

May 2012

Recommended Changes in the Law Affecting Condominium and Homeowner Associations in Georgia

Seth G. Weissman

Follow this and additional works at: <https://readingroom.law.gsu.edu/gsulr>

 Part of the [Law Commons](#)

Recommended Citation

Seth G. Weissman, *Recommended Changes in the Law Affecting Condominium and Homeowner Associations in Georgia*, 1 GA. ST. U. L. REV. (2012).

Available at: <https://readingroom.law.gsu.edu/gsulr/vol1/iss2/36>

This Article is brought to you for free and open access by the Publications at Reading Room. It has been accepted for inclusion in Georgia State University Law Review by an authorized editor of Reading Room. For more information, please contact mbutler@gsu.edu.

RECOMMENDED CHANGES IN THE LAW AFFECTING CONDOMINIUM AND HOMEOWNER ASSOCIATIONS IN GEORGIA*

Seth G. Weissman† and Clara L. Fryer††

INTRODUCTION

The Georgia Condominium Act¹ (GCA or “the Act”) is now ten years old.² It replaced the Apartment Ownership Act,³ as a positive means of regulating the development and operation of condominiums in Georgia.⁴ As with all statutes, the passage of time has revealed a need to strengthen and clarify existing provisions of the Act and the need to provide additional regulation. This article, therefore, will highlight some of those problems and recommend solutions for them. In addition, the article will explore the need for the regulation of other forms of common interest ownership communities,⁵ such as homeowners associations,⁶ in Georgia. While this

* Copyright © 1985 Seth G. Weissman and Clara L. Fryer.

† B.A., University of Pennsylvania, 1975; M.A. (City Planning), University of North Carolina at Chapel Hill, 1978; J.D., Duke University School of Law, 1979. Mr. Weissman is a principal in the law firm of Hyatt & Rhoads, P.C.

†† B.A., Troy State University, 1980; J.D., University of Alabama, 1983. Ms. Fryer is an associate in the law firm of Hyatt & Rhoads, P.C.

1. O.C.G.A. §§ 44-3-70 — 44-3-115 (1982 & Supp. 1985).

2. The GCA became effective October 1, 1975. 1975 Ga. Laws 609, 671.

3. GA. CODE ANN. §§ 85-1601b — 85-1625b (Harrison 1978).

4. See generally Hyman, *The Georgia Condominium Act—Notes for the Practitioner*, 13 GA. ST. B.J. 168 (1977); Comment, *The Georgia Condominium Act of 1975: A Sound Basis for Innovative Condominium Practice*, 24 EMORY L.J. 891 (1975).

5. The term “common interest ownership community” is derived from the Uniform Common Interest Ownership Act, adopted at the 1982 Annual Meeting of the National Conference of Commissioners on Uniform State Laws. The Prefatory Note to that act explains the creation of the concept as follows:

The explosive rise in land costs during the 1960s and 1970s, coupled with the desire of many consumers to own housing and recreational amenities which they could not afford except when owned with others, led to an extraordinary development of various forms of shared or “common” ownership of real estate. The three most common forms of common ownership have been condominiums, cooperatives and so-called “planned unit developments,” or cluster housing projects. Each of these forms typically includes creation of a mandatory owners association to manage and maintain common amenities, while separate portions of the real estate—

article does not advocate wholesale revisions or abandonment of the GCA, it does propose fine tuning of the Act so that it can continue to serve a positive function for the next decade.

I. ASSOCIATION OPERATIONS

A. *Assessment Collection*

The GCA provides that all sums assessed by a condominium association which are unpaid constitute a lien in favor of the association. This lien is prior and superior to all liens except: (1) liens for ad valorem taxes on the condominium unit; (2) the lien of any first priority mortgage covering the unit and the lien of any mortgage recorded prior to the recording of the declaration of condominium; (3) the lessor's lien provided for in O.C.G.A. § 44-3-86; and (4) the lien of any secondary purchase money mortgage covering the unit.⁷

The problem with this priority scheme is in the drafter's elevation of the priority of the "lien of any secondary purchase money mortgage covering the unit."⁸ This priority status is contrary to the scheme established in the superseded Apartment Ownership Act which afforded protection to the condominium association from the secondary purchase money mortgage's foreclosure.⁹ The purchase money mortgage priority is not part of the Uniform Condominium Act.¹⁰

units—are occupied for individual use.

Prefatory Note, UNIF. COMMON INTEREST OWNERSHIP ACT, 7 U.L.A. 231 (1985).

6. See generally Hyatt, *Condominium and Home Owner Associations: Formation and Development*, 24 EMORY L.J. 977 (1975).

7. O.C.G.A. § 44-3-109(a) (1982).

8. O.C.G.A. § 44-3-109(a)(4) (1982).

9. GA. CODE ANN. § 85-1621b (Harrison 1970) provided in pertinent part as follows:

Priority of lien — (a) All sums assessed by the Association of Apartment Owners but unpaid for the share of the common expenses chargeable to any apartment shall constitute a lien on such apartment prior and superior to all other liens except only (i) ad valorem taxes, and (ii) *all sums unpaid on a first mortgage or deed to secure debt of record* or (iii) rental due under lease of the property to which the declaration is subject . . .

(b) *Where the mortgagee of a first mortgage of record or other purchaser of an apartment obtains title to the apartment as a result of foreclosure of the first mortgage*, such acquirer of title, his successors and assigns, shall not be liable for the share of the common expenses or assessments by the association of apartment owners chargeable to such apartment which became due prior to the acquisition of title to such apartment by such acquirer. (Emphasis added.)

10. UNIF. CONDOMINIUM ACT § 3-116(b), 7 U.L.A. 527 (1985). The National Conference of Commissioners on Uniform State Laws promulgated the Uniform Condominium Act two years after Georgia enacted its condominium act. 7 U.L.A. 421 (1985).

Purchase money mortgagees are, in principle, a protected class in certain circumstances, such as those governed by the Uniform Commercial Code.¹¹ The wisdom of such protection, at the expense of the condominium association, is doubtful since the purchase money mortgagee is in a better position to protect himself than the association.

With the aid of a secondary purchase money mortgage, a purchaser may acquire a condominium unit with an assessment beyond that purchaser's financial means. A purchase money mortgagee (who is typically the owner/seller of the unit) may make a bad credit calculation or apply unrealistic credit standards (which unfortunately happens with an anxious seller). Consequently, the assessments which the purchaser owes to the association typically go unpaid. Therefore, the association effectively subsidizes the maintenance, upkeep and insurance costs of preserving the unit. These subsidies continue until the foreclosure of the secondary purchase money lien. The unforeseen financial pressure of impending special assessments or maintenance problems in the condominium may require payments beyond the means of the new owner. Ironically, it is often an owner/seller's failure to disclose these assessments and problems which may cause the new purchaser to become financially unable to pay the assessments; but it is inequitable to allow a prior owner as secondary purchase money mortgagee to preempt the association from collecting the assessments owed on the unit. The prior owner had control and may even have created the situation leading to the financial insolvency.

This problem could be solved by amending the GCA to conform to the principles codified in the Apartment Ownership Act and the Uniform Condominium Act, by deleting O.C.G.A. § 44-3-109(a)(4). In this way, an association's lien for unpaid assessments would be prior and superior to the lien of a secondary purchase money mortgagee. Given that the purchase money mortgagee is in a better position to protect himself against loss than is the association, the risk is more properly shifted to him.¹²

11. See, e.g., U.C.C. §§ 9-107, 9-312 (1978).

12. Judy & Wittie, *Uniform Condominium Act: Selected Key Issues*, 13 REAL PROP. & PROB. TR. J. 437, 474-80 (1978).

Condominium unit owners are far more dependent upon each other for the preservation and promotion of their interests than are either conventional home owners or renters. This interdependence is particularly acute with respect to the operating expenses which must be borne by each unit owner . . . [I]f some unit owners do not pay their share of common expenses, the burden of paying those shares may be shifted to other unit

A similar issue is the GCA's complete and unlimited protection of the first priority mortgage from the association's lien. Although it is necessary to protect the security interest of the first mortgage lender, it is also necessary to protect the association.¹³ The association must enforce collection of unpaid association fees and assessments.

The Uniform Condominium Act strikes a balance between the protection of the lender and the association. Section 3-116 of the Uniform Condominium Act provides that the association's lien has priority as to prior first mortgages for six months' assessments.¹⁴ This type of provision recognizes the following facts: (1) associations have a legal duty to provide for maintenance, upkeep and insurance costs for the condominium;¹⁵ (2) assessment income is generally the sole source of revenue most associations have to meet their obligations;¹⁶ (3) associations may be unable to meet their ob-

owners and may thereby substantially increase the obligations of those other unit owners.

Id. at 474-75.

13. Unlike the secondary purchase money mortgagee who can control the terms of the transaction and who chooses to be a creditor, the association is an involuntary creditor.

In effect, the condominium is an *involuntary* creditor which becomes obligated to advance services to unit owners in return for a promise of future payment. Such advances are much like the loans made by a mortgagee under an obligatory mortgage future advances clause, but with only the most rudimentary controls upon the amount and timing of the loan advances, the terms of the loan, and the continuing creditworthiness of the borrower. At the same time, the association is very much at the mercy of its borrowers whose defaults could impair the association's financial stability.

Id. at 475-76.

