



COMMUNITY MATTERS

LUEDER, LARKIN & HUNTER

News and Trends in Community Association Law

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A Ship Without a Captain

by | **Brendan R. Hunter, Esq.**

Most community associations are Georgia nonprofit corporations subject to the Georgia Nonprofit Corporation Code. As a Georgia nonprofit corporation, the association

is required to have a board of directors. The responsibilities, duties, and obligations of the board of directors are set forth in the Georgia Nonprofit Corporation Code, as well as the governing documents for the association. Generally, the board of directors is responsible for the administration and operation of the association. This includes, but is not limited to, adoption of the budget, retaining personnel to perform services on behalf of the association, and entering into contracts on behalf of the association.

The board is the body that determines the operation of the association. But what happens when there are no board members, and what can the members do to get a board in place?

The association acts through its board of directors. It is the board that makes decisions for the association subject to the governing documents of the association. If there is no one serving on the board, the association is limited in what it can do. If the board had retained a management company for the association, that management company would be permitted to continue to perform certain administrative functions provided for in the management contract. This includes, but is not limited to, receiving and depositing assessments from owners and paying invoices for work previously authorized or relating to contracts previously entered into by a board. If there is not a management company, there is potentially no one that can even perform these basic administrative functions.

Consequently, the failure to have a board can have serious, adverse consequences for the association. Additionally, without having a board and officers, electing a board can become more difficult. Generally, it is the board/officers that call the meetings of the association and send notices to the



members. Consequently, even if there is a management company, the management company is generally not authorized to simply set the meeting and send notice of the meeting.

However, the Georgia Nonprofit Corporation Code provides a mechanism for the members to petition the association to call a special meeting.

As such, the members can petition the association to call a special meeting for the purpose of electing a board. After

compliance with the provisions of the Georgia Nonprofit Corporation Code and any applicable provisions of the governing documents of the association, the members could then call the special meeting and provide notice to the members of the association. At such special meeting, the members would then be able to elect a new board that would be able to right the ship.

There are also situations where the entire board wants to resign. The board can take a few steps to eliminate many of the issues addressed above before resigning. Most bylaws permit the board to fill vacancies on the board caused by resignation. However, if the entire board resigns at once, there are no board members that can take action to fill those vacancies.

As such, prior to the entire board resigning, the board can solicit the members to find volunteers that are willing to serve on the board. Once there are a sufficient number of volunteers, the board can resign in stages, so that the remaining board members can fill those vacancies as they are created. ❖



WHEN:

Saturday, September 23, 2023
9:00 am – 12:00 pm class
8:00 am continental breakfast offered

WHERE:

Dogwood Room, Smyrna Community Center
200 Village Green Circle, Smyrna GA 30080
In Person and Virtual Options

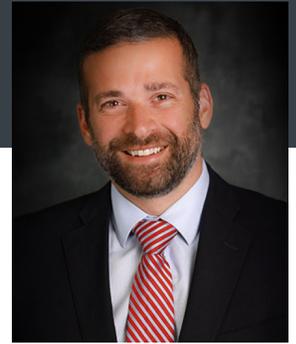
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Pet Peeves: Enforcement Issues with Pet Restrictions?

by | **Joseph C. Larkin, Esq.**

Planned communities in Georgia have restrictive covenants in place to maintain a certain quality of life and protect property values. These covenants often include rules and regulations



regarding pets such as breed restrictions, size limits, or even bans on certain types of animals. While these measures are intended to promote harmony and peaceful coexistence, enforcing restrictive covenants related to pets can present a range of challenges for community associations and homeowners alike.

First, it is important to note that in Georgia, the Georgia Supreme Court has stated: "The general rule is that the owner of land has the right to use it for any lawful purpose. Restrictions upon an owner's use of land must be clearly established and must be strictly construed. Moreover, any doubt concerning restrictions on use of land will be construed in favor of the grantee." Otherwise stated: Where some ambiguity exists, courts may be inclined to interpret a restrictive covenant narrowly and in a light most favorable to the owner. This general rule proves to be problematic with two pet restrictions that are commonly found in Georgia covenants, namely 1) restrictions relating to the specific breed of dog and 2) limitations on a pet's weight.

Many communities in Georgia will have the following language in their use restrictions: "[n]o potbellied pigs, snakes, **pit bulldogs, Rottweillers, Doberman Pinchers** or other animals determined in the Board's sole discretion to be dangerous may be brought onto or kept on the Condominium at any time." (Emphasis added). You may notice that the specifically named breeds are either misspelled or don't actually exist. For example, there is no such thing as a "pit bulldog," rather, the American Kennel Club (the "AKC") refers to this breed as an "American Pitbull Terrier." And the correct spelling of the other named breeds are "Doberman Pinschers" and "Rottweilers." This drafting error is problematic, but it is not fatal to its enforcement. In reality, a typo can be fixed with a scrivener's error affidavit, and regardless, the drafter's intent is quite clear. The problem with breed restrictions is that it must be strictly construed. For example, what if the dog is only part American Pitbull Terrier? It can be very difficult

to determine a dog's breed based upon its appearance alone. Thus, owners will often argue that it is not the breed we believe it to be. For example, a common response to an allegation that a dog is an American Pitbull Terrier is that the dog is really a "Staffordshire Terrier," or that it is a "mutt" that may have some of that breed in its lineage.

While DNA testing exists for pets, the results provided by the AKC typically do not reveal the animal's breed or whether an animal is "purebred." In reality, a Chihuahua and a Great Dane are 99% identical from a genetic standpoint. That said, the technology and databases are improving in this field, which could help with enforcement down the road.

