COMMUNITY MATTERS

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Amateur Sleuthing: What to do When an Owner Wants to Review Association Records

by | **John T. Lueder, Esq.**

A homeowner in your community (we'll call him Mr. McGrumpy) questions and complains about each decision the board makes. No matter how much information the board has given, and no matter how reasonable and patient the board has been, Mr. McGrumpy is never satisfied. He has now demanded to review all of the association's books, records, and documents, including every contract that the association has with its vendors and every invoice the association has paid in the last two years. What must the association do? There are both legal and practical aspects to the answer.

To begin, from a legal perspective, what must the association provide? The brief answer is: it depends. The bylaws for some associations provide that members are entitled to review everything. In that event, Mr. McGrumpy would have the legal right to review everything he has asked to review.

Fortunately, the vast majority of bylaws are not that broad. Instead, the bylaws for most associations provide that members may review documents to the extent permitted by the Georgia Nonprofit Corporation Code. If the bylaws are silent as to what a member is able to review, then the Nonprofit Corporation Code applies by default. Section 14-3-1602 of the Nonprofit Corporation Code states that a member may inspect and copy the following: (1) the articles of incorporation and all amendments to the articles; (2) the bylaws and all amendments to the bylaws; (3) resolutions adopted by the association's membership or its board to increase or decrease the number of directors; (4) resolutions adopted by the association's membership or its board that relate to the characteristics, qualifications, rights, limitations, and obligations of the members; (5) the minutes of membership meetings (such as the annual meeting and special meetings of the members) and any executed consents evidencing all actions taken or approved by the members without a meeting for the past three years; (6) all communications to members within the past three years; (7) a list of the names and business or home addresses of the current directors and officers; (8) the association's most recent annual registration delivered to the Georgia Secretary of State; (9) excerpts of the minutes of board meetings and committee meetings; (10) the association's accounting records; and (11) the association's membership list.

A few points to note: First, the Nonprofit Corporation Code provides that a member may only be entitled to review the records listed above in categories (9), (10), and (11) *if* the member has satisfied the following four conditions: (i) the member's request is made in good faith and for a proper purpose reasonably related to the member's legitimate interest as a member; (ii) the member describes with reasonable particularity such purpose and the records the member desires to inspect; (iii) the records are directly connected with that purpose; and (iv) the records are only used for the purpose.

This means that while many boards may decide as a matter of routine to publish the minutes from board meetings, it is not required under the Nonprofit Corporation Code. Instead, a member only has a right to review excerpts of the board meeting minutes if the member first satisfies the four requirements listed above.

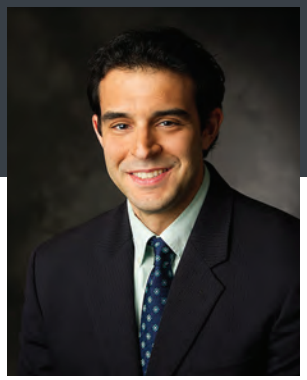
Next, while members may review accounting records if they satisfy the four requirements listed above, the Nonprofit Corporation Code does not define "accounting records." Our firm's position is that accounting records include balance sheets, general ledgers, and income statements. Our position is that underlying contracts and invoices are not accounting records and are not required to be provided under the Nonprofit Corporation Code. Also, while members are entitled to copy the documents that they are entitled to inspect, the members are required to pay reasonable copying costs.

As stated above, some bylaws are extremely broad and allow members to review everything. By contrast, when the bylaws do not have such a broad inspection provision, the Nonprofit Corporation Code restricts the types of documents that a member may review. In that event, does it nevertheless make sense from a practical aspect to allow owners, such as Mr. McGrumpy, to review everything?

That would need to be determined on a case by case basis. Our experience is that if an owner consistently challenges the board on every decision, then providing documents to such an owner (which the owner would not otherwise be legally entitled to review) could result in the owner engaging in more of a fishing expedition and becoming more of a headache to the board. That is, would McGrumpy be satisfied if he was provided contracts and invoices that he would not be legally entitled to have? Or would he use those documents as additional ammunition to challenge the board? If the latter, then the practical response from the board might be to refrain from providing those documents.

To summarize, members of associations have rights to review various documents. But when you have questions regarding which documents owners may review, and if it is wise to allow owners to review documents that the association is not required to provide, please contact the Association's legal counsel.

Lien on Me – Fundamental Guide to Liens



by | **Stephen A. Finamore, Esq.**

Not to be confused with the word "lean," the association's "lien" is a form of security interest granted over real property to secure the payment of assessments owed to the association.

Although these are different words with different meanings, one definition for the word "lean" means to exert influence or pressure in order to gain cooperation, maintain discipline, or the like. This is a fitting way to describe how the association may use its lien to collect amounts owed. The association's "lien" for assessments can be used to "lean" on an owner who has not paid.

An association's lien for assessments is commonly provided for in the recorded declaration of covenants. Typically, the lien provision will state that assessments, interest, costs, and reasonable attorney's fees "shall be a continuing lien upon the property against which each assessment was made." The Georgia Condominium Act and Georgia Property Owners' Association Act ("COA" and "POA," respectively) also provide that all sums lawfully assessed by the association against any owner or property shall constitute a lien in favor of the association. Essentially, assessments that become due and remain unpaid are an automatic lien against the property.