14. Specifically, § 3-116(b) provides in pertinent part:

(b) A lien under this section is prior to all other liens and encumbrances on a unit except (i) liens and encumbrances recorded before the recordation of the declaration, (ii) a first mortgage or deed of trust on the unit recorded before the date on which the assessment sought to be enforced became delinquent, and (iii) liens for real estate taxes and other governmental assessments or charges against the unit. *The lien is also prior to the mortgages and deeds of trust described in clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the 6 months immediately preceding institution of an action to enforce the lien.*

UNIF. CONDOMINIUM ACT § 3-116(b), 7 U.L.A. 527 (1985). (Emphasis added.) See also 68 PA. CONS. STAT. § 3315(b)(2) (Supp. 1985).

15. O.C.G.A. §§ 44-3-105, 44-3-107 (1982).

16. Weissman & Fryer, *Representing Condominium Unit Purchasers*, 21 GA. ST. B.J. 6, 14 n.36 (1984).

ligations without strong rights to collect assessments; and (4) if associations are unable to meet their obligations, fewer services can be provided, property values may drop and higher assessments will be required from those owners who are paying assessments.¹⁷ The commentary to § 3-116 acknowledges that this provision is “[a] significant departure from existing practice”¹⁸ The commentary anticipates that a lender will pay the assessment to protect its priority and then commence direct action against the owner.¹⁹

An eventual downturn in the economy would result in a major increase in foreclosures. The consideration of such a limited lien protection is essential to the economic well-being of the association community.²⁰

B. Enforcement of the Condominium Documents

The GCA requires owners to comply with the condominium instruments, and gives the condominium association remedies to address a lack of compliance, including the power to assess monetary fines.²¹ The power to assess monetary fines is practical because it allows an association to take an immediate, affirmative step to encourage compliance without resorting to litigation, which can be both costly and protracted.²² In the condominium community, the enforcers and violators are neighbors, and often the violations may not justify judicial intervention. Thus, monetary fines are an appropriate remedy.²³

To regulate the association, the enforcement section of the GCA provides that “[e]very unit owner . . . shall comply with all lawful

17. The nonpayment of association fees can create a ripple effect. Judy & Wittie characterized this phenomenon:

The impact of nonpayment of assessments for common expenses goes beyond the resultant increase in costs which may be incurred by the other unit owners [C]ontinuing non-payments may threaten the viability of the condominium itself, forcing down property values within and, conceivably, around the condominium. This, in turn, affects the interests not only of unit owners but of mortgage lenders and, less directly, of the immediate community.

Judy & Wittie, *supra* note 12, at 475.

18. UNIF. CONDOMINIUM ACT § 3-116 comment 2, 7 U.L.A. 528 (1985).

19. *Id.*

20. See Judy & Wittie, *supra* note 12, at 481-83.

21. O.C.G.A. § 44-3-76 (1982).

22. See generally Scavo, *Dispute Resolution in a Community Association*, 17 URB. L. ANN. 295, 308 (1979). (In most cases, litigation is inappropriate given the minor nature of the violations.)

23. *Id.* at 315.

provisions of the condominium instruments [T]o the extent provided in the declaration, the association shall be empowered to impose and assess fines and suspend temporarily the right of use of certain of the common elements in order to enforce such compliance"²⁴ The problem lies in the term "condominium instruments" which is defined in the GCA to include the declaration of condominium, but not the by-laws of the condominium association or rules and regulations adopted pursuant thereto.²⁵ The rules may contain substantial restrictions affecting the use of the condominium property,²⁶ and the by-laws may regulate the operation of the condominium association.²⁷ As a result, a gray area exists as to whether the power to impose monetary fines or employ other enforcement remedies applies to violations of the by-laws and rules.

Associations may be able to circumvent this potential problem by providing in the declaration that the power to impose fines extends to violations of the by-laws and rules;²⁸ but this section of the GCA would be clearer if it specifically required compliance with the declaration, by-laws and any rules and regulations adopted pursuant thereto. The drafters of the Uniform Condominium Act took this approach and gave condominium associations the power to impose "reasonable fines for violations of the declaration, bylaws, and rules and regulations of the association"²⁹

C. Allocation of Liabilities for Common Expenses

The provisions allocating common expenses are among the most complicated in the GCA. Generally, an association must annually determine a budget encompassing all of the common expenses of the association.³⁰ The condominium instruments will either provide that unit owners pay common expenses on an equal basis or on a formula basis where larger units pay a greater share of the common expenses than smaller units. Normally, the common expenses under this formula are allocated based on the percentage of

24. O.C.G.A. § 44-3-76 (1982).

25. O.C.G.A. § 44-3-71(8) (Supp. 1985).

26. See, e.g., *Beachwood Villas Condominium v. Poor*, 448 So. 2d 1143, 1144 (Fla. Dist. Ct. App. 1984). (A board of directors has authority to adopt rules governing and restricting the use and rental of units, when the rules do not contravene the declaration.)

27. Hyatt, *Community Associations: How to Draft Documents That Work*, 7 REAL EST. L.J. 26, 31-32 (1978).

28. See Hyatt, *supra* note 6, at 1002.

29. UNIF. CONDOMINIUM ACT § 3-102(a)(11), 7 U.L.A. 502 (1985).

30. See O.C.G.A. § 44-3-80(c) (1982).

1985] RECOMMENDED CHANGES IN GEORGIA CONDOMINIUM LAW 191

ownership interest that each owner has in the common elements. The GCA provides that the association will allocate common expenses according to "the allocation of liability for common expenses set forth in the declaration."³¹

As a practical matter, many common expenses may not benefit owners on an equal basis or on a standard formula basis related to the percentage of ownership interest in the common elements.³² The GCA contains a provision which was intended to enable associations to allocate assessments on something other than an equal or assigned percentage basis.³³ It allows common expenses benefiting less than all of the units to be assessed equitably among all of the units which are benefited. This provision of the GCA, when incorporated into the condominium instruments, allows a condominium association to assess common expenses in a manner other than a standard division of the expenses among all unit owners, in accordance with an allocation set forth in the declaration of condominium.

The problem with this section of the GCA is that there is no standard to apply to determine the type of common expense which "benefit[s] less than all of the units"³⁴ or which "significantly disproportionately benefit[s] all of the units."³⁵ Condominium associations which attempt to assess common expenses according to the degree they specifically benefit the owners quickly discover that all common expenses arguably benefit some owners more than others and are, therefore, capable of special division. Once the pre-

31. *Id.*

32. Examples of such varying expenses include: utility usage, if provided by the association; cable television usage; and repair of limited common elements, such as decks or patios, which may differ in type and configuration from unit to unit.

33. Specifically, O.C.G.A. § 44-3-80(b) (1982) provides:

(b) To the extent that the condominium instruments expressly so provide:

(1) Any other common expenses benefiting less than all of the units shall be specially assessed equitably among all of the condominium units so benefited

. . . .

(3) Any other common expenses significantly disproportionately benefiting all of the units shall be assessed equitably among all of the condominium units.

In addition, O.C.G.A. § 44-3-80(c) (1982) provides "the amount of all common expenses not specially assessed pursuant to subsection (a) or (b) of this Code section . . . shall be assessed against the condominium units in accordance with the allocation of liability for common expenses set forth in the declaration"

34. O.C.G.A. § 44-3-80(b)(1) (1982).

35. O.C.G.A. § 44-3-80(b)(3) (1982).

cedent is established, associations can find themselves under pressure to specially assess all expenses.³⁶ Administratively, this creates a bizarre method of expense allocation in which every unit has a different assessed fee. More importantly, such a scheme destroys the concept of a condominium as a place where common expenses are shared.³⁷

As a result, many condominium associations have avoided allocating expenses under this section of the Act, choosing instead to live with the inequalities that may arguably exist. The solution to the problems with the special assessments allowed by O.C.G.A. § 44-3-80(b)(1) and (3) is to provide a statutory standard which defines how the sections should be applied. One possible solution would be to bar special assessments for the cost of maintaining, repairing or replacing any item which the association has the responsibility to maintain. Normally, the association is responsible for the maintenance of the common elements (and exterior building surfaces if not a part of the common elements) but not for maintenance of limited common elements and/or the interiors of the units.³⁸ Since all unit owners own an undivided interest in the common elements, a restriction should be applied to O.C.G.A. § 44-3-80(b)(1) and (3) which will apportion common element maintenance costs in accordance with ownership interest. This result is equitable.

Associations should continue to be allowed to allocate the costs of maintaining the limited common elements on a "benefiting less than all" basis. This is reasonable because limited common elements are by definition portions of the condominium reserved to

36. An example of something which "benefit[s] less than all of the units" is the situation where there is one building in a six building complex with a bad roof, and the association decides to specially assess the cost of repairing the roof against only the owners in the building with the bad roof.

The problem is compounded when the corollary principle of specially assessing an expense which "significantly disproportionately benefit[s]" all of the units is applied because of the difficulty in reasonably determining the degree to which an expense "significantly disproportionately benefit[s]" those units. For example, what is the disproportionate benefit of repairing a bad roof to the owners of units on the top floor where a leak is occurring, versus the owners of units on the bottom floor of the same building who are only indirectly affected by the bad roof? Similarly, what is the disproportionate benefit of replacing a shrub located directly outside of one building, but which is viewed by owners in other buildings?

37. Once the costs of maintaining one roof are specially assessed, there is no rational basis for not specially assessing the costs of maintaining all of the other roofs, or maintaining all of the other gutters, siding, doors, walkways and landscaping to the point where no maintenance costs are shared among all of the units.

