COMMUNITY MATTERS

LUEDER, LARKIN & HUNTER

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Articles:

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Are Covenants Restricting Parking On Public Streets Enforceable?

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

Declarations of covenants often restrict parking on public streets by either (1) expressly prohibiting vehicle parking on streets in the community, or (2) requiring vehicles to be parked in a garage or driveway, thus prohibiting vehicles from being parked anywhere else, including the street. Are these parking restrictions enforceable under Georgia law? In answering that question, we first note there are no Georgia appellate cases that have addressed such parking covenants, so this is an unresolved issue within Georgia law. Keeping that in mind, our firm's position nevertheless is that such covenants *are* enforceable. The main purpose of this article is to explain the legal reasoning for our position. Following that, we address some practice issues that arise with parking violations.

Legal Reasoning – Parking Restrictions on Public Streets are Enforceable

We begin with a Georgia Court of Appeals case decided in 1998 called *Hardin v. City Wide Wrecker*, which has sometimes been incorrectly interpreted as addressing parking covenants. The case involved a person named Joan Leitch, who was an "authorized representative" of Royal Towne Park Townhouse Association (RTP) without the appellate court stating whether Ms. Leitch was an officer, director, or property manager of RTP. Ms. Leitch, as an authorized representative acting on behalf of RTP, called a towing company, City Wide Wrecker, to have an "improperly parked" car towed from a public street in the Royal Towne Park community. City Wide Wrecker towed the car as requested. The owner of the car, Ruth Hardin, later sued City Wide Wrecker for conversion of her car (i.e., wrongfully possessing the car until it was returned to Ms. Hardin). The Georgia Court of Appeals analyzed Ms. Hardin's conversion claim by looking at whether the street in the community was public or private. The Court determined it was a public street. The Court then applied Georgia law and stated the following:

> O.C.G.A. § 40-11-3 generally gives the authority to tow cars from public streets to peace officers, law enforcement officers, and employees of the Department of Transportation. Leitch, who represented RTP, fits into none of these categories, and, accordingly, she had no authority to have Hardin's car towed. Therefore, RTP's agent, City Wide Wrecker, also lacked authority. Because it exercised dominion and control over Hardin's car without authority, City Wide Wrecker is liable for conversion in spite of the fact that it acted in good faith.

The *Hardin* case has been sometimes very broadly interpreted by attorneys to mean that a covenant prohibiting parking on a public street is not enforceable. But that is not the holding of the case. In fact, there is no mention in the case that a covenant against parking on a public street was even involved or violated. The facts instead simply state that Ruth Hardin's car was parked improperly. How was it improperly parked? The case does not state. While we might guess that the car was improperly parked because it violated a covenant against parking on a public street, the Court did not discuss, or in any way identify, a parking restriction covenant. As a side note, our firm has obtained and reviewed the recorded RTP covenants that were applicable in the case in 1998. The RTP covenants contain two different restrictions that regulate parking on the streets; but neither covenant was addressed by the Court, nor whether Ms. Hardin's vehicle was parked improperly because it violated either of those covenants. Instead, the entire holding of the case is that a private party cannot have a vehicle towed from a public street.

Since the *Hardin* case does not address the enforceability of covenants restricting parking on a public street or whether a homeowners association can enforce such a covenant by fines or an injunction, we believe the following factors lead to the conclusion that covenants prohibiting or otherwise restricting parking on a public street are enforceable:

First, covenants are viewed under Georgia law as specialized contracts, and Georgia law further provides that people are free to enter into contracts to give up what they would otherwise be legally entitled to do. An excellent example of that is a Georgia Court of Appeals case from 2001 called *Bryan v. MBC Partners*. MBC Partners was the developer in a new community, and one of the first people to buy a home in the community was Skyler Bryan. Mr. Bryan was upset at the failure of MBC Partners to complete various repairs to his house and hung a sign near his front porch facing the subdivision sales office that stated: "Before You Buy A Home In Here PLEASE See US." After Mr. Bryan was informed that the sign violated a covenant against unapproved signs, and after he refused to remove his sign, MBC Partners sued Mr. Bryan to have the sign removed. Mr. Bryan argued he had a First Amendment right of free speech to display his sign. The Court concluded that even though Mr. Bryan would generally

