

Homeowners Associations Take Note:
New Georgia Court of Appeals Decision May Affect You

Dear Board Members and Managers:

In December 2009 the Georgia Court of Appeals rendered an opinion which could adversely affect your community. If your community is a homeowners association that has not submitted to the Georgia Property Owners Association Act ("POAA"), and you have made amendments to your governing legal documents, the decision reached by the Court of Appeals may render those amendments invalid.

In Charter Club on the River Home Owners Association, Inc. v. Walker, 2009 WL 4351908 (Ga.App.) members of the homeowners association approved an amendment to their Declaration of Covenants to restrict the leasing of lots within the community. Prior to the amendment, leasing was allowed. The community followed the procedures detailed in their Declaration, and approved the amendment by the percentage of members specified for amendment approval. Thus, the amendment was approved in accordance with the terms of the Declaration.

A homeowner who voted against the amendment (Walker) claimed that because she voted against it, she was not subject to the amendment. Walker argued that a Georgia Statute, O.C.G.A. Section 44-5-60(d)(4), expressly requires property owners to consent to and approve of any changes in covenants which impose a greater restriction to the use or development of the land than previously existed. The statute expressly states: "no change in the covenants which imposes a greater restriction in 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." While this statute has been in existence for many years in Georgia, no homeowner had ever previously successfully challenged the validity of an amendment to a Declaration of Covenants citing to this statute, and in fact, numerous Georgia courts had upheld amendments to Declarations of Covenants before this case.

However, the trial court in Gwinnett County, Georgia, where Walker first sued the Charter Club on the River Homeowners Association ruled in favor of Walker earlier last year stating that the statute above does, in fact, require any owner who is affected by a change in covenants which imposes a greater restriction on the use or development of the land to affirmatively approve of that change in order for it to be effective. Unfortunately, the Georgia Court of Appeals agreed with the Gwinnett County, Georgia, trial court.

This is an important decision affecting "common law homeowners associations" which are communities that are not subject to the POAA or Georgia Condominium Act ("GCA") because it means that amendments that your community may be in the process of trying to make to your governing legal documents, or even those that have already been approved and recorded, may be challenged and could be deemed invalid.

It is important to note that this case and this statute do not apply to condominiums under the GCA, or to communities submitted to the POAA, as both of these statutes have provisions that expressly exclude O.C.G.A. Section 44-5-60 from applying to these types of communities. Therefore, any amendments made to governing legal documents for communities that are subject to the GCA (after 1975) and the POAA (so long as the amendments were adopted AFTER submission to the POAA) are not affected by this decision. However, for common law homeowners associations, it is imperative that your community take action now in order to avoid potential challenges in the future.

While there may be arguments that your association may make, if challenged, regarding amendments that have been in existence already, and under which the owners in your community have been voluntarily abiding, it is uncertain at this time whether a Georgia Court would find that any amendment to which an owner did not agree in writing will be valid as against that owner if the amendment imposes a greater restriction on the use and development of the owners land.

We, therefore, recommend that all common law homeowners associations propose an amendment your Declaration of Covenants which will submit your community to the POAA. Since the POAA itself authorizes an association to amend its governing legal documents to submit to the POAA, your association should only be required to obtain the approval of whatever percentage of owners your Declaration requires for amendments in order for this submission to be approved. Usually this requires two-thirds (2/3) of the owners, or eligible owners. Also, you should note that some Declarations and Bylaws authorize an association's Board of Directors to amend the Declaration, without approval of the membership, for the purpose of submitting to the POAA. Be sure to check your communities' documents and follow the amendment and/or submission procedures.

Additionally, even if your community is already submitted to the POAA, or if you follow the proper procedures to submit to the POAA this year, any amendments which were adopted prior to submitting to the POAA should be ratified by a vote of membership (the percentage required by your association's Declaration for amendments) in an effort to avoid legal challenge in the future. While such ratification action does not guarantee that prior amendments may not be legally challenged, submission to the POAA now will prevent this case from having any affect in your community on future amendments. As such, we urge all Boards of Directors for homeowners associations to take action now.

We are happy to guide you and assist you in this process, and will answer any questions or concerns that you may have.