38. See, e.g., O.C.G.A. § 44-3-105 (1982).

the exclusive use of less than all of the unit owners.³⁹ The common expenses associated with their maintenance can be readily allocated to or among the owner or owners to whom the limited common element is assigned. In many instances, different units have different limited common elements. For example, some units may have limited common element balconies, while others may not. Therefore, if less than all of the units in a condominium had balconies, those balconies could logically be assigned as limited common elements. Allocating the cost of maintaining the limited common elements on a "benefiting less than all" basis would allow the association to specially assess the cost of maintaining the balconies only to those units which have them.

If the statute is so amended, common expenses which could thereafter be specially assessed would largely be limited to items which had been assigned as limited common elements. These specially assessed items could also include utility services, such as water, gas and electric, as well as other services, such as cable television and trash pick-up. An amendment such as this would more precisely implement what was originally intended by the drafters of the Act.⁴⁰

D. Assignment and Reassignment of Limited Common Elements

O.C.G.A. § 44-3-82 deals with the assignment and reassignment of limited common elements. No portion of the common elements can be assigned as limited common elements unless the assignment is specifically permitted by the terms of the declaration.⁴¹ Limited common elements typically include such things as doorsteps, balconies, patios and, on occasion, assigned parking spaces.⁴² The GCA, however, does not clearly define who must consent to the assignment and reassignment of a limited common element.

With respect to a reassignment of a limited common element, the GCA provides that "[t]he [reassigning] amendment shall become effective when the association and the unit owners of the units whose use of the limited common element is or may be directly affected by the reassignment have executed and recorded

39. O.C.G.A. § 44-3-71(19) (Supp. 1985).

40. See Atlanta Const., Feb. 27, 1975, at 17-A, col. 1 (remarks of J. Clifton Barlow, an author of the Act).

41. O.C.G.A. § 44-3-82 (1982).

42. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW, 28-29 (1981).

the same."⁴³ With respect to an initial assignment of a limited common element not previously assigned by the declaration, the GCA provides that "[t]he amendment shall be delivered to the unit owner or owners directly affected by the assignment upon payment by them of all reasonable costs for the preparation, execution, and recordation thereof."⁴⁴

The problem with these subsections is twofold. First, it is unclear who is "directly affected" by the assignment or reassignment of a limited common element. For example, if the association initially assigns a parking space to a unit as a limited common element, the better argument is that such an assignment directly affects only the unit to which the parking space is assigned. However, it can also be argued that all owners are directly affected since a portion of the common elements in which all owners share an undivided interest is no longer available to the general use. The use of "directly affected" language implies that less than all of the owners are required to approve an initial assignment or reassignment of a limited common element.⁴⁵ This ambiguity could be eliminated by clarifying the term "directly affected." The way to do this is to require that an initial assignment of a limited common element must be approved by the association and by the unit owner to whom it is being assigned. A reassignment of a limited common element should require the additional approval of the owner(s) from whom it is being taken.

Clarifying this provision would make it easier to assign portions of the common elements not previously assigned and to reassign existing limited common elements. Unit owners will be protected because limited common elements cannot be assigned to or taken away from an owner without his or her permission.⁴⁶ Moreover, the owner is protected with respect to third party assignments of limited common elements because the declaration gives notice as to portions of the common elements which may be assigned as limited common elements.⁴⁷

The association also would benefit from such a restriction. By

43. O.C.G.A. § 44-3-82(b) (1982).

44. O.C.G.A. § 44-3-82(c) (1982).

45. Presumably, the "directly affected" language means less than all because if the drafters meant *all* of the units owners they would have specified such number. For example, O.C.G.A. § 44-3-93(a) requires that two-thirds of the unit owners approve amendments to the condominium instruments, unless the instruments themselves call for a larger majority. O.C.G.A. § 44-3-93(a) (1982).

46. O.C.G.A. § 44-3-82(a) (1982).

47. See O.C.G.A. § 44-3-82(c) (1982).

1985] RECOMMENDED CHANGES IN GEORGIA CONDOMINIUM LAW 195

limiting the approval of an assignment of a limited common element to the owner to whom it is assigned, such assignments now become feasible. For example, if an association wants to assign parking spaces on a complex-wide basis, at the present time, one owner could attempt to veto the entire parking assignment scheme arguing that he or she is directly affected by the assignments. With a change in the language of O.C.G.A. § 44-3-82 such an argument would be moot.

The second problem is determining what is meant by the terms "association" and "amendment" in O.C.G.A. § 44-3-82. The association is required to execute an amendment to assign or reassign a limited common element. Presumably, the term "association" means the board of directors acting on behalf of the association as is suggested in the language of O.G.C.A. § 44-3-106.⁴⁸ The term "board of directors" is also specifically indicated in other sections of the GCA,⁴⁹ but the term "association" is used in assigning limited common elements. Moreover, the amendment to assign a limited common element, which must be recorded, is presumably ministerial in nature. The amendment is not one which must be approved by the unit owners in accordance with O.C.G.A. § 44-3-93. The section on limited common elements is silent on this point.

Both of these ambiguities could be clarified by specifically providing that the board of directors on behalf of the association may execute an amendment to assign or reassign a limited common element. Further, such an amendment should not need approval by the unit owners in accordance with O.C.G.A. § 44-3-93. Thus, the assignments of limited common elements would not need the approval of at least two-thirds of the votes in the association.

48. *E.g.*, O.C.G.A. § 44-3-106(b) (1982) provides:

Any third party dealing with the association shall be entitled to rely in good faith upon a certified resolution of the *board of directors* of the association authorizing any such act or transaction as conclusive evidence of the authority and power of the association so to act and of full compliance with all restraints, conditions, and limitations, if any, upon the exercise of such authority and power. (Emphasis added.)

Furthermore, the obligatory language used in O.C.G.A. § 44-3-82(b) (1982), "[t]he association *shall* . . . execute," does not appear to contemplate a democratic consent procedure. Therefore, it can be argued that a consent procedure involving the owners is a paper consent because the association is required to execute the consent by the Act.

49. *See, e.g.*, O.C.G.A. § 44-3-91(c) (1982).

E. Amendment Procedure

The GCA addresses the amendment of condominium instruments by providing that "[e]xcept to the extent expressly permitted or required by other provisions of this article, the condominium instruments shall be amended only by the agreement of unit owners of units to which two-thirds of the votes in the association pertain or such larger majority as the condominium instruments may specify"⁵⁰ Many condominium instruments in Georgia are being written with amendment requirements which far exceed the minimum requirements.

The authors of this article, for example, have reviewed several sets of condominium instruments which required approval of 90% or 100% of all unit owners and first mortgagees to amend the instrument. This stringent amendment procedure makes it difficult, if not impossible, to amend a set of condominium instruments. Practical experience in representing condominium associations tells us that due to apathy and differences of opinion, it is almost impossible to get 90% or 100% of the unit owners and mortgagees to agree on anything.⁵¹ Moreover, whenever a substantial number of mortgagees must approve an amendment, the only sure way to determine who the mortgagees are is to do a full title search on every unit.⁵² The cost of the title searches adds a tremendous burden to an already difficult process of amending the condominium instruments.

A condominium is in reality a quasi-government which exercises broad powers over an owner's right to use his or her unit and the common elements.⁵³ The condominium instruments are, in effect, the laws of the quasi-government; they prescribe the rights, re-

50. O.C.G.A. § 44-3-93(a) (1982).

51. Recently, the authors were involved with a condominium association which was forced, unsuccessfully, to seek 100% owner and 90% mortgagee approval to try to remove an unpopular provision from the declaration which required that cats be on a leash.

52. Such a requirement is even more burdensome because many of the lenders who make loans on the condominium will sell the underlying paper in the secondary mortgage market. Therefore, contacting the various lenders ultimately needed for consent is a major undertaking in itself. Given that the initial lender will often continue to service the loan, the average owner is unaware of the true mortgagee on the property. Thus, unless specifically contemplated in the documents, an informal survey of owners to determine mortgagees cannot always be relied upon.

53. Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253 (1976); see also *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180 (Fla. Dist. Ct. App. 1975). (A restriction on the use of alcoholic beverages in a clubhouse was held to be reasonable.)

1985] RECOMMENDED CHANGES IN GEORGIA CONDOMINIUM LAW 197

sponsibilities and restrictions which apply to the association and unit owners. A fledgling political science student would agree that a government in perpetuity with laws which are not subject to supplementation or alteration cannot meet the changing needs and circumstances of the times. Thus, such laws are not established on a solid foundation. Yet just such a result is dictated when impossible amendment requirements are part of the condominium instruments.⁵⁴

A solution to this problem would be to revise the present amendment language to set an upper limit on the percentage of unit owners and mortgagees needed to amend the condominium instruments. For example, the pertinent part of O.C.G.A. § 44-3-93(a) could be expanded to provide:

Except to the extent expressly permitted or required by other provisions of this article, the condominium instruments shall be amended only by the agreement of unit owners of units to which two-thirds of the votes in the association pertain or such larger majority as the condominium instruments may specify, provided such majority does not exceed the owners and mortgagees of units to which three-fourths of the votes in the association pertain

Such an amendment should not affect developer rights,⁵⁵ or the financing of condominium units,⁵⁶ but should insure the flexibility needed to allow an association to meet its changing needs.

Another needed change is addition of a requirement that a challenge to the validity of an amendment adopted by the association must be brought within one year of the recording of the amendment. This would eliminate the problem of an association having

54. There is some precedent in Georgia for a court to reform and modify in equity an unworkable declaration of condominium. See *Selby v. Gilmer*, 240 Ga. 241, 240 S.E.2d 80 (1977).

