



COMMUNITY MATTERS

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2018 Georgia Appellate Decisions Impacting Covenant Enforcement

– Decisions Impacting Covenant Renewal and Errors in Legal Description of Submitted Property

by | Cynthia C. Hodge, Esq.

The following article will discuss the outcomes of two recent cases in Georgia involving the enforceability and applicability of protective covenants. The opinions were published in June, 2018.

The first case, *Gilbert v. Canterbury Farms, LLC*, was decided by the Georgia Court of Appeals on June 20, 2018. The fundamental issue in this case revolves around the duration and renewal of protective covenants. The relevant facts surrounding this case are as follows: The subdivision is known as “Old Farm” in Columbia County. Old Farm is best described as a single-family neighborhood with expansive lot sizes (at least 10 acres each) and fewer than fifteen (15) lots. The neighborhood features ponds, streams, access by private dirt road, and is heavily wooded. This neighborhood was established some time ago, with protective covenants being executed and filed in 1990. Such covenants ran with all real property contained within the 127 acres of Old Farm.

Of particular importance, the protective covenants included a duration and renewal provision that stated that the covenants are binding upon all successors in title for an initial period of 20 years and “will automatically be renewed for successive 10-year periods unless abolished or amended as provided in paragraph 10 hereinbefore.” Paragraph 10 references the prohibition of cutting down trees of a certain diameter, and it does not reference abolishment or amendment of the covenants. However, Paragraph 14 of the declaration provides that the “covenants may be amended in whole or part by a written document signed by the owners of at least two-thirds (2/3) of the subdivided tracts...and recorded in the Columbia County Clerk’s Office.” The parties agreed that the protective covenants had not been abolished or amended.

The adjacent subdivision, Canterbury Farms, is newer and contains high-volume, high-density housing. It was not in dispute that Columbia County adopted zoning laws in 1979.

A developer decided to purchase a parcel of unimproved land in Old Farm. The developer intended to develop the parcel

as an extension of Canterbury Farms, the higher density subdivision, with the inclusion of buildings, fences, walls and/or structures and subdivide it into multiple tracts. Importantly, the developer refused to get the approval of Old Farm’s architectural control committee. Although the warranty deed indicated that the property was submitted to the Old Farm protective covenants, the parties stipulated that the developer relied upon legal counsel’s opinion that the protective covenants did not apply when purchasing the parcel.

In fact, the developer obtained county permits, erected fences, graded certain sections of the property, and cleared 10 acres of trees without getting Old Farm’s approval. As such, property owners in Old Farm challenged these actions and brought suit against the developer. The trial court sided with the developer. Although the trial court found that the protective covenants were valid under a specific statute, namely O.C.G.A. § 44-5-60, and they could automatically renew, the trial court found that the protective covenants were invalid as they applied to the developer. The trial court reasoned that the property owners waited too long to bring the action, and this delay would result in tremendous harm and severe prejudice to the developer. Both parties filed appeals, and the appellate court consolidated the appeals.

The crux of the case involved duration and renewal of covenants. O.C.G.A. § 44-5-60(b) provided that covenants restricting land could only run for 20 years in municipalities and counties where zoning ordinances had been enacted, and Columbia County had enacted a zoning ordinance. Further, Old Farm protective covenants exceeded the initial 20-year period; however, the parties agreed that the covenants had not been abolished or amended. Keep in mind that the protective covenants included express language that they could be automatically

renewed for successive 10-year periods.

In 1990, O.C.G.A. § 44-5-60 was amended to add subsection (d), which provided that renewals of protective covenants were permitted in planned subdivisions *containing no fewer than 15 individual plots*. Further, there was a specific process for the recording of the renewal to take place. Keep in mind that Old Farm has fewer than 15 lots.

Here, the appellate court reviewed arguments that automatic renewal of protective covenants was for “large subdivisions”; not “small subdivisions” like Old Farm, and that the process for abolishing or amending the covenants never took place.

The Georgia Court of Appeals held that, because (1) the parties agree that the Old Farm protective covenants have never been abolished or amended and (2) the covenants expressly provide for their automatic renewal, the Old Farm protective covenants are still enforceable.

As to whether the Old Farm protective covenants are vague based upon ambiguities and mislabeling (e.g., citing to Paragraph 10 instead of Paragraph 14 in the protective covenants), the Georgia Court of Appeals found no basis to find that the covenants were invalid.