Are Covenants Restricting Parking On Public Streets Enforceable? *(continued...)*

have such a free speech right, he waived that right by purchasing a home in a covenant community, thereby agreeing to not display unapproved signs. Applying that case to street parking, we reach the same analysis and conclusion that even though owners would generally have a right to park on a public street, owners waive that right by purchasing in a community that has a covenant restricting parking on the public street.

Second, many of our firm's clients have covenants restricting parking on public streets, and in 2013, a homeowner in one such community wrote to his county commissioner to ask whether the county believed the covenant was valid. The commissioner forwarded the question to the county attorney for an opinion, and the opinion was eventually provided to our client and our firm. We were pleased to see that the county attorney had gone through the same analysis discussed above that people can give up rights they would otherwise have and cited two cases additional cases other than the *Bryan* case. The county attorney concluded that the covenant is a contract that can be enforced against the owner by his homeowner's association.

Third, one of our attorneys, David Boy, litigated the exact issue for one of our association clients, and the Superior Court of Cobb County concluded that a covenant restricting parking on a public street was valid. Although the case was decided by the trial court and not addressed by an appellate court, therefore not creating binding precedent on other courts in Georgia, this is additional authority for our position.

Fourth, another one of our attorneys, Elina Brim, litigated a case where a covenant permitted a homeowners association to designate parking spaces on a public street. An owner challenged the covenants as it pertained to a public street, and the Superior Court of DeKalb County upheld the covenant as valid. Again, while this was a trial court case that did not create precedent on other courts, it is additional authority and another example of our firm's position being accepted in court.

Fifth, there are several appellate cases from other states that have determined that such covenants are enforceable. Once again, although those cases are not binding on Georgia courts, they are additional authority for our position.

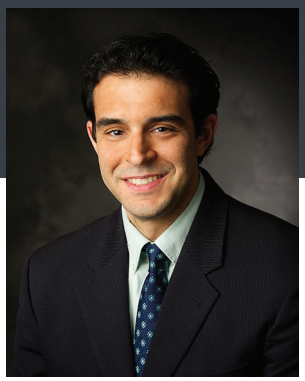
Some Practical Considerations – Enforcing Parking Restrictions

Having concluded that such covenants are valid, we also address some practical issues that can often arise. One such issue is determining who owns the vehicle. If a vehicle parked in violation of a covenant belongs to a homeowner, we believe, as discussed above, that the owner has agreed to the covenant by buying a home in the community. If the vehicle belongs to an occupant of the home, most covenants will bind owners and occupants. We thus recommend that we review the covenants to make sure the occupant is expressly bound by the covenant. If the vehicle belongs to a guest, the homeowner might argue that the owner's guest did not agree to the parking covenant by simply being a guest. In that event, our position would be that an owner has an obligation to make sure the owner's guest complies with the covenants. Similarly, if an owner's guest made modifications to the owner's property without ACC approval in violation of an architectural control covenant, or parked a boat trailer in the owner's driveway in violation of a trailer parking covenant, the owner would still be liable for the violation.

A board must also keep in mind that the association has the burden of proof for covenant violations. As a practical matter, if a fine is levied each time a vehicle is parking on a public street in violation of a covenant, the association needs evidence of each violation. A picture of each violation is often the simplest evidence. A uniform policy of enforcement is also required, so that the owner of a vehicle parked in violation of a parking covenant cannot successfully argue that the owner is the subject of selective enforcement because no enforcement has been taken against other vehicles parked in violation of the covenant.