55. O.C.G.A. § 44-3-93(a) (1982) would continue as follows:

[p]rovided, however, that during any such time as there shall exist an unexpired option to add any additional property to the condominium or during any such time as the declarant has the right to control the association pursuant to Code Section 44-3-101, the agreement shall be that of the declarant and the unit owners of units to which two-thirds of the votes in the association pertain, exclusive of any vote or votes appurtenant to any unit or units then owned by the declarant, or . . . *subject to the limitations in this Code section . . . a larger majority as the condominium instruments may specify.* (Emphasis added.)

56. Mortgagee rights are protected in various other provisions of the Act and would remain unaffected. See Comment, *The Georgia Condominium Act of 1975: A Sound Basis for Innovative Condominium Practice*, 24 EMORY L.J. 891, 899-900 (1975).

to prove that an amendment was validly adopted years after the fact. Often, the owners who originally adopted the amendment have moved from the complex, and the records establishing the validity of the amendment may have been lost or destroyed. The Uniform Condominium Act contains clear language in this regard and gives condominium associations a greater degree of certainty in enforcing and operating pursuant to the condominium instruments.⁵⁷

F. Notice of Meetings

The GCA requires that notice of annual meetings be given to each owner at least twenty-one days in advance of any annual meeting, and at least seven days in advance of any other meeting.⁵⁸ The Act further requires that the notice "be delivered personally or sent by United States mail, postage prepaid, to all unit owners of record . . ."⁵⁹ It is unclear, however, whether the notice must be sent or received before the seven or twenty-one days specified in the statute.

The Uniform Condominium Act resolves this ambiguity by specific provision; the proper officer of the association "shall cause notice to be hand-delivered or sent prepaid by United States mail . . ."⁶⁰ within a specified period of time before the meeting. In other words, the notice is valid if it is sent within the specified time period. The adoption of such a provision would eliminate the potential argument regarding the sufficiency of notice which presently exists in the GCA.

G. Architectural Changes

The GCA gives the association, except to the extent prohibited by the condominium instruments, the power to approve or disapprove architectural changes to the exterior of units.⁶¹ Specifically, the association is authorized to:

[g]rant or withhold approval of any action by one or more unit owners or other persons entitled to occupancy of any unit if such action would change the exterior appearance of any unit

57. UNIF. CONDOMINIUM ACT § 2-117(b), 7 U.L.A. 482 (1985).

58. O.C.G.A. § 44-3-102 (1982).

59. *Id.*

60. UNIF. CONDOMINIUM ACT § 3-108, 7 U.L.A. 515 (1985).

61. O.C.G.A. § 44-3-106(a)(3) (1982).

1985] RECOMMENDED CHANGES IN GEORGIA CONDOMINIUM LAW 199

or of any other portion of the condominium or elect or provide for the appointment of an architectural control committee to grant or withhold such approval.⁶²

It is unclear whether this section of the GCA gives an association the power to permit architectural changes which encroach upon the common elements in a material way.

In a condominium, all unit owners possess an undivided interest in the common elements.⁶³ Additionally, most condominium instruments give unit owners a specific easement right to use and enjoy the common elements. A troublesome issue is whether the association's statutory authority to permit architectural changes includes the power to permit changes which arguably constitute a taking of the common elements or which infringe upon the existing easement rights of the other unit owners. This issue was the focal point of the Ohio case of *Grimes v. Moreland*.⁶⁴

In *Grimes*, a condominium association approved an amendment of the condominium documents by a seventy-five percent vote of the unit owners. The amendment allowed individual owners to install fences and air conditioning compressors upon the common elements.⁶⁵ The court, however, ruled that the placing of fences and air conditioning compressors on the common elements constituted a taking of property because it ousted the unit owners from a percentage of their undivided interest in common areas;⁶⁶ and the court concluded that a unanimous vote of the membership of the association was required to amend the condominium documents in that manner.⁶⁷

In contrast, two strong arguments support the notion that drafters of the GCA contemplated an association having the power to permit encroachments upon the common elements. First, almost any architectural change will extend beyond the strict legal boundaries of the unit and encroach upon or take some portion of the common elements; but the GCA gives the association the power to permit changes to the exterior of units.⁶⁸

The second argument centers on the broad power to grant ease-

62. *Id.*

63. O.C.G.A. § 44-3-71(7), (9) (Supp. 1985).

64. 41 Ohio Misc. 69, 322 N.E.2d 699 (Common Pleas Ct. 1974).

65. *Id.* at 73-74, 322 N.E.2d at 700-01.

66. *Id.* at 74-75, 322 N.E.2d at 702.

67. *Id.*, 322 N.E.2d at 703.

68. O.C.G.A. § 44-3-106(a)(3) (1982).

ments which the GCA expressly confers upon an association.⁶⁹ The power to convey an easement can also be used to permit the kind of architectural changes which the *Grimes* court found to be takings or encroachments. However, the Act's provisions for architectural changes would be much clearer if O.C.G.A. § 44-3-106 were amended to expressly give the condominium association the power to approve actions by unit owners which change the exterior appearance of a unit or any other portion of the condominium. These owner actions would include those which encroach upon the common elements; but such an amendment should also specify that the association cannot grant approval of any change which encroaches upon the common elements or is deemed to alter the boundaries of any unit, unless the association also complies with all of the Act's requirements for redefining unit boundaries.⁷⁰

From a policy viewpoint, allowing an association to permit architectural changes which encroach on the common elements is desirable. The unit owners will be allowed to make improvements that enhance the enjoyment and the value of their units, such as adding or extending a deck or patio, while the association will continue to regulate the size, type, design and quality of encroaching architectural changes.⁷¹ Thus, the owners have the right to make improvements to their units while remaining protected against potential unsightly changes or other abuses which might occur in the absence of regulation.

H. *Granting Licenses and Entering into Leases*

The GCA gives the association the power to convey easements over the common elements,⁷² but the Act does not give the association the companion powers to grant licenses or enter into leases with respect to portions of the common elements. These powers, however, are afforded condominium associations under the Uniform Condominium Act⁷³ and would greatly benefit association operations. These powers would provide associations with a means of giving owners and others use rights over portions of the common

69. O.C.G.A. § 44-3-106(b) (1982).

70. See O.C.G.A. § 44-3-91 (1982).

71. O.C.G.A. § 44-3-106(a) (1982).

72. O.C.G.A. § 44-3-106(b) (1982).

73. The Uniform Condominium Act provides "[e]xcept as provided in subsection (b), and subject to the provisions of the declaration, the association . . . may . . . grant easements, leases, licenses, and concessions through or over the common elements." UNIF. CONDOMINIUM ACT § 3-102(a)(9), 7 U.L.A. 502 (1985).

elements without having to convey an interest in the property.

Having the power to grant a license or enter into a lease could be helpful in several situations. For example, the association might want to lease or license the clubhouse, swimming pool or a portion thereof to an owner for a party; it might want to license the revocable assignment of parking spaces; it might want to lease a portion of a clubhouse for a concession stand or office; or it might want to lease a room for the placement of washing machines and dryers. While these powers may be implied from the theories of general corporate law, it would be beneficial to expressly provide for them in the GCA.

I. Association Insurance

The responsibility of the association to obtain proper insurance coverage is a crucial function. To protect their substantial interest in the property, lenders and unit owners rely on the board of directors to obtain insurance. Unfortunately, the GCA does not provide adequate minimum requirements which define how insurance policies must be structured in order to achieve the desired level of protection.⁷⁴

As a practical matter, insurance policies must be tailored to the condominium concept in several respects to prevent over or under insurance for property and liability protection. The GCA currently provides:

The Association shall obtain:

(1) A casualty insurance policy or policies affording fire and extended coverage insurance for and in an amount consonant with the full replacement value of all structures within the condominium

(2) A liability insurance policy or policies, in amounts specified by the condominium instruments but not in amounts less than \$500,000.00 for injury, including death, to a single person; \$1,000,000.00 for injury or injuries, including death, arising out of a single occurrence; and \$50,000.00 for property damage. The policy or policies shall cover the association, the board of directors and the officers of the association, all agents and employees of the association, and all unit owners and other persons entitled to occupy any unit or other portion of the condominium⁷⁵

74. O.C.G.A. § 44-3-107 (1982).

75. *Id.*

Many decisions as to the type and extent of insurance coverage needed by an association should be addressed in the statute as a legislative requirement. Some insurance policy distinctions, however, should be required by law. For example, the Uniform Condominium Act clearly provides that the association's liability insurance for the protection of unit owners covers death, bodily injury and property damage "arising out of or in connection with the use, ownership, or maintenance of the common elements."⁷⁶ This is in contrast to the GCA which provides no such limitation and simply requires that the association obtain liability insurance covering the unit owner.⁷⁷ The broad language of the GCA could be construed to require liability coverage of the owner for injuries occurring inside the owner's unit even though the association has no present means to protect against risk inside the owner's unit.

For example, if an owner maintained a dangerous condition inside his unit, an invitee could be injured as a result of the condition. Under the language of the GCA, it could be argued that the association's insurance policy must indemnify the owner. The language of the GCA should, therefore, be amended to conform to the requirements of the Uniform Condominium Act with one addition.

