result because the delinquent owner is forced out of the community, and the continuing increase of the delinquency stops.

### ***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.

### ***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 1994 do not receive the benefit of the new 1994 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. 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.

This exclusion of O.C.G.A. Section 44-5-60 is even more important now given the decision of a recent Georgia Court of Appeals case which has ruled that amendments which are not consented to by individual owners may not be effective as against those owners. Submitting to the POA eliminates any problems associated with challenges to amending the association's governing legal documents in the future under this statute.

### **GADDIS & LANIER, LLC**

3330 Cumberland Blvd.

Suite 500

Atlanta, Georgia 30339

404-459-7055

[www.gaddislanier.com](http://www.gaddislanier.com)