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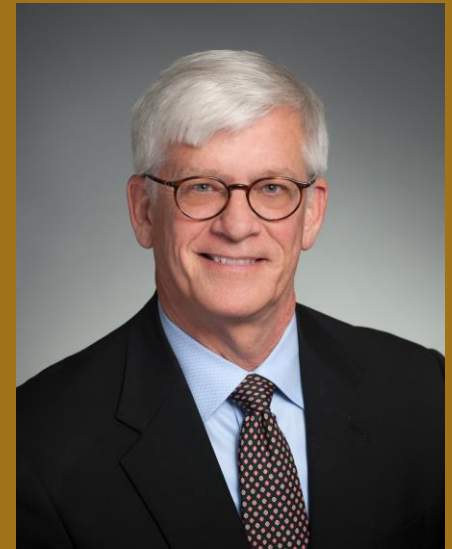
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MAILBOXES + STREET SIGNS. INSTALLED.





# 2018 Community Association Legal Forum & Expo

## Welcome!



# Meet our Team





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# Keynote Address

Presented by George E. Nowack, Jr.  
03.17.2018







# Look Before You Leap







Community Associations are a form of private law making where owners, by purchasing, subordinate some of their traditional ownership rights and privileges – they are specialized contracts.



- ❑ More than one-third of home in the U.S. housing stock are in community associations.
- ❑ 340,000 community associations in U.S.
- ❑ 10,100 community associations in Georgia.
- ❑ Approximately 95% of all new construction is in a community association.



Restrictive covenants are not favored in the law. If the language of a restrictive covenant is ambiguous, the covenant shall be enforced according to its plain meaning.



No residence, building, fence, wall, driveway, patio, patio enclosure, swimming pool, dog house, tree house, pool house, antenna, satellite receiving stations, dishes or discs, flag poles, solar heating or cooling devices, tool or storage shed, or other external improvement... shall be constructed, erected, placed or permitted to remain on any Lot... except Improvements which have been approved by the Board.





Restrictive covenants are to be construed so as to give effect to the intentions of the parties at the time the covenants were created.





No objectionable, unlawful or offensive trade or activity shall be carried on upon a lot

... nor shall anything be done therein which may become a nuisance or annoyance.



“Storage of any property or thing that...  
will be obnoxious to the eye” is  
prohibited.



The language of a restrictive covenant must be interpreted in its entirety.

...if the language is unambiguous, the covenant will be enforced according to its plain language.





The other residents are not without a potential remedy because the covenants may be amended by a vote of 75% or more of the members.



...and to the right of the Association to promulgate reasonable rules and regulations regarding the use of Association Property (including, without limitation, the installation of speed limits and security checks on the roadways located on the Association Property)

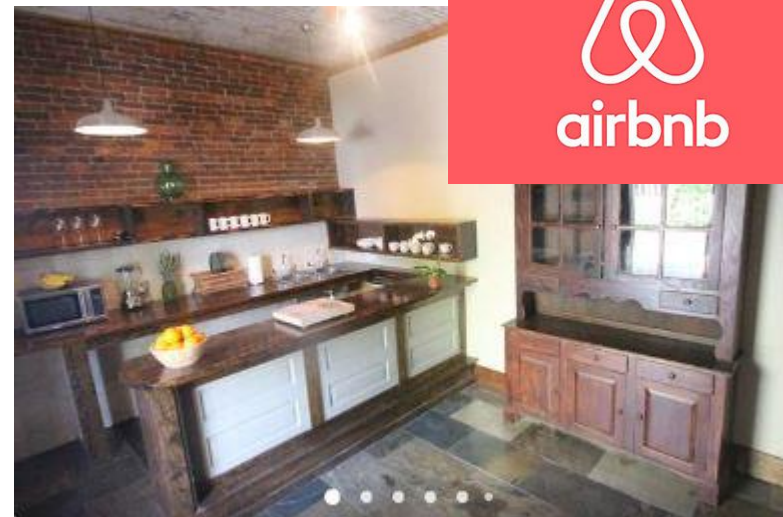




A rule/regulation adds detail to more general provisions of a Declaration

- Cannot conflict with the Declaration

**FOR RENT**



ENTIRE APARTMENT • 1 BED  
Historic 1BD/1BA near Downtown



Viewed 9 times in the last 48 hours

**Best location of Naples, within walking distance the beach**

📍 0.6 mi to Naples Beach

4 BR | 3 BA | 1 HF BA | 2690 sq. ft. | Sleeps 8

🌐 Internet

📺 Satellite / Cable





Declaration provided – any home may be conveyed or leased by its owner free of restrictions.



