

2012 Legislation and Case Update
2012 Community Association Law Seminar & Expo

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1. Fee Upon Foreclosure

- Would require payment of the equivalent of up to six (6) month's assessments by a Party that forecloses
- Would apply only to Georgia Condominium Act and Property Owners Association Act

2. Transfer Fee Authorization – HB 739

- Would authorize transfer fees/initiation fees/capital contribution fees if required by recorded Declaration

3. Process Servers – O.C.G.A 9-11-4

- Associations with controlled access must allow entry of private process servers:
 - i. identification of person
 - ii. evidence of court appointment
 - iii. identify of person to be served
 - iv. server must promptly leave upon service or it cannot be effected at that time

4. Solar Bill of Rights – HB 686

- Applies to property subject to Property Owners Association Act
- Declaration cannot prohibit installation of solar devices except in certain circumstances

5. Cases and Legal Principles

- a. Crittenton v. Southland Owners
 - Lawsuits seeking an order that a Board's action or inaction is harming the Association must be filed by derivative action
 - Suit must be filed by no less than 5% of voting power or 50 members, whichever is less

- b. Villas at Stone Mountain v. Blair
- Heirs at law acquire title to property upon death
 - Georgia Condominium Act (O.C.G.A § 44-3-109[a]) requires all owners pay assessments from date title is acquired
 - Heirs at law liable for assessments regardless of use of unit or receipt of any benefit
- c. Campbell v. Landings Association
- For a property owner to acquire ownership of common property the person must:
 - i. possess for 7 years and prove ownership is based on the title
 - ii. cannot be used to regulate use of individual properties
 - iii. show for (i) and (ii) use is open, notorious (obvious), uninterrupted, and without permission
- d. Campbell v. Landings Association
- If adoption of rules allowed by documents, must be:
 - i. within scope of authority
 - ii. not a provision of Declaration
 - iii. reasonable (not arbitrary, not capricious, good faith)
- e. Williams v. Landings Association
- Duty of care an Association owes to a person depends on the legal status of the person
 - Georgia law recognizes three categories of possible claimants: (a) invitees, (b) licensees and (c) trespassers. The difference is determined based on the nature of the permission to enter another person's property.
 - An invitee is a person that has been invited to be on another person's property for a purpose that benefits the property owner.
 - Unit/property owners and guests are invitees.
 - A licensee is a person who is permitted to enter property with the permission of the owner or the person who controls the property. There is no mutual profit motive. A social guest in a person's home is a licensee.
 - A trespasser is a person that is on the property of another without permission.
 - A landowner owes an invitee the greatest duty of care. A landowner owes an invitee a duty of keeping the premises safe and includes a duty to inspect the premises for possible dangers and to warn of dangers. A licensee is owed a duty to use reasonable care to maintain the property and warn of known dangers. A landowner owes no duty to a trespasser.

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ATTORNEYS AT LAW

Super Lien

- Alternate language draft O.C.G.A. § 44-3-109(a)(2)
Georgia Condominium Act:

Anything in the condominium instruments to the contrary notwithstanding, in the case of a foreclosure sale by the holder of any mortgage described in subparagraphs (a)(1)(B) and (a)(1)(D) of this Code section, the purchaser at the foreclosure sale shall take title subject to a lien in favor of and personal obligation to the association in an amount equal to a portion of the association's unpaid lien existing prior to the foreclosure but not more than the equivalent of the unpaid common expense assessments charged to the unit first coming due during the six months prior to such foreclosure sale.



Super Lien

- Alternate language draft O.C.G.A. § 44-3-232(a)(2)
Property Owners Association Act:

Anything in the property owners' association instruments to the contrary notwithstanding, in the case of a foreclosure sale by the holder of any mortgage described in subparagraphs (a)(1)(B) and (a)(1)(C) of this Code section, the purchaser at the foreclosure sale shall take title subject to a lien in favor of and personal obligation to the association in an amount equal to a portion of the association's unpaid lien existing prior to the foreclosure but not more than the equivalent of one-half of the unpaid common expense assessments charged to the lot during the twelve months prior to such foreclosure sale.



Transfer Fee

House Bill 739

- Prohibits transfer fees to a Declarant
- Allows a fee associated with a conveyance to be paid to:
 - (1) An association formed for the purposes of exercising the powers of the association of any condominium created pursuant to Article 3 of Chapter 3 of this title, the 'Georgia Condominium Act'
 - (2) A property owners' association formed for the purposes of exercising the powers of the property owners' association pursuant to Article 6 of Chapter 3 of this title, the 'Georgia Property Owners Association Act'



Transfer Fee

House Bill 739

- (3) A property owners' association formed for the purposes of exercising the powers of an association of property owners that has not been formed pursuant to or which has not adopted the provisions of Article 6 of Chapter 3 of this title, the 'Georgia Property Owners Association Act', provided that such association shall comply with subsection (d) of Code Section 44-3-232; or
- (4) A person or entity under the general supervision of the Public Service Commission as provided for in subsection (a) of Code Section 46-2-20, provided that the fee is charged for expenses incurred in the administration of ongoing services or rights provided to the property interest conveyed.



