



**CAUGHT IN THE ACT:  
ENFORCING PROTECTIVE  
COVENANTS WHILE THE VIOLATION  
OCCURS**

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One of the greatest challenges for a community association board of directors is enforcing the community's protective covenants. Protective covenants are a wonderful tool for communities that wish to maintain an established quality and character. To help maintain this quality and character, an association's declaration of protective covenants typically contains a provision requiring property owners to seek and obtain approval from the association's board of directors or architectural control committee before making any exterior changes to the property. In the event that a property owner makes exterior changes to the property without first seeking and obtaining approval, the protective covenants usually include a number of enforcement tools such as fining, self help and the right to seek a court injunction.

Unfortunately, at some point most associations are faced with a situation where fining and/or self-help just can't do the trick because the violation is still in progress when discovered. For example, imagine coming home from a long and draining business trip. The only thing on your mind is getting home and relaxing on the front porch and enjoying the familiar sights of your community. As you pull in your driveway you almost collide with the light post when you notice the largest, most horrific structure you have ever seen in your life. As you get out of the car you realize that this monstrosity is a partially-constructed, three-car sheet metal garage located at the edge of the property line and directly facing your porch. You soon learn that the owner failed to submit a property modification request and did not obtain approval before beginning the construction of this garage. You immediately call the president of the board who assures you that a violation letter will be sent demanding that these owners immediately cease and desist all construction and informing them of the violation and imposing a \$25 per day fine - of course, the owners will, per the declaration, have 10 days to appeal before the fine actually becomes effective.

Clearly fines and letters will not be not sufficient in this case. This type of violation must be stopped immediately, before the owner completes the construction. When the board discovers such a violation "in the act" and wants the violation stopped immediately, it is not only advisable but often legally necessary for the association to immediately file a lawsuit seek a temporary Court order requiring the construction to cease. Failure to act immediately to address the violation may give rise to the equitable defense known as Laches.

"Laches" occurs when the association is aware of a violation but "unreasonably" delays bringing suit to address the violation which results in some sort of prejudice to the violating owner. In the hypothetical above, if the association merely sent the letter, allowed the unauthorized construction to be completed, and only then brought suit to have the garage removed the Association could very well be found to have committed laches. The Owner would most likely argue that the association's failure to act prior to the completion of the garage resulted in prejudice in that he continued to expend large amounts of resources after the association learned of the violation. Further, the owners would argue that the cost of removing the garage has also increased significantly from the point when the association discovered the violation. As a result, a Georgia court could very well rule against the association and deny its request to have the garage removed. Under the doctrine of laches, the Court can allow the garage to stay even if it finds that the construction was clearly performed in violation of the protective covenants.

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The doctrine of laches is considered an “equitable doctrine” because it is based upon the principle of fairness as opposed to a strict application of the rules of law. In our hypothetical, the law is clear that construction without prior board approval is a violation of the covenants. However, the principals of equity demand that, where there is a significant expenditure of funds and/or improvement of realty, the association must act swiftly to enforce its rights. When the Association fails to act swiftly, the “good faith” violator can be said to have justifiably relied upon the association’s inaction.<sup>1</sup> In such a case, the Court will likely agree with the violator who argues that the association’s failure to act resulted in the violating owners continued expenditure of significant funds and effort to complete the construction of the structure. The Court will likely agree with the violator who argues that the improvements are not easily undone and that the Association, having had knowledge of the violation prior to the completion of the construction, failed to act and effectively approved the construction. Further, the court will likely agree that the violator’s reliance upon the association’s inaction was justifiable. In short the principals of equity intervene and will prevent an association from purposely waiting until a violator has completed the work before enforcing its rights under the Declaration, thereby inflicting the greatest amount of cost and consequence on the violator.

The principles of equity abhors inaction by the party that seeks to enforce its rights. To avoid this scenario, upon discovery of such a violation, the association must act quickly and immediately seek judicial relief. Over the years the Courts have gone back and forth on what types of violations and how much delay can give rise to a laches defense.