On the issue of whether the developer was severely prejudiced because the owners waited too long in bringing their lawsuit, the Court of Appeals found in favor of the owners. The court disagreed with the trial court on the basis that the evidence did not support a finding that the owners had waited too long.

Based upon the holdings of the appellate court, the case was returned to the trial court for further reconsideration on the claims for equitable relief and an award of attorney’s fees. The covenants were declared to be valid and enforceable as to the developer.

The next case, *Sailak, LLC v. Forsyth County, Georgia*, involves a missing legal description from an association's protective covenants. This case was adjudicated by the United States District Court for the Northern District of Georgia. The dispute in this case arises out of the desired use of a particular lot ("Lot 38") of the Bald Ridge on Lanier subdivision in Forsyth County.

The Plaintiffs, Sailak, LLC and Sumalatha Satoor, are related – Sailak, LLC is an entity created by Satoor. The Plaintiffs purchased Lot 38 in 2008.

When the subdivision was first being developed, the developer-owners recorded a set of protective covenants ("first declaration") in February 1983. Although the first declaration referred to an Exhibit A to describe the property submitted to it, no Exhibit A was included or recorded. In other words, the first declaration was missing a legal description.

With respect to Lot 38, the original developer-owners conveyed it to the first buyer in June 1983, and the deed expressly stated it was subject to the first declaration. Subsequently, there was a recorded waiver of certain restrictions with respect to Lot 38, so that the owners of Lot 38 could have horses. In 1984, a nearly identical, second set of protective covenants was recorded

("second declaration"), which included the legal description as Exhibit A.

As with most subdivisions, the protective covenants specify that the lots should be used for residential purposes. In 2016, the Plaintiffs wanted to build a Hindu temple on the property. Given the existing zoning classification, the Plaintiffs applied for a conditional use permit. After public hearing and a denial recommended by the Forsyth County Planning Commission, the Forsyth County Board of Commissioners denied the application in 2017.

After the denial, the Plaintiffs filed legal action against Forsyth County, challenging that the Defendant violated the Religious Land Use and Institutionalized Persons Act. In rebuttal, Forsyth County filed pleadings to bring before the Court the issue of applicability of restrictive covenants to Lot 38.

In Georgia, the general rule is that the owner of land has the right to use the property for any lawful purpose. Further, purported land use restrictions must be clearly established, not only as to the restrictions but also the land being restricted.

Here, the Plaintiffs alleged that the lack of legal description in the first declaration, and the fact that the second declaration came after the first conveyance of Lot 38, meant that Lot 38 was not subject to the Bald Ridge

protective covenants. The Court disagreed. The Court held that the first declaration was recorded and expressly names the subdivision as the affected property. Further, the first deed conveying Lot 38 expressly referenced the first declaration. The Court held that the restrictive covenants in the first declaration applied to Lot 38.

Since the restrictions intended the lots for residential use only and limited the type of structures that were permitted to be on the lot, the Plaintiff's proposed religious facility would not conform to the intended residential use and would displace any residence on the lot as the main structure. The court held that the first declaration precludes construction of the Plaintiff's proposed religious facility.

As a final argument, the Plaintiffs argued that the previously-filed waiver would permit the Plaintiff's proposed temple construction. The Court disagreed. The waiver was limited to a horse barn for personal enjoyment and did not open the door to other structures.

In conclusion, Forsyth County was successful in its arguments in favor of the applicability of the restrictive covenants to Lot 38. And, as such, Plaintiff's request for proposed construction was denied. ❖



Mandatory E-Filing of Lawsuits and Pleadings Goes into Effect January 1st!

by | Daniel E. Melchi, Esq.

Senate Bill 407 was signed into law by Governor Nathan Deal on May 8, 2018. The new law requires (with very limited exceptions that almost never apply to community

association-related lawsuits for collection or for covenant enforcement) that all lawsuits filed in any Superior or State Court in Georgia after January 1, 2019 be filed electronically. This is often called "e-filing." This means that paper originals of Complaints, Answers, Motions, or other pleadings will no longer be accepted by the Clerks of the Superior or State Courts by mail or by dropping them off for filing at

clerk intake counters. Although the law does not mandate that Magistrate Courts (often called "small claims courts") accept e-filed documents, many of the Magistrate Courts in Georgia have transitioned to mandatory e-filing through local rules.