Summary

The most conservative approach that a board can take is to not enforce a covenant restricting parking on a public street. That is not because such a covenant is not enforceable, rather it is because this is an unsettled area of law. Taking that into account, if a board does want to enforce such a covenant through violation letters, fines, and/or injunctive relief (and never through towing, as concluded by the *Hardin* case), our firm believes that covenants restricting parking on a public street are valid and enforceable. Please note that towing on a public street is not permitted under Georgia law, and our firm does not recommend towing as a possible enforcement remedy.



Lien Foreclosure: Help Me, Help You

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

The usual methods utilized by associations to collect assessments from non-paying owners are to send letters, record liens, and, if that fails, file a lawsuit. If the matter cannot be resolved pre-lawsuit or during pendency of the lawsuit, a judgment may be entered. The judgment can be enforced through garnishment of bank and wages. These tried-and-true methods of collections have been very effective in achieving favorable collection results. Yet, despite an association's best efforts, there will always be a small number of owners who simply do not pay. There is a final option worth considering, namely foreclosure of the association's lien.

Most covenants provide for a continuing lien in favor of the association securing unpaid assessments against an owner's property. The covenants usually provide that the lien can be foreclosed. Even though there may be a security deed (commonly called a mortgage) against the property in favor of a lender, Georgia statutes (the Condominium Act and the Property Owners' Association Act) permit the association to foreclose, subject to superior liens. Associations that are not subject to either Act can still foreclose if a court grants equitable relief. This means that an association can force the sale of a property for payment of delinquent assessments without having to pay off the superior security deed.

Completion of the association's foreclosure sale does not extinguish a superior security deed. At some point, if the superior security deed is not paid off, the lender can foreclose the superior lien, or any interest resulting from the association's foreclosure. If that is a possibility, then why would anyone buy a property at an association foreclosure sale? Even though a property might be encumbered by a superior security deed, the property may be worth more than what is owed on the security deed and other liens, including the association's. When this is the situation, the property is said to have "equity."

For example, if a property is worth $200,000, there is a security deed of $125,000, and the association's lien is $5,000, then there is $70,000 in equity ($200,000 - $125,000 - $5,000 = $70,000). It is likely, under these circumstances, that the association's foreclosure sale would attract an investor because even after paying off the security deed and the association's lien, there is $70,000 left. Of course, this assumes that the property is habitable, marketable, and that the investor can find a buyer. Such is the risk of any investor.

Over the past few years, a booming real estate market has proven a lucrative climate for associations to recover what is owed through the foreclosure process. Many properties, even ones purchased a short few years ago, have increased in value to a point where they are worth more than what was borrowed to purchase them. As a result, almost every property that has gone to foreclosure sale over the past two years has been sold for at least enough to cover the association's judgment. One might ask, "if these properties are so valuable, why doesn't the owner refinance or sell the property before it goes to foreclosure?" The answer is that many owners have done exactly this. In fact, very few properties ever make it to sale because owners who have enough equity in their property have been able to borrow or sell in order to pay the amounts owed.

Board members asked for authorization to proceed with foreclosure are often apprehensive about the prospect of separating a neighbor from title to property in the community. Those board members must consider that arrival at a foreclosure sale date does not occur without having progressed through all the usual methods of collection without successful results. Setting a foreclosure sale is often not necessary because resolution is reached well before the board needs to consider setting a sale date. Foreclosure is always a last resort.

Board members who remain reluctant to engage assistance to begin foreclosure proceedings should consider whether the real estate market will remain as favorable as it has been. With interest rates climbing, rapid inflation, the stock market declining, and recession looming, it is unrealistic to hope that an owner who has not paid assessments for several years during a favorable economy will suddenly have the money to pay during a recession. If there is a possibility that the amounts owed can be recovered from a by foreclosing the lien for assessments against a property, then the board should consider acting before the window of opportunity is shut. If accepting that an owner will remain in the community and never pay is not an option, then "help me, help you" by coming up with a foreclosure plan.

Every property has a different set of circumstances concerning title and valuation. The association's counsel should be consulted to determine whether foreclosure is likely to lead to the desired result.