Board adopted “House Rules and Regulations” which prohibited leasing for less than 2 weeks, renters could not use the clubhouse, and if less than 90 days no guests and no pets.

...also, a rental fee and an administrative fee and fines.



Board argued ambiguity between the provisions of the Declaration and the right to adopt rules and regulations.



If, as the Board asserts, the impact of short-term rentals upon the character of the community is so injurious to warrant the restrictions imposed by the “House Rules”, “their task is to persuade the required percentage to amend the Declaration.”





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Declaration authorized the Board to adopt rules and regulations restricting parking of vehicles on lots and the common area.



Rules prohibited commercial vehicles from being parked, stored or temporarily kept on a lot, except to service a unit.





*Thank You*



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# Hot Topics

Presented by  
Julie McGhee Howard & Jason LoMonaco

03.17.2018



# TIPS NOT INCLUDED...

Presented by Julie McGhee Howard  
03.17.2018



## QUESTION

What are common “tips” to help ensure your association is fiscally strong?

## ANSWER

- Capital Contribution Fees
- Fines
- Move-In/Move-Out Fees
- Cell Tower Leases
- Swim/Tennis Memberships
- ACC fees\*
- “Administration” Fees\*



## Construction Bonds

- Do your architectural controls give the Board the power to charge a construction bond for modification requests?
- Can a Board charge a construction bond under its power to create reasonable rules and fees for use and upkeep of Common Areas?



McVicker v. Bogue Sound Yacht Club, Inc.,  
2017 WL 6454498 (Court of Appeals NC)

- Owners cut trees and cleared brush without prior Association approval.
- Association sent Cease & Desist demanding application form & \$250 Refundable Construction Bond.
- Owners submitted application & Bond - under protest - after Association 7-day deadline.
- Association approved application & returned Bond but fined Owners for missing deadline.



## McVicker v. Bogue Sound Yacht Club, Inc., 2017 WL 6454498 (Court of Appeals NC)

- Owners sued for Court to declare bond not authorized and fines invalid.
- Court held:
  - Not Moot: Association's authority to charge Bond determines right of Association to fine the owners for failing to timely submit.
  - General Law: Covenants clearly expressed may not be enlarged by implication or extended by construction. Enforced as written.
  - Bond Illegal: No express authority to impose bond as part of approval process for maintenance or improvements on owner's lot.
  - Fines Invalid: Imposition of fines for failing to submit illegal bond "plainly not reasonable."



## Liens for Assessments – Condominiums and Associations Submitted to POAA

The Condominium Act (OCGA §44-3-109) and Property Owners' Association Act (OCGA §44-3-232) provide for automatic, statutory liens including:

- Past due principal assessment;
- Late charge the greater of \$10 or 10%;
- Interest at 10% per annum; and
- Costs of collection, including reasonable attorney's fees actually incurred.



## QUESTION

Can an association charge an “administrative fee” for delinquent accounts?

## ANSWER

Heartland Crossing Foundation, Inc. v. Dotlich, 976 N.E.2d 760 (2012): **NO**

- Declaration allowed “late charges, all costs of collection, reasonable attorney’s fees and paraprofessional fees actually incurred.”
- Court ruled \$50 “administrative fee” invalid “junk fee” and not a collectible cost actually incurred.





## Liens for Assessments – Common Law Homeowner Associations

Northside Bank v. Mountainbrook of Bartow County Homeowners Association, Inc., 338 Ga.App. 126 (July 14, 2016):

- Unless the Declaration specifies the **interest** to be charged, the maximum legal rate is **7 percent** per year;
- The Declaration must specify the **late fee** to be charged, and cannot be left to Board discretion or it is deemed an **impermissible penalty**.



## QUESTION

Can an association shift its administrative duties and its costs for those duties to a third-party?

## ANSWER

- Most documents allow the Board to shift duties to a third-party.
- Be sure the documents expressly allow the Board to shift the costs.







