

## Amendment Checklist

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Certain governing document provisions are essential to efficient and effective community association governance. Further, there are many document provisions that, while not essential, can greatly assist an association in tailoring its governing documents to support the unique goals of its membership and strengthen its community. For that reason, we created the below checklist of essential and helpful document provisions so that you can ensure that your association's governing documents contain all provisions necessary to support your community's goals. To be valid, the provisions below must be included in either your association's governing declaration or bylaws. Thus, if you find that your documents are missing any of these provisions, they must be added in by amendment. If you would like to learn more about amending your documents to add in any of these provisions, please contact us.



### 1. Authority to Adopt Rules and Regulations

A community association's board of directors does not have any authority to make rules governing an owner's use of his or her property unless that right is specifically granted to the board in the association's governing documents. This is true even if the association is subject to the Georgia Condominium Act or the Georgia Property Owners' Association Act (the "POAA"). The right to make rules concerning an owner's use of his or her property is essential as it provides the board with the ability to tailor and adapt the existing use restrictions in the declaration to better fit the needs of the association.

### 2. Fining Power

The authority to levy fines is essential because, without fining authority, an association's enforcement options are typically limited to self-help to abate a violation or filing a lawsuit to seek specific performance by the owner. The use of self-help can create liability concerns and is not practical for large-scale violations. Further, filing lawsuits can be costly and take a long time to resolve a violation. In contrast, fines can be an inexpensive and relatively quick means of getting an owner's attention and prompting action to correct the violation.

### 3. Self-Help/Abatement

The right of self-help/abatement allows the board to correct a violation on an owner's property if the owner refuses to do so. If provided in the governing documents, the board can assess the costs it incurs in its exercise of self-help back to the owner. Many boards find this ability helpful in addressing overgrown or unkempt lawns and similar maintenance violations.

## 4. Suspension of Membership Rights

Suspension provisions can provide the board authority to suspend an owner's right to vote and right to use common areas (including both the right to use the recreational amenities and the right to park on the common areas) for failure to pay assessments or other violations. Suspension of voting and common area use rights should be automatic once an owner becomes more than thirty (30) days delinquent in paying assessments.

## 5. "Limit" v. "Deny"

Some condominium declarations that provide authority to suspend an owner's use of common elements contain a limitation that a board may not suspend common area rights if doing so would "limit" an owner's right to access his or her unit. The word "limit" in this context can eviscerate the association's right to suspend common area use, as suspending an owner's right to park or use other common areas could be interpreted to limit that owner's right of access to his or her property. We recommend amending to remove the word "limit" and replace it with the word "deny," so that the board can suspend common area use rights so long as an owner can still access his or her property, even if the common area suspension makes it more difficult to do so.

## 6. Utility Suspension

In communities in which the association pays for water or other utilities as a common expense, this provision gives the board authority to suspend water and other utility services to a delinquent owner's unit until the owner pays off his or her balance, including all costs incurred by the association in suspending the utility. Note that by statute, condominiums can only suspend water after obtaining a judgment of at least \$750 against an owner.

## 7. Leasing Restrictions, Including Prohibitions on Airbnb

Leasing restrictions can provide a board with broad authority over the leasing of properties within the community. Leasing restrictions can limit the number of homes that can be leased in your community ("leasing cap"), provide that a leasing owner must give the association a copy of the lease and names of the tenants, require that a tenant pay rent to the association if the owner becomes delinquent, and can provide the association with the power to evict the tenant for failure to obey the association's governing documents. In addition, some communities with existing leasing caps may wish to consider amending to provide for a maximum duration that owners can lease their property to facilitate turn-over of the leasing waiting list, to provide for a leasing administration fee to cover the costs incurred by the association in handling the administration of the leasing program, and to require that leasing owners keep a current lawn maintenance contract in place.

Furthermore, given the recent development of transient leasing websites such as Airbnb and VRBO, even communities with existing leasing provisions will often need to update those provisions to specifically prohibit Airbnb and other transient leasing. Communities with existing leasing caps may also want to consider amending to include provisions designed to close loopholes that have developed over the past few years and limit an owner's ability to circumvent an association's leasing restrictions.

If you find that your documents are missing any of these provisions, they must be added in by amendment.

## 8. Submission to the Property Owners Association Act

The Georgia Property Owners' Association Act (the "POAA") is a Georgia law, similar to the Georgia Condominium Act. The POAA provides many benefits and protections to homeowners' associations, including an automatic statutory lien for assessments that eliminates the need for filing paper liens, the ability to foreclose for non-payment of assessments, and perpetual duration of the association covenants.

In addition, any homeowners' association considering adopting amendments that could be construed to impose greater restrictions on an owner's use of his or her property, such as leasing restrictions, must first amend to join the POAA. This is because of Section 44 5 60(d)(4), of the Official Code of Georgia Statutes, which states that no change (i.e., amendment) in an association's covenants that imposes a greater restriction on the use of property ("use restriction") will be enforced unless agreed to in writing by the owner of the affected property. Under this statute, if a community not subject to the POAA passes an amendment containing a use restriction, such as an amendment to restrict the number of houses that may be leased at any one time, the amendment will not be enforceable against any homeowner who has not agreed to the amendment in writing because the amendment seeks to impose a new restriction on the ability of homeowners' to rent their property. However, Code Section 44 5 60(d)(4) does not apply to community associations subject to the POAA. So, a community association subject to the POAA can adopt amendments restricting an owner's use of his or her property and such amendments will be binding against all owners, including those who voted against it.

