COMMUNITY MATTERS

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What Does The "Covenant Not To Sue" Provision Really Cover? A Summary of the 2025 Appellate Case Regarding Architectural Review and Solar Panels

by | **Cynthia C. Hodge, Esq.**

The September 2025 appellate decision handed down from the Georgia Court of Appeals involves solar panels, architectural review and denials, and review and analysis of the architectural indemnity and covenant not to sue provision. The Gwinnett trial court found in favor of the Association, and the owners appealed and won. Let us discuss the facts and Court of Appeals' decision, followed by some key takeaways from this case.

The Case

Kinnaird, et al. v. Morningview Homeowners Association, Inc. (September 10, 2025)

The Facts

The Kinnaids ("owners") lived in the Morningview subdivision in Suwanee for many years. In 2022, they submitted an application for modification to install 33 solar panels to the roof of their single-family home. On the day they electronically submitted the application to the community manager, they received an electronic response *within two hours* saying that their application was denied. The denial letter cited to the Declaration of Protective Covenants for Morningview concerning "Energy Conservation Equipment," which read:

No solar energy collector panels or attendant hardware or other energy conservation equipment shall be constructed or installed unless they are an integral and harmonious part of the architectural design of a structure, as determined in the sole discretion of the ARC.

The owners attempted to speak with a member of the Architectural Review Committee ("ARC"), who informed them that "solar panels are not currently approved by the bylaws."

The Kinnaids appealed the decision to the Board of Directors, and the Board agreed with the ARC denial. The Kinnaids requested the opportunity to meet with the ARC in person and have an expert available to answer questions or submit alternative ideas. The request for a meeting was declined, because the application was denied on appeal.

Ultimately, the owners retained legal counsel who argued that the ARC failed to exercise proper review of application and, as such, the application should be deemed approved. Also, the owners brought up that the declaration did not include an express prohibition on solar panels. Furthermore, the owners argued that a prohibition on solar panels violates public policy.

Unable to reach a resolution, the owners filed an action for declaratory judgment, asking the Court to declare the Association's "ban on solar panels" unlawful and against the governing documents, as well as finding that the Association breached its legal duty of review of the architectural application (i.e., the two-hour turnaround after submission without proper deliberation). They brought claims of breach of contract, breach of legal duty, and interference with property rights. They sought a court order deeming their architectural application approved (to install the solar panels) and seeking legal costs incurred.

At the trial court level, the Association filed a motion for summary judgment, which the trial court granted. The trial court said that the Association's indemnity and covenant not to sue provision was triggered, and the owners could not bring such a suit. The indemnity and covenant not to sue provision read:

Plans and specifications are not approved for engineering or structural design or quality of materials, and by approving such plans and specifications[,] neither the ARC, the members thereof, nor the [HOA] assumes liability or responsibility therefor, nor for any defect in any structure constructed from such plans and specifications. Neither ... the [HOA] [nor] the ARC ... shall be liable in damages to anyone submitting plans and specifications to any of them for approval, or to any owner or property affected by these restrictions by reason of mistake in judgment, negligence, or nonfeasance arising out of or in connection with the approval or disapproval or failure to approve or disapprove any such plans or specifications.

Every person who submits plans or specifications and every owner agrees that such person or owner will not bring any action or suit against ... the [HOA], [or] the ARC ... to recover any damages and hereby releases, remises, quitclaims, and covenants not to sue for any claims, demands, and causes of action arising out of or in connection with any judgment, negligence, or nonfeasance and hereby waives the provisions of any law which provides that a general release does not extend to claims, demands, and causes of action not known at the time the release is given.

(Emphasis added).

So, the owners appealed.

Court of Appeals Decision

To summarize, the Court of Appeals disagreed with the trial court's ruling and reversed the decision entirely. Here is what the Court of Appeals held:

1) The Court of Appeals agreed with the trial court that the owners provided plans and specifications so required when submitting an application for modification to the ARC.
2) The trial court interpreted the indemnity and covenant not to sue provision incorrectly. Put plainly, the indemnity language is narrow. The provision prevents an owner from suing the Association based on any damages arising as a result of engineering plans, structural design or quality of materials used by reason of approval or disapproval of request.