Transfer Fee

House Bill 739

(d) A conveyance of real property by gift, devise, nonjudicial or judicial foreclosure, deed in lieu of foreclosure, court order, or operation of law shall be exempt from any permissible fees under this Code section.



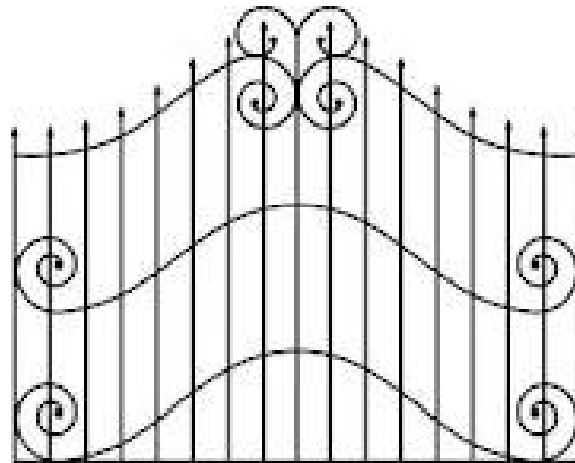
Private Process Server

- Service Upon Persons Residing in Gated and Secured Communities (O.C.G.A § 9-11-4)
 - As used in this paragraph, the term “gated and secured communities” means multiple residential or commercial properties, such as houses, condominiums, offices, or apartments, where access to the multiple residential or commercial properties is restricted by a gate, security device, or security attendant that restricts public entrance onto the property; provided, however, that a single residence, a farm, or commercial property with its own fence or gate shall not be included in this definition.



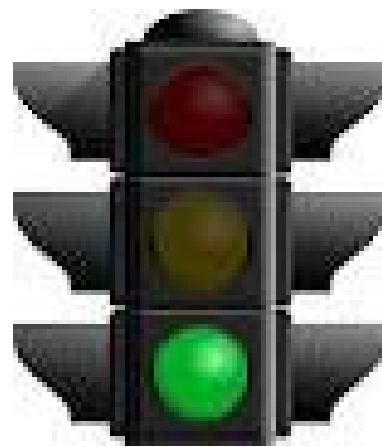
Private Process Server

- Any person authorized to service process shall be granted access to gated and secured communities for a reasonable period of time during reasonable hours for the purpose of performing lawful service of process upon:



Private Process Server

- 1) Identifying to the guard or managing agent the person, persons, entity, or entities to be served;
- 2) Displaying a current driver's license or other government issued identification which contains a photograph; and
- 3) Displaying evidence of current appointment as a process server pursuant to this Code section.



Private Process Server

- Any person authorized to serve process shall promptly leave gated and secured communities upon perfecting service of process or upon a determination that process cannot be effect at that time.



Solar Bill of Rights

House Bill 686

- Applies to property owners associations
- Except as provided in the law, no association shall prohibit or restrict a lot owner from installing or maintaining a solar energy device
- Association may prohibit if:
 - (1) As adjudicated by a court: (A) Threatens the public health or safety; (B) Violates a law; or (C) Would conflict with a local ordinance adopted in conformity with Article 2 of Chapter 10 of this title



Solar Bill of Rights

House Bill 686

- (2) Is located on property owned or maintained by the association;
- (3) Is located within a common area;
- (4) Is located in an area on the lot owner's property other than: (A) On the roof of the home or on the roof of another structure allowed by an instrument or other rules or regulations adopted pursuant to an instrument; or (B) In a fenced yard or fenced patio owned and maintained by the lot owner;



Solar Bill of Rights

House Bill 686

(5) If mounted on a roof:

- (A) Extends higher than or beyond the roof line;
- (B) Is located in an area other than an area designated by the Association, unless the alternative location increases the estimated annual energy production of the device, as determined by using a publicly available modeling tool provided by the National Renewable Energy Laboratory and adopted by rule or regulation of the Department of Natural Resources, by more than 10% above the energy production of the device if located in an area designated by the Association;



Solar Bill of Rights

House Bill 686

(5) If mounted on a roof (*continued*)

(C) Does not conform to the slope of the roof or has a top edge that is not parallel to the roof line; or

(D) Has a frame, support bracket, or visible piping or wiring that is not in a silver, bronze, or black tone commonly available in the marketplace;

(6) If located in a fenced yard or fenced patio, extends higher than the fence line; or

(7) As installed, voids material warranties.



Solar Bill of Rights

House Bill 686

- (d) No association shall require a permit or fee for the installation or continuous use of a solar energy device
- (e) This Code section shall apply to covenants running with the land that are entered into or renewed on or after the effective date of this Code section.



CASES



Terms

- **Summary Judgment** – a pleading asking a court to decide a case without a trial. The undisputed facts and the law support a ruling.
 - Not available if facts are in dispute
- **Declaratory Judgment** – a pleading by a Plaintiff asking a court to answer a question of law that relates to a future action
- **Derivative Suit** – individual members do not have authority to sue an association or Board members for alleged harm to the association caused by the action or inaction of the Board members.
 - Suit must be filed by no less than 5% of voting power or 50 members, whichever is less



Crittenton v. Southland Owners Association, Inc.

