

## Georgia HOAs:

Now is the Time to Submit to the Georgia Property Owners' Association Act!

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The Georgia Property Owners' Association Act ("POAA") was enacted on July 1, 1994 to empower homeowners' associations (HOAs) in Georgia with similar rights as Georgia's condominium associations. Although not as expansive, many essential provisions of the POAA mirror provisions of the Georgia Condominium Act. However, while the Georgia Condominium Act applies to all condominiums in Georgia, HOA submission to the POAA is optional.

There are many great advantages for HOAs to submit to the POAA. The biggest advantage may be that under Georgia case law, unless a community's governing declaration is subject to the Georgia Condominium Act or POAA, the only way to change or add new use restrictions (including leasing restrictions) to the declaration is with each owner's written consent, rather than with the typical 2/3rds or 75% approval of the owners. The rise in short-term leasing through Airbnb, Vrbo and other like sites and a desire by many HOAs to prevent short-term and other leasing may be the reason that pushes many Georgia HOAs to finally submit to the POAA.

### How Do HOAs Submit to the POAA?

For HOAs, if the community's developer did not submit the HOA to the POAA, the only way for the community to take advantage of the POAA is to amend the governing declaration to affirmatively submit to the POAA. The amendment will need to include any necessary restating or updating of any provisions in the current documents that conflict with the POAA and addition of any powers not included in the current documents to take full advantage of the POAA. Although some governing declarations allow submission by approval of only the board of directors, most documents require the approval of the owners in accordance with the declaration's current amendment process. Typical amendment provisions require 2/3rds or 75% member approval for amendments.



### Benefits of Submitting to the POAA

For Georgia's homeowners' associations (HOAs), there are many advantages to submitting to the Georgia Property Owners' Association Act (POAA):

- Automatic Liens
- Past Due Assessment Recovery
- Foreclosure Remedy
- Tenants Bound
- Statutory Right to Fine and Suspend Rights
- Amendment Process
- Perpetual Duration

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## What Are the Benefits of Submitting to the POAA?

In addition to ensuring communities can amend their governing documents without 100% owner approval, the POAA provides many other benefits to HOAs. The POAA benefits include the following:

### Automatic Liens

One of the biggest advantages of the POAA is the provision for secured, automatic, statutory liens for past due owner assessments. Associations subject to the POAA are not required to race to the courthouse to file a paper lien, but, rather, have an automatic, statutory lien for unpaid assessments or other charges that increase with any accruing delinquency. This automatic lien provision safeguards associations from losing money from delinquent owners and provides for secured lien status in the event owners file bankruptcy.

### Past Due Assessment Recovery

The POAA lien for past due assessments includes a late fee of the greater of \$10.00 or ten percent (10%) of the past due assessments and interest at a rate of 10% per annum on unpaid assessments and charges, if set forth in the governing declaration. The POAA also entitles associations to recover its costs of collection incurred for delinquent assessments, including its reasonable attorney's fees actually incurred, which are also included in the statutory lien.

The POAA makes both the buyer and seller jointly and severally liable for all unpaid assessments due at the time title is transferred and if the association's lien is not paid at the time of the transfer. The POAA also establishes a required statutory process for obtaining a payoff statement of account prior to any transfer.

### Foreclosure Remedy

HOA liens under the POAA are superior to all other liens on the lot except these liens:

- Liens for ad valorem taxes on the lot;
- The lien for any first priority mortgage covering the lot;
- The lien for any mortgages recorded prior to the recording of the declaration; or
- The lien of any secondary purchase money mortgage covering the lot, given by someone other than the seller.

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Lien priority is important in the context of foreclosures. First, a POAA lien will be paid prior to all but those superior liens. Second, the POAA establishes a process and power for associations to foreclose on their liens for past due assessments over \$2,000. Although foreclosure is a drastic remedy, it is sometimes necessary in the most egregious past due cases and is a powerful remedy for associations to have.

For Georgia HOAs not submitted to the POAA, in order to foreclose on a lien for assessments, an HOA must satisfy all liens superior to the association's lien in order to foreclose. This usually means the association must pay off, at a minimum, the first mortgage. Because many associations do not have the resources to pay off an owner's mortgage, foreclosure is impractical for HOAs not submitted to the POAA.