   It does not include legal action brought by owners to challenge how the Association (or ARC) did or did not execute the duties in the approval/denial process, or to challenge a breach of legal duty, breach of contract, or bad faith. As such, the claims brought by the owners survive and should be further pursued in legal action.
3) On the issue of whether the case goes back down to the trial court for examination of the claims of breach of legal duty, breach of contract, and bad faith (seeking attorney's fees and costs), the Court of Appeals said it should. The case was sent back to the trial court to assess the validity of such claims.

So, what are some of the key takeaways from this case?

1) The indemnity and covenant not to sue provision in the governing documents is not a complete bar to all suits brought by an owner regarding architectural modifications.
2) Be mindful of your review process for architectural modifications. Usually, covenants will allow 30-45 days for review. Perform deliberate review and consideration of the applications received. Do not be hasty to send a quick denial.
3) Be careful not to make assumptions about outright "bans per your governing documents," especially when there is language that provides some discretion to a governing body, like an ARC.
4) Lastly, if you have further questions about whether you have established design or architectural guidelines that may be too stringent or not in line with your governing documents, please contact your association's counsel for further assistance.

What Enforcers Should Know About Invasion of Privacy Claims

by | **Elina V. Brim, Esq.**

Many boards are frequently surprised that homeowners can raise invasion of privacy claims in response to enforcement actions by associations. Such claims are asserted frequently against associations, board members, and managers. Therefore, it is essential for board members, committee members, and agents to understand these claims and exercise appropriate caution.

The tort of invasion of privacy has four different categories: (1) intrusion upon a person's seclusion or solitude or into a person's private affairs; (2) public disclosure of embarrassing private facts about a person; (3) publicity which places a person in a false light in the public eye; and (4) appropriation of the person's name or likeness. In the context of community associations, most claims are based on intrusion upon a homeowner's seclusion or solitude or into the homeowner's private affairs.

To prove this cause of action, the homeowner must establish a prying or intrusion into a person's private concerns which would be offensive or objectionable to a reasonable person. Whenever a cause of action references "a reasonable person" standard, that generally creates a fact question about whether the offending party's conduct is objectionable. Consequently, invasion of privacy claims may be difficult to address in litigation before trial.

In a community association setting, these claims generally arise due to the association's observations and documentation of violations or certain property conditions. Photographing property violations or owners engaged in behaviors that may amount to a violation can give rise to such claims, depending on the time, place, and manner of documenting. Similarly, drone inspections can give rise to such claims, depending on where the drone is flown, for how long, and what images are captured. Georgia law recognizes that an easement over someone's property can provide a defense to an invasion of privacy claim. While it is true that most covenants provide an easement right to enter lots for covenant enforcement purposes or inspections, exceeding the scope of inspection easement rights or failing to comply with procedural requirements prior to exercising such rights could give rise to a legitimate invasion of privacy claim.

Given the arguable legal standard, it may be challenging to determine what methods are appropriate to utilize for covenant enforcement activities. In that regard, case law offers some guidance. Traditionally, watching or observing a person from a public place is not an intrusion upon one's privacy, as there is no expectation of privacy for conduct occurring within view of a public place. Therefore, to the extent photographs of a violation are taken from a public right of way, this activity does not generally give rise to this claim. However, Georgia courts have held that surveillance of an individual on public thoroughfares, where the aim of such surveillance is to frighten or torment a person, would be an unreasonable intrusion upon a person's privacy. In the context of association inspections, if several inspections are done in one day, an owner may have a valid position that repeated inspections are intended to harass or intimidate. On the other hand, if an association conducts daily inspections to substantiate continued existence of a violation and imposition of daily fines, it would have a valid argument that inspections are done to collect evidence for its enforcement case. Courts have held that observing a person from a public place in order to investigate a disability claim is reasonable. Similarly, surveillance to determine a parent's fitness to have custody of minor children has been held to be reasonable surveillance.

Examination of Georgia case law indicates that the most conservative option is to perform surveillance from a public right of way, during day-time hours, and for the purposes of enforcing covenants. Caution should be exercised before entering an owner's lot to inspect for violations or document violations. All procedural requirements of the covenants pertaining to easement access should be observed prior to such entry.

If you have questions about property inspections conducted by your association, please reach out to your community association attorney for further guidance.