In short, enforcement of this imperfectly drafted sentence is more trouble than it is worth. Our general recommendation is to only proceed against animals that have shown physical manifestations of aggressive or dangerous behavior. Of course, if we have evidence supporting our claim that the dog(s) are in fact purebred Dobermans or Rottweilers (for example, the owner consistently brags about her purebred animals, has displayed paperwork on the animals, etc.), then it will be okay to rely upon this provision.

Many condominiums in Georgia include provisions that prohibit animals that weigh more than a certain amount. For example, you may see a provision that states "[a]ny dog that weighs more than forty (40) pounds is prohibited on any portion of the Condominium."

As you can imagine, pet weight restrictions are challenging to enforce and are a breeding ground for litigation. First, unless it is extremely obvious or we can visually ascertain a dog's weight within a reasonable degree of certainty, most people have no idea how much a dog actually weighs. Some communities require pet registration, which may include a requirement that owners provide veterinary records, but these regulations come with frequent objection and argument. I have also noticed that veterinary offices will side with the pet and

pet owner, and will modify records accordingly. In short, it is difficult to know a dog's weight at any given moment.

Secondly, it is somewhat arbitrary. Why are we implementing this rule? What issue is it meant to address? At what weight do we draw the line and why? For example, why is a 40lb overweight pug more damaging to the common elements than a 34lb rottweiler puppy? If the pug was put on a diet and lost a little weight, would it benefit the building?

Finally, when one purchases (or adopts) a pet, they often have no clue whatsoever how large it will eventually grow. It could comply perfectly with our weight limits while it is a puppy, but then grossly exceed it within a couple of years. By then, the owner has bonded with the animal and will be unwilling to voluntarily come into compliance.

In conclusion, pet enforcement is probably the most frequently challenged enforcement remedy a community association might have. Enforcing pet-related restrictive covenants can often pose practical and emotional challenges for community associations. Determining whether a homeowner is in violation of the rules may require evidence, such as eyewitness testimony, photographs, and/or documentation. Gathering and presenting such evidence can be time-consuming and may require significant effort from community association volunteers or professionals. Further, enforcement efforts are almost always challenged by the owner. The increased likelihood of challenge is primarily because people love their pets and are willing to put up a fight to keep them. Pets are often considered members of the family, and pet owners are emotionally attached to their animals. When restrictive covenants limit or ban certain types of pets, it can lead to resentment and frustration among homeowners who feel their rights are being infringed upon. Balancing the interests of pet owners with the overall goals of the community can be a delicate task, requiring open dialogue and understanding between all parties involved. ❖



FHA Approval for Condominiums - Should You Consider It?

by | **Brandon D. Wagner, Esq.**

We are often asked how condominium developments are approved by the Federal Housing Administration (“FHA”) and what benefits come with that certification approval.

Typically, these questions come from those owners who are looking to sell a unit to a potential buyer who has been pre-approved for FHA financing. Unfortunately, for condominiums, only those associations that have undergone the formal approval process with FHA will be eligible to be financed using an FHA backed mortgage. Like most government programs, approval can take some time to achieve, and the U.S. Department of Housing and Urban Development (“HUD”) has mandated that condominium approvals must be renewed every two years, so condominiums need to be proactive to prevent an expiration of their approval certification status and the loss of benefits to unit owners.

There are several benefits to obtaining FHA approval. One such benefit is that approval allows prospective buyers to utilize federally insured FHA mortgages to purchase units within the condominium. This provides a huge incentive for condominiums to obtain approval because it significantly expands the pool of prospective buyers. FHA loans typically require a lower down payment of 3.5 percent, compared to the typical 5 to 20 percent down payments required for conventional home loans. FHA loans are also more attractive due to their slightly relaxed credit score requirements, which typically benefits first-time home buyers. Individuals utilizing an FHA loan are required to live in the unit as their primary residence, effectively reducing the amount of investor-owned properties in a condominium. Condominiums with fewer

investor-owned units often experience higher property values than those with a greater number of investor-owned units, not to mention experience lower delinquency rates.

Another huge benefit of obtaining FHA approval is that it opens the door for senior owners to participate in the federally insured FHA Home Equity Conversion Mortgage (HECM) program, otherwise known as a reverse mortgage. This program allows qualified owners of a certain age to withdraw some of the equity in their units, up to the lesser of the appraised value of the home or the HECM FHA mortgage limit of \$625,000; typically without being required to make any payments until certain qualifying events occur. Only owners residing in FHA approved condominiums are eligible for this program, which provides certain benefits that other reverse mortgage programs may not. For instance, private reverse mortgages are backed by the financial strength of the companies providing those loans, whereas HECM loans are backed by the federal government. Some private lenders also place restrictions on how the loan proceeds can be used, but HECM proceeds can be used for any purpose.

It is important to note that while FHA approval is open to all condominiums, not all condominiums are eligible for approval. HUD requires condominiums to meet strict financial and fiduciary requirements before it will grant approval. Some of the main

requirements include: 1) no greater than 15 percent (15%) of units can be delinquent in the payment of assessments; 2) at least 10 percent (10%) of the annual budget must go toward funding reserves; and 3) condominiums must have a Fidelity/Crime insurance policy with certain minimum coverage requirements.

Expanding the pool of potential buyers and providing unit owners with the ability to obtain a federally insured FHA reverse mortgage are just two of the benefits that accompany FHA approval. Condominiums that are interested in obtaining more information regarding the approval process, or the specific requirements for approval, are encouraged to contact their association attorneys for assistance. ❖



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