Statute of Limitations to Stop a Covenant Violation

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Effective July 1, 2017, the Georgia General Assembly amended the Statute of Limitation for Covenant Violations (O.C.G.A. § 9-3-29) to add the language underlined in the box to the right. The purpose of these additions to subsection (c) was to clarify subsection (a) requiring a lawsuit [i.e. "action"] to be "brought within two years after the right of action accrues."

Subsection (c) has always stated that the right of action accrues [i.e. the 2 year clock starts to run] when the violation first begins. However, it is not always easy to determine when a violation began when the violation is one that is repeated. Does the two year statute begin when the first violation occurred or does it begin each time the same violation is committed? Think about a neighbor who sporadically complies with a requirement that garbage cans must be returned within 24 hours of pick-up.

Various decisions of the Georgia Court of Appeals over the years have resulted in three general categories of covenant violations for statute of limitations purposes:

1. Fixtures
2. Discrete Repetitive Acts/Omissions (a/k/a "continuous violations')
3. Neither of the above

§ 9-3-29. Limitations as to actions for breach of covenant restricting use of land

(a) All actions for breach of any covenant restricting lands to certain uses shall be brought within two years after the right of action accrues, excepting violations for failure to pay assessments or fees, which shall be governed by subsection of this Code section.

(b) For the purpose of this Code section, the right of action shall accrue immediately upon the erection of a permanent fixture which results in a violation of the covenant restricting lands to certain uses or the violation of a set-back line provision. When an alleged violation or complaint is based upon a continuous violation of the covenant resulting from an act or omission, the right of action shall accrue each time such act or omission occurs. This Code section shall not be construed so as to extend any applicable statute of limitations affecting actions in equity.

Common examples of "fixtures" are a fence, outbuilding, detached garage, residence, deck, new roof, or similar items.

Since covenants contain restrictions well beyond "fixtures," Georgia Courts developed a principal known as the "continuing violation theory", which holds that for certain discrete and repeated violations, the 2 year time period begins to run each time the violation occurs. Examples of "continuing violations" are: unauthorized parking, loud noises, leaving out a trashcan, yard decorations, leaving the garage door open, too many guests at the pool, etc.

While Georgia Courts have not made a formal determination, examples of violations that are not easily categorized as a "fixture" or "continuing" are weeds, peeling paint and other deterioration, unkempt/unsightly conditions, and other failures of "maintenance."

Since the statute has always required that an enforcement lawsuit be brought within two years after the violation commenced, the question has always been, when does the 2 year period start to run? With "fixtures" the answer has always been simple: the clock begins to run immediately upon installation of the fence, flag pole, new deck etc. Although, with larger items like additions or new garages, the clock would generally start to run when they are "substantially complete."

On the other hand, the "continuing violation theory" holds that a new violation occurs each time the prohibited act occurs or the required act is omitted by an owner. With "continuing" violations, an Association can be said to have 2 years to bring a lawsuit from the each date that violation commenced. Such a rule is essential for Associations to be able to enforce these types of repetitive violations.

The legislature had to act because of the case of S-D RIRA, LLC v. Outback Prop. Owners' Ass'n, Inc., 330 Ga. App. 442, 457, 765 S.E.2d 498, 510 (2014) where the Georgia Court of appeals cast significant doubt on the "continuing violation theory" created by court decisions. All twelve judges of the Court of Appeals weighed in on the issue and split 6-6 on whether the "continuing violation theory" was valid law in Georgia. Six Judges argued that it be kept in place as is, while six argued that it is inconsistent with the words used in the prior version of O.C.G.A. § 9-3-29(c) as it existed at the time. Although the 6-6 split in the Court was not sufficient to overrule the "continuing violation theory," it became apparent that its days might be numbered.

If the "continuing" violation theory were overruled, then repeated violations like unauthorized parking would be treated the same way as an unauthorized fence. In other words, an Association would have to file a lawsuit within 2 years of the very first time the owner parked in the wrong space or in an emergency area regardless of how many other times he/she parked there or how recently. Without the "continuing violation theory," an Association would have to sue within 2 years of when the owner first committed a particular violation or lose the right to sue even if the owner commits the same violation more than 2 years later. To do away with the "continuing violation theory" would have obvious drastic and negative consequences for the entire community association industry.

Thankfully, the Georgia Legislature stepped in and, in 2017, added the above highlighted language to O.C.G.A. § 9-3-29(c) which basically adopts the "continuing violation theory" as a matter of law, and potentially even expands it. The new subsection (c) distinguishes between "fixtures" and "continuing" violations and states that the 2 year period begins to run for "continuing" violations upon each act or omission in violation of the covenants. Therefore, the "continuing violation theory" is now clearly established Georgia statutory law and can be utilized by Associations.

Unfortunately, neither the Legislature nor Georgia Appellate Courts have ever expressly addressed the aforementioned "maintenance" violations that are not easily categorized as either "fixtures" or "continuing." Are peeling paint and dead grass more like a "fixture" or are they a "continuing" violation where the owner repeatedly fails to keep the property up to a particular standard? There is no clear cut answer to this question. However, while not addressing the issue directly, the fact that the amended Statute of Limitation establishes only two categories of violations ("fixtures" and "continuous") and does not limit "continuous" violations to "discrete" acts or omissions that can be repeated like the Court of Appeals had done, there is a reasonable argument that the Legislature intended these "maintenance" violations to be included within the category of "continuous" violations.

Although some uncertainty remains time will tell whether these "maintenance" violations should be considered "continuous." Until such time, as a best practice, an Association should assume that a "maintenance" violation will not be considered "continuous" and that it first began sometime before it was noticed. As a result, an Association should notify the owner quickly and work with him or her correct the violation as soon as possible so that there is ample time to file suit since attempting to resolve the issue does not stop the running of the 2 year statute. In the event it cannot be resolved, an action — a lawsuit — must be filed within the 2 years.