However, the POAA does not include the lien pay-off hurdle for HOAs subject to the POAA. Under the POAA, associations have the statutory right to seek a court order to foreclose their liens without first paying off superior liens, like first mortgages. The superior liens remain on the property after the foreclosure sale and become the responsibility of the buyer at the sale, but those superior liens do not have to be paid off by the association before the foreclosure sale. The power of the right to foreclose has proven very effective in enabling associations submitted to the POAA to collect past due assessments.

### Tenants Bound

The POAA clarifies that all owners and tenants must comply with all lawful provisions of the association's declaration and rules and regulations.

### Statutory Right to Fine and Suspend Rights

The POAA gives submitted associations a statutory power to assess fines against owners and occupants who are in violation of the governing documents, as well as the power to suspend the common area use rights of violators. Fines, which must also be expressly allowed by the governing declaration, constitute a lien against the violator's lot under the POAA.

### Amendment Process

Unless an HOA is submitted to the POAA, under O.C.G.A. § 44-5-60(d)(4), each owner must give their written consent for any change in the covenants which imposes a greater restriction on the use or development of the property. However, if an HOA is submitted to the POAA, amendments to the association's legal documents may be approved by only 2/3rds of the votes in the association. The POAA expressly excludes application of O.C.G.A. § 44-5-60(d)(4) from applying to communities subject to the Act.

### Perpetual Duration

O.C.G.A. § 44-5-60(b) provides that in Georgia, covenants restricting lands to certain uses shall not run for more than 20 years and may be terminated by the owners following the statutory process or as detailed in the covenants, although there can be renewal periods. However, the POAA provides that this covenant duration limitation does not apply to associations submitted to the POAA, and covenants may run perpetually without the possibility of the covenants for the community expiring or being terminated by the owners.

## What's the Downside of Not Submitting to the POAA?

For most HOAs, amending the declaration is a daunting task. However, there is a big payoff for amending the declaration to submit to the POAA: the opportunity to change or add use restrictions to the lots in the community. Georgia law is settled that this is a necessary step for HOAs. In 2009, the Georgia Court of Appeals held that the Georgia statute at O.C.G.A. § 44-5-60(d)(4) requires HOAs not submitted to the POAA to obtain the written consent of each owner to change or impose new restrictions on the lots in the community. O.C.G.A. § 44-5-60(d)(4) provides that no change to a community's covenants which imposes a greater restriction

on the use of the land than already exists will be enforced unless agreed to in writing by the owner of the affected property at the time such change is made.

In the case of *Charter Club on the River Homeowners Association v. Walker*, 201 Ga.App. 898 (2009), the Court held that the HOA could not add a leasing and occupancy restriction to its recorded Declaration of Protective Covenants through its regular declaration amendment process. In the Charter Club case, the amendment process for the declaration required approval by a majority of all owners. The court ruled that, pursuant to the Georgia statute O.C.G.A. § 44-5-60(d)(4), the leasing restriction adopted by a majority of the Charter Club owners only applied to those owners that approved the amendment.

Based on this case law, HOAs not subject to the POAA can only change or add a use restriction to their governing declarations if each owner approves the new restriction. This would apply to leasing and occupancy restrictions, like in the Charter Club case, but would also extend to any other restrictions on use or development of the land.

However, if a community is submitted to the POAA, the POAA provides for amendments to the association's legal documents with approval of 2/3rds of the owners. The POAA expressly excludes the hurdles of O.C.G.A. § 44-5-60(d)(4) from applying to communities that are subject to the POAA.

## Why Should My HOA Submit to the POAA?

By submitting to the POAA, your community can enjoy the many benefits of the Act including statutory, secured liens for past due assessments and perpetual duration of your community's covenants. More than that, submitting your HOA to the POAA is the best way to ensure that amendments to your community's governing documents, including the use restrictions, can always be made by 2/3rds of the association's vote instead of 100% of the owners. If your community wants the power to control leasing in your community, submission to the POAA is the only path forward.

Please contact your attorneys at NowackHoward for more details or if your community is interested in submitting to the POAA.