The landmark legal opinion which dictates the application of the doctrine of laches to community association cases is set forth by the Georgia Superior Court in *Bacon v. Edwards*, 234 Ga 100, 214 S.E.2d 539. In *Bacon*, the Georgia Supreme Court held that “[a] mere objection or protest, or a mere threat to take legal proceedings is not sufficient to exclude the consequences of laches or acquiescence.” However, the *Bacon* court identified specific factors that are to be considered by Georgia courts when applying the doctrine of laches to community association cases. Specifically, the *Bacon* court held that, “[i]n determining whether there has been laches, there are many factors to be considered, including the sufficiency of the excuse offered in extenuation of the delay in bringing suit.”

Additionally, factors that Georgia courts consider when applying the doctrine of laches include the amount of time it took for the violating construction to be completed, when the association became aware of the violation, the actions taken by the association once it learned of the violation, the cost incurred by the owner for said construction, the cost the owner will incur to remove the construction, the level of difficulty associated with the removal of the construction, the potential damage which could be caused by the removal of the construction, the violating owner’s knowledge of the covenants and the violating owner’s knowledge that the association objects to and seeks to prevent the construction.

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<sup>1</sup> While there are no specific cases on this particular point, under the principals of equity we believe an owner who knowingly and willfully fails to obtain construction approval and continues construction in the face of a cease and desist letter would no be protected by the doctrine of laches even if he/she has expended a significant amount of resources. The principles of equity, and laches in particular, generally assume that the parties are acting equally in good faith.

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The doctrine of laches is not an absolute defense for owners who begin construction without first obtaining board approval. Georgia courts have and will require violating owners remove unauthorized construction in certain circumstances.

For example, in *Hech v. Summit Oaks Owners Ass'n, Inc.* 275 Ga.App. 265, 620 S.E.2d 490 (2005), the property owners erected an above ground pool in violation of the community protective covenants without first seeking and obtaining board approval. In *Hech*, the owners constructed the unapproved pool in about one week. Approximately two weeks after the construction of the pool was completed, the association contacted the owners and advised them that the pool violated the community's protective covenants. The association repeatedly sent written notice of the violation to the owners and demanded the pool be removed. After the owners continued to ignore the association's demands, the association filed against the owners. The lawsuit was ultimately filed approximately 13 months *after* the construction of the pool was completed.

The trial court agreed with the association and ordered the removal of the pool. The owners appealed the trial court's decision and the Georgia Court of Appeals affirmed the trial court's ruling that the owners violated the Declaration, that the doctrine of laches did not apply and that the owner must remove the unauthorized pool. Specifically, the Georgia Court of Appeals held that:

To suggest that the [Hechs] acquired equitable rights in their violations merely because they managed to build the [pool] before [the association] realized that they intended to [do so], or because [the association] tried to avoid litigation by settling the dispute within the neighborhood, is to say that any restrictive covenant can be successfully violated, even in the face of complaints, merely by expending a large sum of money to erect a structure before the complaining party can figure out what is happening or can get to the courthouse to file a lawsuit. This would stand the law of restrictive covenants on its head

The *Hech* case describes a situation where the Court will require the removal of a structure even when the Association has waited until after completion of construction to file suit. However, this should be considered the exception and not the rule. In *Hech*, the court operated under the assumption that the association did not have knowledge of the construction of the pool until *after* construction was substantially complete.

Therefore, when a significant violation is unfolding before your eyes, the best practice is to dispense with formalities and immediately notify the owner in writing of the violation and demand the owner immediately cease and desist the unauthorized construction. If the owner does not immediately cease and desist construction, the Association must immediately file a lawsuit and seek a temporary restraining order ("TRO") from the Court.