In its current configuration, the Uniform Condominium Act requires that the association maintain liability coverage for injuries arising out of the use of the common elements;⁷⁸ but an association will often maintain portions of a unit which are not common elements. Therefore, the language should be broadened slightly; the coverage should include injuries "arising out of or in connection with the common elements and other portions of the condominium which the association is responsible for maintaining."⁷⁹

Additionally, the Uniform Condominium Act requires that an association policy contain the following provisions: (1) each unit owner is an insured person under the policy with respect to liability arising out of his interest in the common elements or membership in the association; (2) the insurer waives its right to subrogation under the policy against any unit owner or member of his household; (3) no act or omission by any unit owner, unless acting within the scope of his authority on behalf of the association, will void the policy or be a condition to recovery under the policy; and (4) if, at the time of a loss under the policy, there is other insur-

76. UNIF. CONDOMINIUM ACT § 3-113(a)(2), 7 U.L.A. 521 (1985).

77. O.C.G.A. § 44-3-107(2) (1982).

78. UNIF. CONDOMINIUM ACT § 3-113(a)(2), 7 U.L.A. 521 (1985).

79. *See id.*

1985] RECOMMENDED CHANGES IN GEORGIA CONDOMINIUM LAW 203

ance in the name of a unit owner covering the same risk covered by the policy, the association's policy provides primary insurance.⁸⁰

Although most policies designed by the insurance industry for condominium associations fulfill the above requirements, there are still a number of policies which do not incorporate these needed provisions. Moreover, the reasoning behind these provisions is sound.

Requiring that each unit owner be an insured person under the insurance policy means that the owner will be protected against liability, a requirement of the GCA. Mandating that the insurer waive its right to subrogate against the unit owner ensures that the insurance which is statutorily required to protect the unit owner is in place. After all, it is that owner, by virtue of his or her assessment, who has purchased the insurance for protection from the risk of loss. If the association were the only "insured" under the policy, the insurer could theoretically subrogate the "claim" of the association against a negligent unit owner for damages from which he or she has purchased protection.⁸¹

The provisions of the Uniform Condominium Act also provide protection for the association from unit owner misconduct which might otherwise negate coverage for the entire community;⁸² and the language of the Uniform Condominium Act makes it clear that the association's policy must be primary coverage and not supplemental coverage with respect to the unit owner's policy.⁸³ Adding similar language to the GCA would only serve to strengthen its protection for condominium owners and associations.

J. Leasing Restrictions

A major issue facing homeowners within many condominium communities is the question of how to deal with the leasing of units within the condominium. Associations have experienced problems in four major areas as a result of the leasing of condominium units: absentee ownership, the attitudes and behavior of some renters, the number of persons leasing units and requirements for financing and insurance.

The problems which can arise because of substantial absentee

80. UNIF. CONDOMINIUM ACT § 3-113(d), 7 U.L.A. 521 (1985).

81. See generally *Community Association Insurance*, 4 COMMUNITY A. INST. GUIDE FOR A. PRAC. 7301.

82. UNIF. CONDOMINIUM ACT § 3-113(d)(3), 7 U.L.A. 521 (1985).

83. UNIF. CONDOMINIUM ACT § 3-113(d)(4), 7 U.L.A. 521 (1985).

ownership are of primary concern. When a large number of unit owners stop residing at the condominium, their interest in the day-to-day affairs of the condominium association often declines. This is particularly true in the case of investment owners; and as the number of renters increases and the number of resident owners decreases, some associations find that it becomes more difficult to muster a dedicated and active group of owners to contribute to those projects and programs which enhance both the financial value of the condominium and its character as a place to live.

The second concern is the attitudes and behavior of some renters. Many owners perceive renters to have a different degree of commitment to the condominium community because the renters lack a financial stake in the community and usually reside within the community for a much shorter period of time. The owners' concern with commitment is normally articulated in several ways: they feel that they have a greater interest in the appearance of the units they occupy; they have a greater consideration for their neighbors; and they have a greater interest in maintaining compliance with the condominium instruments and rules and regulations.⁸⁴ These perceptions vary from one condominium to another and, of course, may not be evident in every case.

The third concern relates to the number of persons who are renting units. Often, the sheer number of persons leasing units expands in an uncontrolled manner. The facilities of the condominium are then spread beyond the capacity for which they were designed. This typically creates parking problems and overcrowded recreational facilities; and when the number of renters is excessive, the condominium begins to resemble an apartment complex.⁸⁵ As a result, the resident owners feel that their community is too transitory to establish a stable neighborhood, and are concerned with the improvement of the community's living conditions and property values.

Finally, if the condominium is not substantially owner-occupied, problems can arise when financing and insurance are obtained. Some lenders become hesitant to loan money for condominium resales if a condominium is not substantially owner-occupied.⁸⁶ Similarly, some insurance companies use the level of rental occupancy in a complex as a criterion in determining coverage or premium

84. Mercer & Rogers, *State of the Law on Occupancy and Use Restrictions (pt. 2)*, COMMUNITY ASSN. L. REP., Mar. 1982, at 1, 2.

85. *Id.* at 2-3.

86. *Id.* at 3.

rates.⁸⁷

Often, lender reluctance has been caused by guidelines regarding the number of owner-occupied units imposed by the secondary mortgage market.⁸⁸ These guidelines were designed to make the condominium a safe investment. Presently, there are no prohibitive maximum caps on the level of leasing within projects;⁸⁹ but secondary mortgage market entities such as the Federal Home Loan Mortgage Corporation (FHLMC - "Freddie Mac") and the Federal National Mortgage Association (FNMA - "Fannie Mae") continue to distinguish between projects based on the level of rental occupancy.⁹⁰ This distinction, in turn, causes many primary lenders to be concerned when rental occupancy substantially exceeds thirty percent because of the primary lenders' desire to sell their mortgages in the secondary market.⁹¹

Because of these concerns, many associations in Georgia have acted to amend their documents to more carefully regulate the leasing of units and the behavior of tenants. Some associations have prohibited the leasing of units altogether except in cases of undue hardship of an owner.

Although courts in other jurisdictions have upheld a condominium association's right to regulate and prohibit leasing,⁹² there is

87. *Id.*

88. In the past, the major secondary mortgage market entities had criteria for which they would purchase loan paper only in projects that were substantially owner-occupied. The guidelines imposed a cap of 20, 25, or 30% on the level of rental units. During the recession in the 1970s, this meant for many condominium sellers and purchasers that money was not available for financing since the local lender was reluctant to finance ultimately knowing it could not sell the paper in the secondary market. *See id.*

89. *See* FED. NAT'L MORTGAGE ASSOCIATION, PROJECT GUIDEBOOK: PROJECT APPROVAL PROCEDURES, SOUTHEASTERN REGION, FEDERAL NATIONAL MORTGAGE ASSOCIATION (Feb. 1, 1984).

90. For example, FNMA distinguishes between a "Principal Residence/Second Home Project" and an "Investment Project" as follows:

Principal Residence/Second Home Project. A project in which 70% or more of the units are principal residences and second homes.

Investment Projects. A project in which less than 70% of the units are principal residences/second homes (i.e., a project in which more than 30% of the units are investment properties).

Id. at 24.

91. *See* Mercer & Rogers, *supra* note 84, at 2-3.

92. *See, e.g.,* Beachwood Villas Condominium v. Poor, 448 So. 2d 1143 (Fla. Dist. Ct. App. 1984); Lyons v. King, 397 So. 2d 964 (Fla. Dist. Ct. App. 1981); Kroop v. Caravelle Condominium, Inc., 323 So. 2d 307 (Fla. Dist. Ct. App. 1975); Board of Managers of Village House v. Frazier, 81 A.D.2d 760, 439 N.Y.S.2d 360 (N.Y. App. Div. 1979), *aff'd*, 55 N.Y.2d 991, 434 N.E.2d 257, 449 N.Y.S.2d 188 (1982); LeFebvre v. Osterndorf, 87 Wis. 2d 525, 275 N.W.2d 154 (Wis. Ct. App. 1979).

no Georgia case on the subject. The landmark case in this area, *Seagate Condominium Association, Inc. v. Duffy*,⁹³ upheld an association's amendment prohibiting leasing except in limited, hardship cases.⁹⁴ In *Seagate*, the Florida Court of Appeals addressed its response to the issue as follows:

Given the unique problems of condominium living in general . . . [the association's] avowed objective — to inhibit transiency and to impart a certain degree of continuity of residence and a residential character to their community — is, we believe a reasonable one The attainment of this community goal outweighs the social value of retaining for the individual unit owner the absolutely unqualified right to dispose of his property in any way and for such duration or purpose as he alone so desires.⁹⁵

In addition, the legislature in at least one state has clarified its condominium statute so that the association has the authority to file an action for damages or an injunction against a tenant for the violation of the association declaration, by-laws, rules and regulations.⁹⁶

Arguably, associations in Georgia can continue to regulate and restrict leasing without enabling legislation. Amending the GCA, however, would help end much of the controversy currently surrounding the efforts of associations to control leasing. The legislation could also ensure that leasing restrictions are not adopted without the support of a majority of the condominium community; and any such legislation should specify that an association can only regulate or restrict leasing to the extent permitted in the condominium instruments.

II. CONSUMER PROTECTION

A. *Standing*

The GCA gives a condominium association the power to sue in its own name to enforce the terms and provisions of the condominium instruments.⁹⁷ Additionally, the Act requires that an association must be sued as party defendant for torts occurring on the

93. 330 So. 2d 484 (Fla. Dist. Ct. App. 1976).

94. *Id.* at 485.

95. *Id.* at 486-87.