Recording of a physical lien in land records is usually not required. In fact, the COA and POA specifically state that recording of a lien is not required. Moreover, many declarations provide that recording of a lien is not required. Notwithstanding, the recording of a "Notice of Lien" is prudent because it gives actual record notice (1) that there is a debt owed to the association against the particular property, (2) of the amount secured as of the date the lien is filed, and (3) who should be contacted to resolve the lien.

If property is sold or otherwise conveyed to a new owner without paying the lien, the lien will endure and take priority over any subsequent lien, including a first mortgage. This means that if the association's lien is not paid when the property is sold, the association can foreclose the property free and clear of any subsequently recorded first mortgage as the latter is now an inferior lien. No lender would knowingly complete a sale or refinance of real property when an unpaid association lien exists, and the sale would not be likely to go forward until such a lien is satisfied. The potential for the association's lien to effectively hold the sale of a property hostage until payment is received is a compelling reason to pay what is owed.

Rather than wait for the sale of the property for the lien to get paid, an association subject to the COA or POA can foreclose its lien for the amounts owed. The COA and POA permit an association to foreclose its lien subject to superior liens (typically the first mortgage) if the association lien amount exceeds $2,000. This exertion of influence and pressure can be an effective means of either compelling payment from the owner or divesting the nonpaying owner of ownership. If not subject to either the COA or POA, the law provides that any superior lien must be paid prior to foreclosing. In this situation, equity may intervene to allow foreclosure subject to the superior lien if there are just reasons for doing so. Of course, this can be a rather subjective inquiry, so having a statutory basis to foreclose as a matter of right offers better certainty.

While deciding which way for an association to "lean" in exerting its "lien" powers, it is critical not to wait too long. Under the COA and POA, the lien for assessments only secures amounts owed during the prior four years. Arguably, there could even be a limitation on enforcement of a lien in favor of an association not subject to the COA or POA. If you have further questions, consult with your attorney regarding lien recording and enforcement.

To Fine or Not To Fine: Enforcement of Parking Restrictions on Public Streets

by | **David C. Boy, IV, Esq.**

Vehicles parked on streets within a community can be an eyesore and safety concern. The covenants for many communities contain a restriction prohibiting or limiting on-street parking of vehicles. While an association may be able to enforce such a restriction by towing a vehicle from a private street, the Georgia Court of Appeals in case of *Hardin v. City Wide Wrecker Service, Inc.* ruled that a homeowners association cannot tow vehicles from a public street. But what about imposing fines for violating an on-street parking restriction on a public street? Or seeking a court-ordered injunction prohibiting such parking?

While this issue has not been decided by the Georgia appellate courts, it was addressed in a Missouri Court of Appeals case called *Maryland Estates Homeowners' Association v. Puckett*. In that case, the homeowners against whom enforcement action was taken by the association argued that because the streets were dedicated to the public, the association lost its power to control their use by restricting parking on those streets. However, the court held that the covenants at issue were a contract that owners agreed to upon purchasing property in the subdivision. The homeowners were violating their agreement not to park on the public streets in the subdivision, and the association had a right to obtain an injunction prohibiting such parking in the future. Because the covenants also provided for the recovery of the association's attorney's fees from the violating owner, the court also upheld the trial court's award of attorney's fees to the association.

While not a reported appellate court decision, our firm also represented an association in a 2009 Cobb County Superior Court lawsuit seeking an injunction prohibiting on-street parking and recovery of fines and attorney's fees. In the case of *Creekside Community Association, Inc. v. Figura*, Mr. Figura routinely parked a vehicle on the street adjacent to his house, even after numerous warnings from the association and the imposition of daily fines. A lawsuit ensued, and the Figuras argued that the covenant prohibiting on-street parking was invalid as a matter of law, because the neighborhood's streets were public roads subject only to the traffic regulations of city, county, and state governmental authorities. The court rejected this argument, ruling that "the contract between neighbors does not in any way conflict with government officials' enforcement of the law against the public generally." Further, the court found that the homeowners confused "the governmental entities' rights to enforce traffic laws and ordinances against the public at large with the Creekside neighborhood property owners' contractual obligations to each other and the Association under the covenant."

A jury trial was then conducted to determine the amount of damages (fines, attorney's fees, and costs) which should be awarded to Creekside Community Association due to the parking violations. One of the issues at trial was proving that the owner had parked in violation each day that a $25 fine was imposed by the association. During testimony, the association's president testified that each morning on the way to work he drove past the Figuras' home, and each day the vehicle continued to be parked on the street. Although Mr. Figura testified that the vehicle was moved or parked in the garage from time to time, the jury determined that the association was entitled to an award of most of the fines imposed, and a judgment was entered against the Figuras for $21,360.50, which included fines, attorney's fees, and court costs.

While the *Puckett* and *Figura* cases are not binding precedent in Georgia, both are well-reasoned decisions and persuasive authority supporting an association's ability to impose fines to enforce parking restrictions on public streets.

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