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# Association Issues in Property Transfers

**P**rotect yourself when buying, lending on or leasing property that is subject to a property owners association.

An “association” is a non-profit corporation formed to enforce and carry out the obligations delegated to it in a declaration, such as:

- maintain and insure the common areas
- enforce rules and regulations, such as landscaping standards and design standards for new construction
- hold meetings and conduct business as any other non-profit would be required to do
- collect assessments from property owners
- place liens on the properties of non-paying owners



All property owners are members in the association, and the declaration and bylaws for the association will dictate the voting power of each owner. Typically, voting rights are linked to the size of the property or percentage owned by each owner in the association. The declaration may require the formation of committees to carry out its intent. A common example is an architectural control committee.

The association derives its authority from a “declaration,” the purpose of which is to subject certain real estate to restrictions for development and future use. (It is commonly called a declaration of covenants, conditions and restrictions, or a declaration of condominium.) The person or entity making the declaration is called the “declarant.” The declarant must either own all of the property described in the initial declaration, or the other property owners must consent to the declaration. That is, a declarant cannot initially impose a restriction on property owned by another person without that person’s written permission. However, once a valid declaration is recorded in the real estate records of the county where the affected property is located, the declaration will affect and bind all future property owners. We often think of the developer as the declarant.

A typical declaration might:

- prohibit certain uses of the property (beyond any restrictions imposed by zoning ordinance)
  - require owners to maintain their properties at a predetermined standard (e.g., landscaping with grass and plants rather than pine straw)
  - impose design guidelines for new construction and modifications to existing structures (in addition to any guidelines or requirements imposed by zoning ordinance), including approval rights of the association or sub-committees for any new development
  - establish common areas (e.g., detention ponds and landscaping and signage located at entry points) and easements for the mutual benefit of all properties subject to the declaration, such as utility and access easements
- require property owners to pay assessments to an association to cover the association’s expenses of maintaining common areas and enforcing the declaration

- delegate to an association the right to enforce the provisions of the declaration
- reserve to the declarant certain rights such as the right to amend the declaration and subject other properties owned by the declarant to the declaration

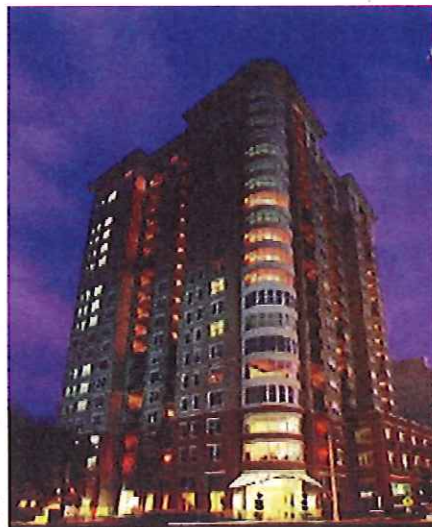
A condominium declaration must strictly comply with the Georgia Condominium Act, and contains many of the same general restrictions, monetary obligations and covenants as a general declaration.

*How can I find out if a property is subject to a declaration?*

Two words – title examination. In an acquisition, even if one does not plan to purchase title insurance, and perhaps especially in such case, a prudent purchaser of real estate (and its lender) should examine title to the property to determine what recorded instruments are affecting the property, including any declarations. In order to “run with the land” and bind future property owners, a declaration must be recorded in the real estate records in the county where the property is located and describe the real estate that it affects. Thus, a properly conducted title examination will reveal the existence of any declaration affecting the property.

**Declaration Due Diligence (Estoppel Certificates and other practice tips)**

Owners and end-users (i.e., tenants) of real estate subject to a declaration as well as lenders with a security interest in such property should all read and understand their rights and obligations under the declaration. In addition to knowing the monetary obligations such as assessments, fees and fines that the property owner will be assuming upon its purchase of the property, one should at a minimum confirm that its intended use of the property is permitted by the declaration. If the property is in unimproved, the potential purchaser or user should confirm that its development plan will not violate the declaration (or that it at least understands the approval process).