96. OHIO REV. CODE ANN. § 5311.23 (Page 1981).

97. O.C.G.A. § 44-3-76 (1982).

1985] RECOMMENDED CHANGES IN GEORGIA CONDOMINIUM LAW 207

common area;⁹⁸ but the Act is silent as to a condominium association's standing to sue in its own name to recover for damages to the common area (or other areas the association is responsible for maintaining) which do not involve violations of the condominium instruments. The most common claim of this type involves damages caused by construction defects, which, due to the uncertainty in this area, developers frequently defend not on the merits but on procedural grounds by raising the question of standing.

The only reported Georgia case in this area is *Equitable Life Assurance Society of the United States v. Tinsley Mill Village*.⁹⁹ In that case, an unincorporated condominium association was organized pursuant to the Apartment Ownership Act¹⁰⁰ and sought money damages from a developer for the negligent construction of certain drainage culverts.¹⁰¹ The condominium unit owners were responsible for maintaining the culverts pursuant to easement rights, and the association brought an action on their behalf.¹⁰² In its defense, the developer argued that the association lacked standing because it did not own the injured property and as such was not the real party in interest under the Georgia Civil Practice Act.¹⁰³ The Georgia Supreme Court agreed with the developer and held the right to bring the claim belonged to the condominium owners who owned the property.¹⁰⁴

Initially, the holding in *Tinsley Mill Village* appears to bar a condominium association from asserting a claim on behalf of its members because it lacks standing. However, the effect of the case on an association organized under the GCA is unsettled. The supreme court's opinion focused on the fact that the plaintiff was an unincorporated association organized under the Apartment Ownership Act;¹⁰⁵ but the GCA, which superseded the Apartment Ownership Act,¹⁰⁶ requires that a condominium association be incorporated.¹⁰⁷ The act of incorporation gives an association the specific

98. O.C.G.A. § 44-3-106(g) (1982).

99. 249 Ga. 769, 294 S.E.2d 495 (1982).

100. GA. CODE ANN. §§ 85-1601b — 85-1625b (Harrison 1978).

101. 249 Ga. at 770, 294 S.E.2d at 496.

102. *Id.* at 770-71, 294 S.E.2d at 496.

103. *Id.* at 771, 294 S.E.2d at 497 (citing GA. CODE ANN. § 81A-117 which is now codified at O.C.G.A. § 9-11-17(a) (Supp. 1985)).

104. *Id.* at 772, 294 S.E.2d at 498.

105. The court stated that "[w]e note that the Association has not incorporated pursuant to the Georgia Condominium Act . . ." *Id.*

106. GA. CODE ANN. §§ 85-1601b — 85-1625b (Harrison 1978).

107. O.C.G.A. § 44-3-100 (1982).

power to sue or be sued and to complain and defend in all courts.¹⁰⁸ The mere act of incorporation, however, should not be dispositive because it goes more to the capacity to sue rather than determining who is the real party in interest.¹⁰⁹

A condominium association established and incorporated pursuant to the GCA must be a real party in interest because the Act charges it with obligations to the unit owners and grants it powers and duties with respect to damaged condominium property.¹¹⁰ In addition, the declarations of condominium for most associations organized under the GCA provide that the association shall make all repairs to the common area.¹¹¹ In contrast, the Apartment Ownership Act was virtually silent as to an association's powers and interests in the property and with respect to the rights of the asso-

108. O.C.G.A. §§ 44-2-21(a)(3)(C), 44-3-21(a)(3)(C), 44-3-100 (1982).

109. Considering the statutory power of an unincorporated homeowner's association to maintain suit on behalf of its members, the Georgia Supreme Court in *Tinsley Mill Village* stated that "[t]his section [of the Code] merely provides that an unincorporated association has the *capacity* to sue . . . [but] a party may have the capacity to sue without being the real party in interest." 249 Ga. at 772, 294 S.E.2d at 497 (Citations omitted.) (Emphasis in original.)

110. The GCA establishes in the condominium association interests in the condominium property. For example, O.C.G.A. § 44-3-106(a) (1982) provides that the association has the power to:

(2) *Make or cause to be made additional improvements* on and as a part of the common elements; and . . .

(3) *Grant or withhold approval of any action* by one or more unit owners or other persons entitled to occupancy of any unit if such action would *change the exterior appearance* of any unit or of any other portion of the condominium or elect or provide for the appointment of an architectural control committee to grant or withhold such approval . . . (Emphasis added.)

O.C.G.A. § 44-3-106(b) also provides:

[T]he association shall have the irrevocable power, as attorney in fact on behalf of all unit owners and their successors in title, to grant easements through or over the common elements, to accept easements benefiting the condominium or any portion thereof, and to acquire or lease property in the name of the association as nominee for all unit owners . . . and own in its own name property of any nature, real, personal, or mixed, tangible or intangible to borrow money; and to pledge, mortgage, or hypothecate all or any portion of the property of the association for any lawful purpose within the association's inherent or expressly granted powers. (Emphasis added.)

O.C.G.A. § 44-3-105 (1982) provides "*all powers and responsibilities with regard to maintenance, repair, renovation, restoration, and replacement shall pertain to the association in the case of common elements . . .*" and O.C.G.A. § 44-3-94 (Supp. 1985) requires the association to restore any unit in the event of damage or destruction "unless otherwise provided in the condominium instruments." (Emphasis added.)

111. Weissman & Fryer, *supra* note 16, at 7; *see also* O.C.G.A. § 44-3-105 (1982); UNIF. CONDOMINIUM ACT § 3-102(a)(6), 7 U.L.A. 502 (1985).

1985] RECOMMENDED CHANGES IN GEORGIA CONDOMINIUM LAW 209

ciation for damages to the condominium property.¹¹²

Clearly, the provisions of the Act (and most declarations of condominium) charge an association with obligations and powers regarding the common area; but these provisions are only viable if the association has the right to sue to protect its interests and recover for damages to those interests. This approach is now gaining support from courts in other jurisdictions.¹¹³ For these reasons, the holding in *Tinsley Mill Village* should not apply to condominium associations organized under the GCA. In the former, the unincorporated association sued in a purely representative capacity; in the latter, the association has rights and obligations in and to the damaged condominium property.

The standing issue could be completely clarified by amending the GCA to pattern it after the Uniform Condominium Act, which gives the association the power to "institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or 2 or more unit owners on matters affecting the condominium."¹¹⁴ If such an amendment were adopted, a condominium association would clearly have the power to recover damages to portions of the condominium which it is financially responsible to repair. Additionally, the adoption would eliminate any undue burden on the individual condominium owners who might otherwise have to pursue claims on their own. Finally, adopting the language of the Uniform Condominium Act would help ensure that claims against developers involving the common elements are handled equitably and decided by a fair hearing on the merits, rather than becoming bogged down in procedural issues involving who has standing to sue.

112. See GA. CODE ANN. §§ 85-1601b — 85-1625b (Harrison 1978); see also Comment, *supra* note 56, at 897.

113. *Governors Grove Condominium Ass'n, Inc. v. Hill Dev. Corp.*, 35 Conn. Supp. 199, 404 A.2d 131 (Conn. Super. Ct. 1979); *Avila South Condominium Ass'n, Inc. v. Kappa Corp.*, 347 So. 2d 599 (Fla. 1977); *Briarcliffe W. Townhouse Owners Ass'n v. Wiseman Constr. Co.*, 118 Ill. App. 3d 163, 454 N.E.2d 363 (1983), *reh'g denied*, 134 Ill. App. 3d 402, 480 N.E.2d 833 (1985); *Siller v. Hartz Mountain Assoc.*, 93 N.J. 370, 461 A.2d 568 (1983); *1000 Grandview Ass'n v. Mt. Washington Assoc.*, 290 Pa. Super. 365, 434 A.2d 796 (1981); *Brickyard Homeowners' Ass'n Management Comm. v. Gibbons Realty Co.*, 668 P.2d 535 (Utah 1983); *cf. Dockside Ass'n, Inc. v. Detyens, Simmons and Carlisle*, 330 S.E.2d 537 (S.C. Ct. App. 1985). (A nonprofit corporation which managed common elements of a condominium was held not to be a real party in interest because it did not own the common elements in its own name and no statute existed to give it standing.)

114. UNIF. CONDOMINIUM ACT § 3-102(a)(4), 7 U.L.A. 502 (1985).

B. *Statute of Limitations Periods*

The GCA gives purchasers substantial rights if they reasonably rely upon false or misleading statements published by the seller.¹¹⁵ Specifically, the Act provides:

Any person who, in reasonable reliance upon any false or misleading material statement or information published by or under authority from the seller in advertising and promotional materials, including, but not limited to, the items required to be furnished by this Code section, brochures, and newspaper advertising, or who, without having been furnished with all of the information required to be furnished by this Code section, pays anything of value toward the purchase of a condominium unit located in this state shall be entitled to bring an action against the seller for damages¹¹⁶

This provision particularly benefits consumers because the prevailing party is entitled to recover reasonable attorney's fees.¹¹⁷

The Act requires, however, that the purchaser file the cause of action within one year of the date that the last of any of the following events occurs:

- (1) the closing of the transaction;
- (2) the issuance of a certificate of occupancy for the building containing the unit; or
- (3) the date the common elements and any recreational facilities are completed.¹¹⁸

The problem is that the statute of limitations provided in the Act is too short and effectively bars most claims from being brought. The problem is particularly acute when the claim involves the common elements or other portions of the condominium which the association is obligated to maintain.