Capitol Property Management Corporation v.  
Nationwide Insurance, 261 F.Supp.3d 680 (VA 2017)

- Nationwide refused to pay \$400,000 for an Insurance Claim Processing Fee and a Construction Management Fee.
- Court ruled these were not covered under the Association's insurance policy as "extra expenses" because these were indirect and non-physical costs, **not** direct physical loss to buildings or to business personal property.
- % vs. hourly rate?



## Statement of Account – Condominiums and Associations Submitted to the POAA

OCGA §§44-3-109(d) and 44-3-232(d) require 5 day written request and payment of \$10 delivered to registered agent to receive a statement of the amount of assessments past due.



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## House Bill 410



- Must ensure fair compensation for time and expense for closing packages.
- Possible new disclosure requirements.
- Possible new response deadlines.
- Enormous amount of liability at stake!





*Thank You*

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# New Statute of Limitation for Covenant Enforcement

Presented by Jason LoMonaco  
03.17.2018



## *OLD* Statute of Limitation for Covenant Enforcement

### *Old* O.C.G.A. § 9-3-29:

(a) All actions for breach of any covenant restricting lands to certain uses shall be brought within two years after the right of action accrues . . . This Code section shall apply to rights of action which may accrue as a result of the violation of a building set-back line. . . .

(c) For the purpose of this Code section, the right of action shall accrue immediately upon the violation of the covenant restricting lands to certain uses or the violation of a set-back line provision . . . .



## *NEW* Statute of Limitation for Covenant Enforcement

New O.C.G.A. § 9-3-29(c):

(c) For the purpose of this Code section, the right of action shall accrue immediately upon *the erection of a permanent fixture which results in a violation of the covenant restricting lands to certain uses or the violation of a set-back line provision. When an alleged violation or complaint is based upon a continuous violation of the covenant resulting from an act or omission, the right of action shall accrue each time such act or omission occurs. . . .*



## What is a Permanent Fixture?

**O.C.G.A. § 44-1-6(a) defines “Fixture” as:**

“Anything which is intended to remain permanently in its place even if it is not actually attached to the land is a fixture which constitutes a part of the realty and passes with it.”



## What is a “continuous” violation of the covenant resulting from an act or omission?

“The continuing violation rule applies only where there are ***separate and distinct repetitive acts*** . . . [It] does not apply in cases involving fixtures, or where no separate and repetitive act . . . is shown . . . The . . . [mismatched] window screens and [unapproved] garage door were in the nature of fixtures. [E]ven if they were not, neither violation involved separate, repetitive or distinct acts. Accordingly, the continuing violation rule has no application here.”



## 3 Kinds of Violations for SOL Purposes

- 1) Fixtures- 2 years from date of installation
- 2) “Continuous” Repetitive Acts/Omissions-  
2 Years from each distinct act/omission
- 3) Neither
  - Uncertain. *TBD*



# Fixtures

2 years from installation/construction

Structures, changes to structures, anything attached to a structure or the ground, and anything “heavy” that’s not going anywhere anytime soon:

- New Construction
- Detached Garage
- Deck, Screened Porch & Other Additions
- New Roof, Windows, Siding etc.
- *New* Paint
- *Large* Statues (but what of unless moved)





## “Continuing” (i.e. repetitive) Violations 2 Years from each distinct act/omission

- Unauthorized Parking
- Loud Music/Parties
- Leaving out a trashcan
- Small/lightweight yard decorations (i.e. easily movable items)
- Leaving the garage door open
- Too many guests at the pool, etc.
- Weeds?



## If Neither a “Fixture” nor “Continuing” **Get into Court within 2 years!**

- Deterioration
- Disrepair
- *Peeling* paint
- unkempt/unsightly conditions
- failures of “maintenance.”
- Weeds?
- When does the 2 year SOL begin to run?..?..  
*TBD (most likely when the violation first occurs)*



## Neither a “Fixture” nor “Continuing” **Get into Court within 2 years!**

- What covenant is being violated?
  - “Unkempt/unsightly,” failure to “maintain,” or “keep in good repair” etc.
  - Covenant specifying specific height of grass
- When did the violation begin?
  - When do peeling paint, rotting wood or weeds become “Unkempt/unsightly?” or a failure to maintain?

*Thank You*



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# Ask the Experts