Security Problems? What Boards Need To Know

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

2022 has seen a significant increase in crime, and community associations have not been immune to this wave of violence and destruction. The year also brought to the forefront the issue of security in association-maintained and operated areas. From condominium developments to single family subdivisions, many boards struggled to strike the right balance in addressing this issue. Thankfully, 2022 has also brought some clarity regarding the obligation of associations to provide security to their members and guests.

At the outset, it is important to understand the basis of liability for failure to provide security. Most claims related to criminal activities are brought under the premises liability theory, which provides that an owner of land is liable to the owner's invitees for injuries caused by the owner's failure to exercise ordinary care in keeping the premises and approaches safe. Most individuals bringing these types of claims assert that their association had a duty to take steps to prevent known criminal activity.

With respect to this duty to keep the premises and approaches safe, it should be noted that many covenants already contain helpful language regarding this obligation. Many covenants contain a clause relieving the association of the obligation to provide any security to members, guests, licensees and invitees, making all members and visitors their own insurers of security. In *Bradford Square Condominium Association, Inc. v. Miller*, the declaration of condominium included an exculpatory clause providing that the condominium association was not a provider of security, had no duty to provide security, and that the association was not liable for any loss by reason of failure to provide adequate security measures. The Georgia Court of Appeals upheld the exculpatory clause. In doing so, the Court stated a condominium association's responsibility to maintain security may vary from property to property depending on the private contract between the association and its unit owners/membership. It will also depend upon the terms of the declaration which control the association's obligations to the unit owners/members. The same logic would apply to covenants for townhomes and single-family homes. If your community's governing documents have a similar exculpatory clause regarding security, the association has protection against such claims.

Even if your community's documents do not have a similar exculpatory clause, the Court of Appeals recently indicated that associations' obligation to provide security is determined by the scope of their responsibilities under the covenants. In *Villages of Cascade Homeowners Association, Inc. v. Edwards*, which was decided in March of 2022, the Court of Appeals took the opportunity to clarify this obligation. Mr. Edwards, a renter within the Villages, was robbed at gunpoint. During the robbery, Mr. Edwards was also shot by the assailants. Both assailants left the community through a broken exit gate. Mr. Edwards filed suit against Villages of Cascade based on premises liability and nuisance theories. In reversing the trial court's decision, the Court found that the association only had a duty to provide maintenance of common areas, such as landscaping, private roadways, and parking areas, and that the association had no duty to provide security. The Court then proceeded to evaluate whether the Association's conduct was consistent with ordinary care as it relates to the broken exit gate. In examining the undisputed facts of the case, the Court found that when the board was notified of the broken gate, it immediately took actions to repair them. It obtained bids the same day that it received notice of the problem and approved an estimate within two days of getting notified. The gate was fully repaired in eleven days. The injury to the tenant occurred four days after the gate was broken, but only two days after the estimate was approved by the board. Given this undisputed evidence, the Court of Appeals found that, as a matter of law, the Association exercised ordinary care. The Court of Appeals also pointed out that Mr. Edwards failed to show that the repair could have been done sooner and that it could have prevented the crime.

With this information in mind, boards should also be aware that if security measures are undertaken, they must be implemented properly. For instance, if the association installs cameras, they should be operational. If the association hires a security firm, that security firm must follow appropriate security protocols for visitors. In other words, if the association voluntarily undertakes a security measure, it has an obligation to carry it out with ordinary care.

If your community's covenants do not require your association to provide security, members should be reminded of that fact and requested to take measures to be insurers of their own safety. If the board becomes aware of any criminal activity in the surrounding areas or in the neighborhood, notifications to members are strongly recommended. However, these notifications should be accompanied with the disclaimer of responsibility by the association for security.

As always, should you have questions, seek guidance from your association's counsel that is specifically tailored to your community's circumstances.

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t: 770.685.7000 f: 770.685.7002

www.luederlaw.com email: newsletter@luederlaw.com

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