As a practical matter, most condominium unit owners do not turn their attention to defects in the common elements during the statute of limitations period; nor do they believe it is necessary to address such problems until the declarant has turned control of the association over to them.¹¹⁹ Moreover, turnovers usually occur

115. O.C.G.A. § 44-3-111(i) (Supp. 1985) (This Code section does not apply to resales.)

116. O.C.G.A. § 44-3-111(i) (Supp. 1985).

117. O.C.G.A. § 44-3-111(j) (Supp. 1985).

118. O.C.G.A. § 44-3-111(i) (Supp. 1985).

119. Developers are often advised not to address problems which concern construction defects until after control of the condominium association has been turned over to

close to or after the one-year statute of limitations has run; and the owners are then left with little or no time to evaluate the common elements for defects or to bring a cause of action for such defects under the GCA.¹²⁰

This problem can be solved easily by adding the date upon which the declarant turns over control of the condominium association to the unit owners as an additional event from which to measure the one-year statute of limitations in the Act. Owners can then evaluate and pursue claims relative to the common elements upon taking control of the association, and they can do so without the time pressures they currently face.

Under the current law, there is also some question as to whether it is legitimate for fewer than all of the unit owners to recover 100% of the cost of repairing a defect in the common elements.¹²¹ The inclusion of the proposed revision to the statute of limitations will eliminate this concern.

C. *Limitations on Exculpatory Clauses*

Drafters of condominium instruments are including exculpatory clauses in the more obscure sections of their condominium instruments at an alarming frequency. Typically, these clauses attempt to limit the declarant's liability with respect to the construction or sale of condominium units and prevent the condominium association and the individual unit owners from asserting claims on behalf of themselves or each other.¹²² Arguably, such restrictions are void

the unit owners. HYATT, CONDOMINIUMS AND HOME OWNER ASSOCIATIONS - A GUIDE TO THE DEVELOPMENT PROCESS § 10.20 (1985).

120. *Id.*

121. *See* Equitable Life Assurance Soc'y of the U.S. v. Tinsley Mill Village, 219 Ga. 769, 291 S.E.2d 195 (1982). (The result in Tinsley Mill Village suggests this result.)

122. *See, e.g.*, Declaration of Condominium for the Oaks of Dunwoody, A Condominium, Fulton County, Georgia (available at the Clerk's Office, Superior Court, Fulton County, Georgia, Deed Book No. 8269, at 315) art. IX, § 9.06:

§ 9.06 *Right of Action.* Each Owner hereby acknowledges and agrees that the Association shall not be entitled to institute any legal action against anyone on behalf of any or all of the Unit Owners which is based on any alleged defect in any Unit or the common elements, or any damage allegedly sustained by any Unit Owner by reason thereof, but rather, that all such actions shall be instituted by the Unit Owners owning such Units or served by such common elements or allegedly sustaining such damage.

See also, Declaration of the Ponce Condominium, Fulton County, Georgia (available at the Clerk's Office, Superior Court, Fulton County, Georgia, Deed Book No. 8237, at 150) § 10.07:

§ 10.07 *Acceptance of Improvements.* Each Unit Owner hereby acknowledges and agrees that Declarant shall not be liable for any defects in

as against public policy under O.C.G.A. § 13-8-2(b);¹²³ but even if the clauses do not affect the actual rights of condominium owners, they can have a chilling effect on the perception which condominium unit owners have of their rights. Moreover, there is no case law in Georgia directly on point which involves condominium instruments.

The interests of Georgia's condominium unit owners could be better served by amending the GCA to expressly void exculpatory clauses of this type. The needed amendment could prospectively prohibit the inclusion of such restrictions in condominium instruments, articles of incorporation and by-laws.

III. REGULATION OF HOMEOWNER ASSOCIATIONS

A housing development which includes a homeowner's association (HOA) is prevalent in Georgia today. It is an alternative to development under the condominium regime.¹²⁴ Unlike the condominium which was created by statute,¹²⁵ the HOA is largely a product of the Planned Unit Development (PUD) concept. Historically, the PUD was a zoning device used by local authorities to allow cluster housing to be built at a greater density than the same land would support if single family homes were built on individual

any Owner's Unit, any Limited Common Elements or any Common Elements, or damages resulting therefrom. Further, each Unit Owner hereby acknowledges and agrees that the Association shall not be entitled to institute any legal action or seek any damages or redress whatsoever against the Declarant, or any past, present, or future partner, employee or agent of the Declarant, or any corporation or other entity, controlling, controlled by or under common control with the Declarant (an "Affiliate") or any such shareholder, officer, director, employee or agent of any such Affiliate, on behalf of any or all of the Unit Owners which is based upon any alleged defect in any Unit Owner's Unit or the Common Elements, or any damage allegedly sustained by any Unit Owner by reason thereof.

123. *See, e.g.,* Smith v. Seaboard Coast Line R.R. Co., 639 F.2d 1235, 1242 (5th Cir. 1981). (Contracts relating to the construction or maintenance of buildings which purport to limit the liability of a contractor are in derogation of the common-law rule and should be strictly construed.)

124. An HOA can take many forms including, but not limited to, conventional subdivisions, attached housing and cluster housing. *See generally*, Hyatt, *supra* note 6, at 980.

125. The first statute providing for the creation of condominiums in the United States was adopted in Puerto Rico in 1958. The Federal Housing Administration model condominium statute was promulgated in 1962. Since that time, all states have adopted at least a "first generation" of laws designed to govern the creation of condominiums. *Development of the Act*, UNIF. COMMON INTEREST OWNERSHIP ACT, 7 U.L.A. 231, 232 (1985).

1985] RECOMMENDED CHANGES IN GEORGIA CONDOMINIUM LAW 213

lots.¹²⁶ Nevertheless, the existence of mandatory HOAs and the use of them by developers to maintain, repair, insure and manage housing developments have made today's HOA largely indistinguishable from a condominium;¹²⁷ and with regard to the association which governs the community, the issues and needs of a condominium development and an HOA development are identical.¹²⁸

Despite its similar purpose, an association of homeowners operating as an HOA cannot rely on the statutory framework of the GCA for guidance or authority. The GCA does not apply to HOAs for two reasons. First, the developer in creating the condominium association must specifically submit the property to the GCA by "record[ing] the] condominium instruments pursuant to [the Act]."¹²⁹ Secondly, and more importantly, the GCA specifies that "[n]o property shall be deemed to be a condominium within the meaning of [the Act] unless undivided interests in common elements are vested in the unit owners."¹³⁰ In an HOA, the title to the common area is held in the name of the homeowners association instead of being vested in the unit owners as tenants in common.¹³¹ Since the HOA is made up of all the individual owners in the community, this distinction is largely technical.¹³²

While HOAs in Georgia derive their powers from a declaration of covenants, conditions and restrictions (hereinafter CC&R) which is recorded at the beginning of the project, the ability of an HOA to enforce the provisions of the CC&R depends on Georgia common law governing covenants which "run with the land."¹³³ A CC&R declaration may be identical to a declaration of condominium, but an HOA must rely on common law arguments which consider whether a covenant "touches and concerns the land" or is designed to preserve a "common sense" rather than following a modern statutory scheme of shared ownership and responsibility.¹³⁴

On a national level, the National Conference of Commissioners

126. *Id.*

127. *Id.* See also Hyatt, *supra* note 6, at 980-81.

128. *Development of the Act, supra* note 125, at 233 (1985).

129. O.C.G.A. § 44-3-71(7) (Supp. 1985).

130. *Id.*

131. HYATT, *supra* note 42, at 13.

132. See Hyatt, *supra* note 6, at 980-81.

133. See *Development of the Act, supra* note 125, at 233.

134. *Muldawer v. Stribling*, 243 Ga. 673, 256 S.E.2d 357 (1979); *Antill v. Sigman*, 240 Ga. 511, 241 S.E.2d 254 (1978), *cert. denied*, 436 U.S. 926 (1978); *City of Atlanta v. Jones*, 135 Ga. 377, 69 S.E. 571 (1910); *Tift v. Savannah, F. & W. Ry.*, 103 Ga. 580, 30 S.E. 266 (1898); see generally cases collected in *Jackson v. Rogers*, 205 Ga. 581, 54 S.E.2d 132 (1949).

on Uniform State Laws has recognized that this gap in the statutory regulation of PUDs exists. The Commissioners' initial response was the Uniform Planned Community Act which was adopted in 1980.¹³⁵ Since then, the Commissioners have promulgated an all-encompassing regulatory scheme which recognizes the fact that condominiums, PUDs and cooperatives¹³⁶ are three technically distinct entities with the same common theme; in all three forms, "the beneficial interest in both the common elements and the units lies with the unit owners, while management of the common elements is performed by the association."¹³⁷ This statute, which was adopted in 1982, is the Uniform Common Interest Ownership Act (UCIOA).¹³⁸

Because of the practical similarities of PUDs, cooperatives and condominiums, one act should regulate the development, sale and operation of such "common interest communities." The UCIOA parallels the Uniform Condominium Act,¹³⁹ with only slight modifications beyond the "definition"¹⁴⁰ and "applicability"¹⁴¹ portions of the Uniform Condominium Act. As a result, states which have adopted the Uniform Condominium Act can easily adopt the UCIOA.

The GCA, however, is not based on the Uniform Condominium Act.¹⁴² Therefore, Georgia cannot adopt UCIOA without rejecting a

135. *Development of the Act*, *supra* note 125, at 232.

136. "'Cooperative' means a common interest community in which the real estate is owned by an association, each of whose members is entitled by virtue of his ownership interest in the association to exclusive possession of a unit." UNIF. COMMON INTEREST OWNERSHIP ACT § 1-103(10), 7 U.L.A. 241 (1985).

