What to Consider When Buying Real Property in a Community Association

2026 Printing

This brochure was prepared courtesy of the Georgia Association of REALTORS® to help buyers with the buying process in a community association. The recommendations herein are general in nature and are not intended to be exhaustive. Some of the recommendations may not apply to specific properties. Buyers are encouraged to consult with experts and professionals of their own choosing to ensure that they are protected when buying property in a community association.

Many properties are located in a community where the buyer, as part of purchasing the property, becomes a mandatory member of a Homeowners Association ("HOA"). This brochure will help educate buyers on some of the more important issues to consider when buying a property in this type of community.

What is a HOA? A HOA is usually a non-profit corporation the members of which are the owners of lots in the community. It is normally established by the developer of a subdivision to: (1) own, maintain and operate certain common properties within the community (such as a pool and other recreational amenities, entrance features and common landscaping); (2) enforce covenants designed to protect property values and preserve community standards; and (3) collect assessments to fund the obligations of the HOA. The legal document in which the covenants are contained is typically referred to as a Declaration of Covenants, Conditions and Restrictions ("Declaration" or "CC&Rs"). The HOA is also required to have Bylaws in which the procedures for operating the HOA are described and an Articles of Incorporation which creates the HOA. In addition to covenants, members of a HOA are also typically required to comply with rules and regulations that are normally adopted by the Board of Directors and deal with specific issues within the community such as the use of the swimming pool. Most decisions in a HOA are made by its Board of Directors which is the governing body of the HOA. However, certain important decisions, such as amending the Declaration are usually reserved to the members. Most communities only have one HOA. However, some communities, particularly large master planned communities, will often have both master and sub-associations.

Some HOAs have chosen to be regulated as a Property Owners' Association ("POA") under the Georgia Property Owners' Association Act O.C.G.A. § 44-3-220. Being in a community that is subject to a POA generally means that the association has stronger legal powers to enforce the protective covenants (including the obligation to pay assessments) against violators and that amendments to the community's legal documents are enforceable against all owners upon a vote of at least 2/3s of the total association vote.

How can a Buyer Determine if the HOA is Well Run? There are a variety of ways to determine whether the HOA is well run and a community is one in which a buyer would want to live. These include the number of owners who are delinquent in paying their assessments to the HOA, whether the HOA has sufficient capital reserves, the frequency of special assessments, the amount and type of litigation between the HOA and its members and the general appearance of the community. Buyers are also encouraged to talk with other owners in any community with a HOA regarding their experiences and review at least some of the financial and corporate records of the HOA to learn more about the community. In particular, reviewing the minutes of the meetings of the Board of Directors for the last year or two can be quite revealing as to the collegiality and professionalism of the leadership of the HOA and the types of issues facing the community. Since these records can often only be obtained by a present member of the HOA, buyers may have to get their sellers to obtain these records for them.

Are there Special Costs or Fees Typically Paid by Buyers in a Community with a HOA? Yes. Some fees typically charged by HOA's to new owners include the following: a capital reserve contribution, an initiation fee, a transfer fee and/or a property management account establishment fee. There are not set rules on the type, amount or even the name of the fees charged to new owners by the HOA. Buyers should ask the HOA property manager, the seller or Declarant (if the community is still Declarant controlled) for confirmation of the fees a new buyer will be obligated to pay. Owners also typically pay ongoing assessments to the HOA. These are usually paid monthly, quarterly or annually. If the HOA has insufficient funds, the HOA also typically has the right to levy a special assessment. If an owner fails to pay his or her assessments a lien can be filed against the owner's lot and the owner's right to use the common areas can usually be suspended.

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What Kinds of Use Restrictions Typically Exist in a Community with a HOA? The covenants contained in a typical Declaration can be wide-ranging. The covenants normally establish maintenance standards for lots and regulate things like parking, pets, architectural changes to the exterior of buildings, leasing, how many people can occupy a dwelling and whether a property can be used for non-residential purposes. The covenants contained in the Declaration can be as broad or as narrow as the Declarant chooses to make them in causing the initial Declaration to be drafted. Buyers are encouraged to carefully review the Declaration during any due diligence period to confirm that the lifestyle reflected in the covenants is one with which they are going to be comfortable.

How Do I Know What Property is Part of the HOA and Whether the HOA can be Expanded? The Declaration should include a legal description of the property that is subject to the Declaration. Just because the community may appear to be large physically does not necessarily mean that all of that property within the community is a part of the HOA. Again, the legal description of the property submitted to the Declaration that is the key. Any right to expand the community is normally contained in the Declaration. Of course, just because the community can be expanded does not mean that it will be expanded. Sometimes, property that can be added as a future phase to the community is not ultimately made a part of the community or is developed for a completely different use. There is also usually no guarantee that properties built in other parts of the community or in a future phase will be the same size, architectural style, housing type or even in the same price range as houses built in earlier phases.

Does the Developer Get to Control the HOA? When lots are being developed and sold, the developer or "Declarant" of a HOA normally controls the Association by having the right to appoint and remove its directors and officers. This period of Declarant control can last for years and its duration is set forth in the Declaration. When most or all of the lots have been sold, the Declarant normally loses this right to appoint and remove the officers and directors of the HOA Board of Directors and the owners thereafter elect a member controlled Board of Directors. This event is often referred to as the turnover of the Association.

Are the Covenants in the Declaration Enforceable? As a general rule, the covenants in the Declaration, even those pertaining to restrictions on the use of lots, are enforceable. The Declaration is in the nature of a private contract between all property owners that is recorded in the land records and the nature of these private restrictions often go well beyond the type of regulations adopted by local governments. In a HOA, the idea that a person's home is his castle gives way to the concept that all owners give up certain rights to enjoy the benefits of living in a community with a HOA. As a matter of Georgia law, owners are on constructive notice of and bound by the recorded Declaration whether or not they have actually read it. This is why it is important for buyers to confirm during any due diligence period that there is nothing objectionable in the Declaration.

How Do I Tell Whether I am Buying into a Community with a HOA or a Condominium Association? Most detached single family home communities are organized as HOAs. Townhomes can either be organized as a HOA or a condominium. Most midrise and high-rise residential buildings are condominiums. Reviewing the legal documents for the community is the best way to tell whether it is a condominium or a HOA. If the community is a condominium, the Declaration is required to include the word "Condominium". Therefore, a Declaration of Covenants, Conditions and Restrictions would normally refer to a HOA while a Declaration of Condominium would refer to a condominium. State law also requires that the name of the condominium association include the words "condominium association" or "unit owners' association". Therefore, if the name of the association in the Bylaws includes the words "homeowners' association", it is not normally a condominium. However, if it includes the words "condominium association" or "unit owner's association", it is normally a condominium.

How Do I Find Out if the Seller Owes Any Money to the HOA? Most HOAs will file a lien against any lot where the owner has not paid the monies owed to the HOA. Other HOA's have automatic lien rights where no lien needs to be filed in the land records office. A title search and assessment "clearance letter" from the association should reveal whether (and what monies, if any) are owed to the HOA. These are normally obtained by the attorney handling the closing. In many cases, the HOA will charge a fee for issuing the clearance letter.

A Final Word Concerning HOAs. The HOA lifestyle offers owners many benefits. Recreational amenities are often available that few owners could otherwise afford. Covenants tend to ensure a uniformity of exterior appearance in the community and prevent behaviors that are inconsistent with community standards. While this lifestyle is wonderful for most buyers, it is not for everyone. Reading the Declaration is the best way for buyers to decide whether they will be comfortable with the nature and scope of the regulations to which they will be subject.