Getting a Handle on Assessment Collection:
Crafting a Coherent Plan for Dealing with Delinquencies

by | **Harrison J. Woodworth, Esq.**

Assessments are the lifeblood of any community association. They are vital as they allow the association to maintain the neighborhood and meet its obligations to the membership as a whole. Accordingly, collecting assessments when owners fail to pay as required is one of the most important tasks for a board, and it is often one of the most daunting. Establishing and following a well-thought-out collection policy can be a help in managing this process.

A collection policy should be tailored to fit the individual association's needs. Getting a handle on the scope of the problem is an important first step. What is the percentage of the membership who are delinquent on their assessments? How far past-due are those owners? There is a four-year statute of limitations for collecting delinquent assessments, and the policy should be set that collections activity is started well before the collection bar date becomes an issue. If there are owners with amounts owed that are approaching or past the four-year mark, a collection policy should place a priority on addressing those accounts first. A board should also consider how many resources are presently available to devote to more advanced collections activity. Sending collection demand letters and having liens placed on subject properties are relatively inexpensive, but they can take longer to get results because they rely on voluntary payments. Obtaining a judgment allows for garnishments, but obtaining those requires more expense and time. The initial policy may be to pursue the largest balances first while being prepared to invest funds in more advanced collections if needed. As funds are recovered and reserves built back up, the board can then expand out to address other past-due accounts.

Once the board has determined the goals for a collection policy, it can proceed with the details of the policy itself. The threshold needs to be set for when collection activity commences on an account. Determining that threshold can be a function of the total number of unpaid assessments on an individual account, the total amount past-due, or a combination of both. The common initial action to take place once that threshold is met is for a collection demand letter to be sent to a delinquent owner. The collection policy should specify if that action is to be taken by the board itself, or by an agent of the association such as a management company or the association's law firm. (For many people, just getting a letter from a law firm itself is enough incentive to get a check in the mail and get their debt to the association paid up.) The policy should then address the next steps to take if an owner does not pay as required, and ideally any collections communication to the owner informs them of the potential consequences that will follow upon their failure to pay. Is it vital that if the association makes the threat of a consequence (for example, that the next step will be to refer the account to the association's law firm for collections and attorney's fees will be incurred) then the association needs follow through. Consistently crying "WOLF!" and not following through tends to spread by word of mouth, and an association's collection efforts may become more difficult in the long-run.

It is very important to note that any collections activity taken must comply with the requirements provided for by Georgia and federal law as well as the association's governing documents. The collections policy might call for more aggressive steps like terminating voting rights, amenities access, or cutting off utilities, but in doing so, all required notice procedures need to be followed closely.

Community members will inevitably present a diverse range of reasons for why they are unable to pay in full right away. Having a collection policy that features basic guidelines for settlement can assist boards in treating owners equitably while including the ability to be flexible in different situations. For example, a policy might include a maximum amount of time allowed for a payment plan, a minimum percentage-of-debt amount for a down payment, or that soft costs such as interest or late fees may be waived in settlement. But these should remain guidelines as opposed to hard and fast rules so that the board can use its discretion and business judgment to act in the manner most beneficial to the association. There will likely be situations where it is in the best interest of the community to accept a payment plan that is longer than it might have preferred rather than incur a substantial amount of expense pursuing an owner with little in the way of collectible assets. At the same time, the board is not obligated waste time on protracted settlement negotiations with owners who have been through the process previously and failed to meet their obligations in prior agreements.

Certain aspects of a collections policy (such as what charges might be waivable) should be kept for internal board use as opposed to circulated to the general membership. Confidentiality helps board members exercise their discretion and judgment, while also protecting the homeowners who are in active collection. The association should also keep detailed records of collection actions against owners, such as meeting minutes or copies of correspondence sent regarding delinquent accounts. These records can be vital in potential litigation to show that a consistent collection and equitable process was followed in pursuing a delinquent owner. Owners commonly claim, often without any merit, that they are being unfairly targeted or singled out for collections, and following a set collections policy can rebut that claim. A good collection policy can also serve to demonstrate the extent to which the association took measures to resolve the matter prior to filing a collection lawsuit against an owner and incurring additional attorney's fees and costs. Our firm can assist with preparing a policy for your association as well as ensuring that the collection policy complies with applicable laws and the association's governing documents.