Challenge of Election

- Election conducted by written ballot. After ballots were sent out, Board made the decision to allow more owners to vote. As a result, the number of ballots returned were not enough to meet quorum. Five persons elected challenged, asking court for declaratory judgment on the number of eligible votes. During lawsuit, second election held and results certified. Court held:



Crittenton v. Southland Owners Association, Inc.

Challenge of Election

- 1) Declaratory Judgment not proper because no uncertainty to future action
- 2) Court will not validate past events
- 3) The claim for breach of duty must be brought as a derivative action because it affects all members; no special damages to an individual member



Villas at Stone Mountain Condominium v. Blair

Heirs Required to Pay Assessments After Inheriting Property

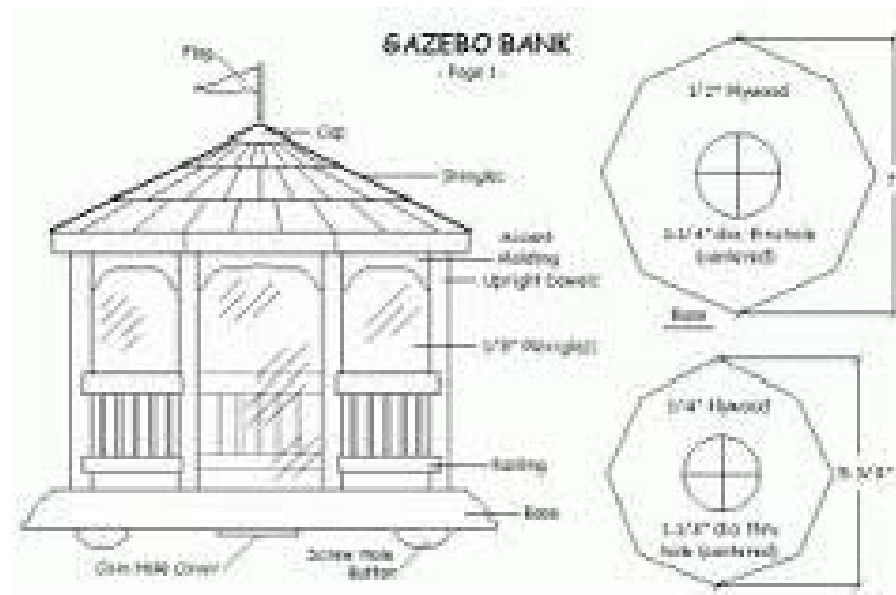
- Was Blair the owner?
 - Yes – O.C.G.A § 53-2-7(a) provides where a person who owns property dies without a will, the title to the property vests immediately to the heirs
- Did she owe assessments?
 - Yes – O.C.G.A § 44-3-109(a) requires every owner to pay assessments
- Blair could have renounced ownership within 9 months, that would have resulted in property going to Blair's heirs



Campbell v. Landings Association

Architectural Control Committee Violation

- Owners built a gazebo on land located between their lot and the marshlands on common property



Campbell v. Landings Association

Architectural Control Committee Violation

- Campbell argued that he had acquired prescriptive title – adverse possession
- 7 years if the claim is based on the title and is not based on fraud and the use is public, continuous, exclusive, uninterrupted, and peaceable
- 20 years where the use is open, notorious (obvious) and without permission
- Campbells only owned their lot for 16 years



Campbell v. Landings Association

Fiduciary Duty Does Not Apply to a Rule

- Mr. and Mrs. Campbell ordered a \$68,624.04 air boat



Campbell v. Landings Association

Fiduciary Duty Does Not Apply to a Rule

- Campbells alleged Board had breached its fiduciary duty because it adopted a rule it would not allow air boats and other high-powered boats to be stored at the Association's marina
- Campbells asked for a waiver of the rule
- Basis of rule was noise and ability to store without damage
- Campbell argued the Association owed him a “fiduciary duty” and it breached that duty when it adopted the rule because it was not an act in good faith
- The rule did not breach any fiduciary duty



Williams v. Landings Association

Premises Liability

- Ms. Williams was fatally injured by an alligator attack



Williams v. Landings Association

Premises Liability

- Association sought summary judgment based on concept of O.C.G.A § 54-3-1:

Where an owner or occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries caused by his failure to exercise ordinary care in keeping the premises and approaches safe

- If a landowner does more than the law requires, may be liable if he or she acts unreasonably or makes the situation worse by increasing the danger, or by misleading the person into belief that it has been removed



Williams v. Landings Association

Premises Liability

- People are presumed to know wild animals are dangerous – *animals ferae naturae*
- Association had policy of removing any alligator over seven feet long
- No warning signs around lagoons



Williams v. Landings Association

Premises Liability

- Categories of land users:
 - Invitee
 - Licensee
 - Trespasser
- For invitees, property owners have a duty to inspect the premises to discern possible dangerous conditions of which it does not know and to take reasonable precautions to protect the person from dangers which are foreseeable
- When a person learns or should have learned of a hazard on the premises and by exercising ordinary care could avoid the injury, failure to act may



IS THIS LIVESTOCK?



FRED AND BARNEY



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**Thank
You!**