137. *Prefatory Note*, *supra* note 5.

138. *Id.*

139. *The Underlying Concept of UCIOA*, UNIF. COMMON INTEREST OWNERSHIP ACT, 7 U.L.A. 235-36 (1985).

140. See generally UNIF. COMMON INTEREST OWNERSHIP ACT § 1-103, 7 U.L.A. 240 (1985), and compare with UNIF. CONDOMINIUM ACT § 1-103, 7 U.L.A. 433 (1985). The most important definition added to the UCIOA was § 1-103(7):

"Common interest community" means real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate described in a declaration. "Ownership of a unit" does not include holding a leasehold interest of less than [20] years in a unit, including renewal options.

UNIF. COMMON INTEREST OWNERSHIP ACT § 1-103(7), 7 U.L.A. 240 (1985).

141. Compare the UNIF. COMMON INTEREST OWNERSHIP ACT, art. 1, pt. II, 7 U.L.A. 264-72 (1985), with the UNIF. CONDOMINIUM ACT § 1-102, 7 U.L.A. 428 (1985).

142. The GCA was adopted in 1975. See 1975 Ga. Laws 609, 671. The Uniform Condominium Act was approved at the annual meeting of the National Conference of Commissioners of Uniform State Laws in Vail, Colorado in August 1977. See *Prefatory*

statutory framework which has been in place in Georgia for the past decade. For this reason, UCIOA is not an acceptable solution to the problems facing HOAs in Georgia.

Instead, Georgia's legislature must determine the degree of regulation which is needed to provide structure and certainty to the creation and sale of units within PUDs and the powers and duties of HOAs. The legislature must then consider its response to this problem. For example, it could propose a separate act to govern HOAs or it could amend the GCA to make it applicable to HOAs. The latter approach adopts the principle underlying the UCIOA and has the attractive advantage of utilizing legislation with which Georgia's attorneys and courts are already familiar.

Regardless of the form of the selected solution, Georgia's lawmakers should consider immediate action in three critical areas. First, the legislature must reassess the twenty-year statutory limitation on the duration of covenants¹⁴³ as it applies to the CC&R which regulate the operation of an HOA. Specifically, O.C.G.A. § 44-5-60 provides that in any municipality or county having a zoning ordinance, restrictive covenants may run with the land for only twenty years. The intent of this limitation is to ensure that land is not unduly burdened for indefinite periods of time.¹⁴⁴

While the intent of this twenty-year limitation makes sense in a traditional real estate context, it works an extreme hardship on an HOA. In an HOA, the owners live in close proximity to one another and share the ownership, use and maintenance of common property through an association to which all belong. Under O.C.G.A. § 44-5-60, the covenants which create these communities and give them the means to operate would be eliminated at the end of a twenty-year period.

HOAs in Georgia presently own, maintain, insure and operate roads, greenbelts and recreational facilities for the benefit of the

Note, UNIF. CONDOMINIUM ACT, 7 U.L.A. 421-23 (1985).

143. O.C.G.A. § 44-5-60(b) (1982).

144. See *Copelan v. Acree Oil Co.*, 249 Ga. 276, 290 S.E.2d 94 (1982).

It is the general rule that the owner of land has the right to use it for any lawful purpose, and restrictions upon its use must be . . . strictly construed

. . . .

Underlying this rule is the sound policy that land use must be governed by its present owners, and should be subjected only in severely restricted circumstances to control by former owners. Were this not the law, any whim and caprice, once set down by deed, could diminish or destroy the utility of real property for fully two decades. (Citations omitted).

Id. at 278, 290 S.E.2d at 96.

lot owners. If O.C.G.A. § 44-5-60 is not amended at the end of twenty years, HOAs will lose their power to impose assessments to discharge their duties. They will be unable to enforce covenants designed to preserve the peace and tranquility of owners living in close proximity to one another and sharing the use of common property. In many cases, the result will be that little or no organized maintenance of the common property will take place. Large decreases in property values will likely follow; and eventually, some type of forced intervention by a local unit of government or the courts may become necessary. The CC&R bind the community and provide the HOA with the apparatus to govern it. It follows, therefore, that the nature and complexity of these communities demand that the CC&R have perpetual duration.

On balance, arguments can be made that the restrictions in the CC&R will continue to exist beyond the twenty-year limitation by virtue of their being connected to easement rights.¹⁴⁵ Arguments can also be made that the covenants can legally provide for their being automatically renewed.¹⁴⁶ The better approach, however, is to provide a statutory basis which allows for the perpetual existence of covenants in communities of this type.

Many HOAs in Georgia are nearing their twentieth year of operation. Most lot owners and lenders are not yet aware of the existence of the twenty-year limitation. Therefore, the need for immediate legislative action is clear.

The second issue is whether to grant HOAs the same assessment lien collection powers which the GCA currently affords to condominium associations. As with condominium associations, assessments are, by and large, the sole source of available funds for HOAs to meet their financial obligations.

The legal effect of an HOA lien for an unpaid assessment in Georgia is not clear. In *Country Green Village One Owner's Asso-*

145. *Hendley v. Overstreet*, 253 Ga. 136, 318 S.E.2d 54 (1984); *Lowry v. Norris Lake Shores Dev. Corp.*, 231 Ga. 549, 203 S.E.2d 171 (1974); *Atlantic Coast Line R.R. Co. v. Georgia, Ashburn, Sylvester & Camilla Ry. Co.*, 91 Ga. App. 698, 87 S.E.2d 92 (1955). (In most HOAs, the association holds legal title to the common area with each owner having an easement right to use and enjoy such property subject to certain restrictions.)

146. Many CC&R provide that the covenants will be renewed automatically for successive periods of ten years unless some super-majority of the lot owners vote not to renew the covenants. Precedent exists in Georgia, however, which suggests that covenants which purport to extend beyond the twenty-year statutory limitation period will be limited in duration to twenty years. See *Antill v. Sigman*, 240 Ga. 511, 241 S.E.2d 254 (1978).

ciation, Inc. v. Meyers,¹⁴⁷ the Georgia Court of Appeals held that an HOA lien was neither a valid statutory nor common law lien.¹⁴⁸ In dicta, the court explained that if the association's lien was anything it was an equitable lien; but the validity of the lien as an equitable lien could not be decided in *Country Green* because the original action had been brought in a court which lacked equity jurisdiction.¹⁴⁹ Thus, while an HOA lien for an unpaid assessment is arguably an equitable lien, the legal precedent which supports this conclusion has not been established in Georgia.

By contrast, the GCA provides a condominium association with a statutory lien which arises automatically when an assessment is due and unpaid and which does not require recordation for notice.¹⁵⁰ With limited exceptions,¹⁵¹ the GCA condominium association's lien is, by statute, prior and superior to all other liens. Furthermore, the GCA provides for the addition of late fees, interest and reasonable attorney's fees *actually* incurred.¹⁵² An HOA, however, may be forced to pursue the collection of its liens subject to a statutory limitation on its recoupment of attorney's fees expended.¹⁵³ When an HOA's ability to collect attorney's fees is limited by the statute to fifteen percent of the principal amount due, the costs of collection will often exceed the amounts collected because of the small principal amounts owed in most cases.

The ability of an HOA to collect assessments is critical to the operation and maintenance of the property. Therefore, the legislature should consider an immediate expansion of the GCA to make O.C.G.A. §§ 44-3-80 and 44-3-109 applicable to HOAs.

Finally, the legislature should consider giving HOAs the same power to assess monetary fines that presently exists for condominium associations.¹⁵⁴ This could be accomplished by making O.C.G.A. § 44-3-76 apply to HOAs. As stated earlier in this article, the power to assess monetary fines is among the most practical remedies available to an association to enforce covenants.¹⁵⁵ Having this power will allow an HOA to take an immediate and affirmative step to encourage compliance with the CC&R without hav-

147. 158 Ga. App. 609, 281 S.E.2d 346 (1981).

148. *Id.* at 610-11, 281 S.E.2d at 348-49.

149. *Id.* at 612, 281 S.E.2d at 349.

150. O.C.G.A. § 44-3-109(a) (1982).

151. O.C.G.A. § 44-3-109(a)(1) - (4) (1982).

152. O.C.G.A. § 44-3-109(b) (1982).

153. O.C.G.A. § 13-1-11 (1982).

154. O.C.G.A. § 44-3-76 (1982).

155. *See* text accompanying notes 20-28.

ing to resort to litigation which can be both costly and protracted. While this is a power typically given to the HOA within the terms of the CC&R, it would be clearer if applied by statutory law and would ease the operation of the HOA. As such, it is the remedy most frequently used by condominium associations for enforcement.¹⁵⁶

The above suggestions are minimum legal protections which should be afforded HOAs in Georgia. The legislature should additionally focus its attention on such matters as developer disclosure and consumer protection for purchasers of homes in HOAs. As protections for consumers under the GCA are refined, as is suggested by this article, there will be an increased incentive for developers to avoid development under the GCA in favor of development in some other, currently nonregulated format. With this potential for avoiding consumer protection guidelines available, the Georgia legislature needs to begin its discussion of the entire area of HOA regulation immediately.

IV. CONCLUSION

The intent of this article has been to highlight problem areas in the Georgia Condominium Act and explore whether regulation of other forms of common interest ownership communities would be helpful. There may be disagreements on whether this article raised all of the changes needed in the Act and even whether all of the changes recommended in this article are needed. The authors hope that it will serve as a framework to let the much needed legislative debate in this area begin.

156. *Id.*