## 9. New Types of Fees

Over the years, many of our communities have found it helpful to add provisions to their documents authorizing them to charge owners additional fees not originally provided for in their documents. These include initiation fees, which are due upon the conveyance of a Lot from one owner to the next and are usually paid by buyer and collected at closing, and "Foreclosure Administration Fees," designed to compensate the association for the extra expenses incurred as the result of foreclosures. This fee is typically around \$1,000.00 and would be due and payable by a foreclosing lender upon taking title to a property through foreclosure. Other examples of types of fees that can be amended into documents are fees for moving in and out of condominiums (designed to compensate associations for additional wear and tear on common elevators and hallways caused by moves); pet fees, which are charged to pet owners to compensate the association for costs associated with dogs on association property; fees for architectural review; and security deposits for construction work and moving in and out of a condominium building.

## 10. Late Fees/Interest

The ability to charge late fees and interest on delinquent balances can be an effective tool in encouraging owners to timely pay their assessments. If your community association's governing documents do not specifically allow for recovery of late fees and/or interest, this right must be added by amendment. In addition, for those associations not subject to either the POAA or the Georgia Condominium Act, a 2016 Georgia Court of Appeals case, *Northside Bank v. Mountainbrook of Bartow County Homeowners Association, Inc.*, may negatively impact your association's ability to collect late fees and interest, even if the right to do so is stated in your governing documents. Specifically, the case held that late fee provisions allowing the board of Directors to decide the amount of a late fee, instead of specifying a specific late fee amount or percentage, were invalid. The court also held that unless the declaration states a specific numerical interest rate to be charged on late assessments, then the most that the association can charge is 7%. Community associations negatively affected by this ruling can recover their ability to collect late fees and interest by submitting to the POAA, or by amending the declaration of covenants to specify the numerical late fee and delinquent interest percentage that can be charged on late assessments.

## 11. No Duty to Enforce

At times, a board may determine that a technical violation of the association's governing documents does not warrant enforcement action, for example, if the issue is really a neighbor to neighbor dispute which is not of importance to the community-at-large. However, many association documents can be interpreted to impose a duty on the board to take enforcement action based on any violation, no matter how trivial. This means that a decision not to enforce the covenants, for whatever reason, could expose the board to liability for suit for its failure to enforce. Thus, we recommend that an association's documents contain a provision allowing the board the discretion to decide not to enforce a particular violation if it determines enforcement is not warranted.

## 12. Security

Because of the potential risk of liability to the association for not providing security or for providing inadequate security, a community association's documents should contain a provision that clearly provides that the association has no duty to provide security to the owners, and that each owner is responsible for his or her own security. The Georgia Court of Appeals has held that such a security provision protects the association in the event that it is sued for an alleged failure to provide adequate security.

## 13. Board Vote Via E-mail

When boards vote via e-mail, they technically vote via "written consent." Georgia law allows for board members to take action by written consent by majority vote of the directors. However, many community association bylaws require that when voting via written consent, the board can only take action by unanimous consent. This should be changed to allow boards to approve actions with the written consent of a majority of directors, just as would be required at a meeting.

## 14. High Risk Components

Stacked condominiums can minimize the risk of water leaks, fire and other hazards by including a provision allowing the board to designate certain unit components, such as water heaters and plumbing, to be a "high risk" component and giving the board authority to conduct inspections of such components and require owners to take action to safeguard against the risks posed by such components.

## 15. Enforcement Costs

The documents should provide the board with the authority to assess costs it incurs in the enforcement of its documents, such as attorneys fees, to the violating owner.

## 16. Architectural Control Provisions

Architectural control provisions provide the association with prior approval rights over any proposed change to the exterior of an owner's property, including landscaping, building of new structures or additions to structures, and painting. Those associations that currently have such architectural control provisions should ensure that such provisions contain a disclaimer to protect the association from possible liability stemming from its approval of a proposed change. Additionally, some architectural control provisions contain an "automatic approval" clause that provides that an owner's application for approval of a proposed modification is deemed approved if not decided upon by the board after a relatively short period of time, such as thirty days. Many boards choose to amend this provision to require that the owner provide a notice to the board before such automatic approval becomes effective.

## 17. Vehicle Issues

For a homeowners' association to have authority to tow a vehicle from an owner's property, or for a condominium association to have authority to tow from its common elements, such right to tow should be specifically provided for in the association's governing documents. Further, if the association wants to prohibit certain types of vehicles, such as vehicles with commercial writings on their exterior, trailers, recreational vehicles or the like, these prohibitions must also be stated as specifically as possible in the association's documents.

## 18. Smoking

Generally, boards have authority to regulate smoking in common areas. However, in order to regulate smoking within a condominium unit or lot, a provision giving the board such authority must be included in the recorded governing documents.

## 19. Pets

If the board would like to regulate the number of pets, type of pets, specific breeds of dogs and/or weight limit of permitted pets, the governing documents must include these provisions specifically outlining the permitted and prohibited types, breeds and sizes of pets. Such a provision can also provide the board authority to remove a pet that has been deemed to be dangerous and/or a nuisance.

## 20. Insurance Deductible

In 2013, the Georgia Condominium Act was amended to allow a condominium association to assess an owner whose unit was damaged by fire or other casualty covered by the association's insurance policy up to \$5,000 of the policy's deductible. Previously, the limitation was \$2,500. If your governing documents contain a lower limitation on the amount of the deductible that can be assessed back, then the board should consider an amendment to allow it to take advantage of the new, higher, deductible amount allowed under the Condominium Act.

*If you would like to learn more about amending your documents to add in any of these provisions, please contact us.*