A TRO is a judicial device which allows for an immediate hearing, sometime as quickly as the same day the lawsuit is filed. At the hearing, the court will hear evidence from both the association and the owner in order to determine whether to enter an order requiring the owner to cease construction. The order will not address the merits of the underlying violation, but rather will address solely the issue of immediate construction. If the court finds some evidence of fact that the construction may be a violation of the Declaration, the court will order the owner to

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cease construction for a maximum of 30 days. Then, in order for the restraining order to be extended for the duration of the lawsuit, the Court must hold a full evidentiary hearing, which is basically a mini trial. If the Court decides to extend the order requiring construction to cease it will issue what is called an Interlocutory Injunction. If granted, an Interlocutory Injunction will remain in effect until the lawsuit is completed.

One of the advantages of the TRO is that it may be granted *ex parte*. An *ex parte* order is one granted upon application by the association without the violator having an opportunity to present his position. When seeking a TRO, an association is required to present evidence which establishes that the association has taken diligent effort to notify the owner that it is seeking a TRO and has taken diligent effort to provide the owner with information relative to the hearing date. Regardless of whether the violator contests the association's request for a TRO, a TRO is such an extraordinary remedy that it is only valid for a maximum of thirty days. This thirty day cessation of construction, however, is usually sufficient to get the owner's attention and to resolve the violation.

In Georgia, to have a TRO expanded into an interlocutory injunction, the association must pass a three-part test established by Georgia Courts.

First, the Association must demonstrate that there is a substantial likelihood that it will win the underlying lawsuit. Second, the Association must demonstrate to the court that a greater harm will occur to the association if the covenants are not enforced than to the violator if the injunction is granted. Third, the association must demonstrate to the court that it will suffer irreparable harm if the injunction is not granted. While these three elements are required to obtain an Interlocutory Injunction after a full hearing with witnesses, Courts often apply the same or similar criteria when evaluating a request for a TRO. The main difference being that the hearing for a TRO often does not have actual witness testimony and the Court generally relies on the contentions of the respective attorneys for the parties.

The first two elements required for an Interlocutory Injunction usually do not pose much difficulty to the Association seeking an Interlocutory Injunction. The third element, however, historically has been more difficult for associations to demonstrate. The demonstration to the court that the association will suffer "irreparable harm" if the injunction is not granted is sometimes a difficult burden for the association to meet. In some situations, it is not difficult to show irreparable harm. For example, a water leak causing continuing damage to other units in a condominium clearly meets this burden because the continued water exposure could result in unknown and substantial damage. The immediate urgency of this type of problem helps establish irreparable harm. However, it has often been difficult to convince a judge that a violation of a restrictive covenant in a non-emergency situation would result in irreparable harm to an association if a preliminary injunction is not granted.

Fortunately, the third requirement of proving irreparable harm to the association is no longer required. The Georgia Court of Appeals ruled in the case *Focus Entertainment International, Inc. v. Partridge Greene, Inc.*, that irreparable harm automatically occurs as a matter of law when a restrictive covenant is violated. With this decision, the Georgia Court of Appeals greatly simplified the process for community associations to obtain court protection to immediately stop architectural and other violations from continuing.

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The point we have tried to make in this article is that an association must act swiftly when confronted with construction violations that are still in progress when discovered. Whether the association must file a lawsuit and seek a TRO in order to avoid laches will depend on the cost and scope of construction and the cost and difficulty of removing it at a later date. However, a good rule of thumb to is to consider that a court is likely to find laches to exist when delay in addressing a violation involves significant monetary investment and construction by the violating owner and significant cost and difficulty of removing the construction once complete. On the other hand, a court is much less likely to find laches to exist when the modification is minor, less costly and is quickly installed and/or removed. Regardless, once unauthorized construction is discovered a cease and desist letter should be immediately sent, then the association can evaluate whether or not the violation is of such a kind as to require a lawsuit and a TRO. Each case is different, but all require the Association act and act swiftly.