Our law firm is familiar with the e-filing of court cases, and we have been doing so in many of the courts which adopted (and often mandated) the practice of e-filing

early. It is important for community associations' management companies and Boards of Directors to be aware of this new mandatory filing law, and it is important for law firms to develop file retention policies that comport with any requirements regarding the preserving of court-original documents which may be in the custody of the filing party. ❖



Delegating Authority to an “Alpha” Board Member - Harmless or Hazardous?

by | L. Paschal Glavinios, Esq.

Just as community associations come in varying flavors and activity levels, so, too, do board members on any given board of directors. One type of director style presents a unique set

of challenges inherent in his or her governance style, namely the “alpha.” This article will identify some challenges in working and living in communities with alpha board members, and discuss means of addressing the distinct issues that may arise.

Webster’s defines an “Alpha” as a person who has a dominant role or position within a particular sphere. Note that the definition of alpha does not necessitate that the person actually hold a position of power. So, where an alpha is given responsibility or a position of power, the tendencies to exert dominance and control may be over-amplified by virtue of his or her position. As a result, other board members may seek minimized roles or allow the alpha to govern the association’s affairs unilaterally for varying reasons. Maybe the alpha “does a great job.” More commonly, however, it is simply easier to let the alpha run the show rather than create confrontation by attempting to impede the alpha’s exercise of power.

While minimizing the role of other board members may seem harmless, the enabling of an alpha board member’s conduct can set a precedent that the alpha may rely upon in debates regarding decision-making functions in the future. For example, let us suppose an association’s board of directors is negotiating with a homeowner regarding a past due balance owed to the association. The alpha is a strong negotiator, and the other board members feel comfortable delegating the authority to agree to a settlement amount on behalf of the association to the alpha board member. Generally, having one party delegated as the negotiator is prudent, as it prevents the opposing party from receiving inconsistent offers and allows the negotiator to develop

and execute a negotiating plan. However, such a delegation of power can also enable the alpha to usurp additional powers if the delegation of authority is not explicitly and specifically defined in writing.

Where a board member is delegated some authority to make a decision on behalf of the board of directors, the scope of the delegation should be limited to the single transaction and impose a time-frame for the expiration of the delegated authority. In a perfect world, each board member would participate in the decision-making process; however, it is common for community associations to delegate some limited authority due to board members’ work schedules and availability, among other factors. Where a delegation of authority is not limited, the alpha may interpret the delegation for a single transaction as *carte blanche* over all of the association’s affairs.

The documentation of the scope of the delegation will also be important should any dispute arise regarding decisions made by the alpha member. Two types of disputes about such decisions may arise. The first is a challenge by an opposing party to a unilateral alpha decision. An alpha may, for example, refuse to compromise or negotiate on a given issue. The opposing party may seek input from additional board members about whether such a refusal was agreed upon by a majority of the board. The other board members could then point to the document outlining the delegation as support for the alpha board member’s decision. Conversely, without the documentation, the decision of the alpha could be subject to challenge on the basis that the decision was not ratified by a majority of the board. The board could still

argue that it delegated the authority to the alpha, but written, substantive evidence is always better than oral representations.

Second, disputes between the alpha board member and the other board members can arise and prove problematic. The primary purpose of a delegation agreement is to define and limit the scope of the alpha’s power. As noted above, an alpha is typically the most engaged and active board member and can be a valuable asset to an association. However, it is important to outline the scope of the relationship at the onset so as to try and prevent a dispute about that authority later. Granted, even if the scope is defined at the beginning, it certainly will not eliminate all disputes; but it will give the other board members important leverage and documentation to rely upon in attempting to reel in an out-of-control alpha. Outlining the scope of the delegation at the onset also conveys to the alpha that he or she may have heightened authority for “situation A”, but sends a message to the alpha that he or she is not the sole arbiter of the association’s affairs.

A goal of documenting delegations should always be to prevent future disputes between board members. While a certain level of disagreement and debate is healthy, disputes about authority and power struggles are not productive dialogues. Documenting delegations of authority is vital in preserving the status quo and preventing usurpation of power by an alpha member. The unique characteristics of the alpha can be utilized to benefit the association, but the conventional and absentee members must not let an alpha turn into an authoritarian. ❖



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