Prior to closing, the purchaser should confirm that the property fully complies with the declaration and that all assessments are paid in full. A signed “estoppel certificate” from the association confirms the seller’s and property’s compliance with the declaration, and is a useful tool for potential purchasers. The theory behind the estoppel is that the association is “estopped”

from asserting claims against the new owner after closing to the extent that the claims are contrary to the statements made in the estoppel certificate. Examples of statements to include in an estoppel certificate are:

- Pursuant to the association’s records, the property is currently owned by \_\_\_\_\_ (“Owner”)
- No amounts are currently due and owing from Owner, no liens have been placed on the property by the Association, and neither Owner nor the property are in default under the Declaration.
- The next assessment in the amount of \$\_\_\_\_\_ will be due on \_\_\_\_\_.

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### Declaration of Covenants, Conditions and Restrictions



- The Association validly exists and was duly formed in the State of Georgia.
- Except for the development guidelines contained in Article \_\_\_ of the Declaration, there are no design standards affecting the Property, and no other updates to the said standards exist.
- Owner is entitled to \_\_\_ votes in the Association.

A potential purchaser might also want to request financial information for the association, such as a current budget and balance sheet.

A timely obtained estoppel certificate will bring to light any problems with the property that might not be apparent from the purchaser's inspection, such as unpaid assessments that a purchaser could require to be paid at closing by the seller. Another example from my practice occurred when the association revealed in an estoppel certificate that the property was in violation of the requirements for screening of dumpsters. The potential purchaser required the seller to install appropriate screening at that seller's expense prior to closing.

**Tip: Request an estoppel certificate early in the due diligence period, as it can sometimes take several weeks to get an estoppel from the association.**

There are myriad other issues that may arise when purchasing property subject to a declaration, including the following:

**The association does not exist or is not active.** If the association is inactive, but the declaration is still in effect, there is uncertainty as to whether the common areas are being maintained (and who is responsible for maintaining them). There is risk to the property owner in that the standards imposed by the declaration will not actually be enforced (e.g., if a neighboring owner allow its property to fall into disrepair, this could have a negative effect on the property value and appearance). The purchaser may need to take action to reinvigorate the association.

**Declarant rights issues.** The declarant often retains certain rights, such as a limited right to control the association board of directors, the right to add more property to the association, and the right to approve all amendments. If one is purchasing property from the declarant, the purchaser may want to negotiate for an assignment of the "declarant rights" as well as the real estate. A lender to a declarant may require a "collateral assignment" of the declarant rights, so that in the event the lender forecloses and acquires the property, it has the corresponding rights as declarant. In other cases, the declarant may retain rights long after it actually owns any property subject to the declaration, which poses its own set of risks to property owners with interests adverse to the declarant.

## DIVERSIONS 😊

### East Oregonian

Switch-pitcher Pat Venditte made his Major League debut for the Oakland A's against the Boston Red Sox at Fenway Park in early June, using both arms to pitch two scoreless innings in relief. The newspaper probably intended to call Venditte "ambidextrous" but it's more fun to think that the East Oregonian newspaper uncovered something about Venditte even more shocking than his ability to pitch with both arms.



## DIVERSIONS 😊

### Summer's Fall Reading List

#### NON-FICTION

- A Little Bit of Everything by Samora Dissendat
- How to Draw by Ellis Strait
- It's All In Your Head by Madge Enation
- Days of the Revolution by Millie Tant

#### FICTION

- The Scent of a Man by Jim Nasium
- Disappeared! by Otto Slight
- The Lion Attack by Claudia Armoff
- The Monkey's Cage by Jim Panzee

#### CHILDREN

- Joe Wins at the Track Meet by C. Howie Runns
- Life Before Cars by Orson Buggy
- Don't Be Scared by Emma Fraid
- Cry Wolf by Al Armist

#### BIOGRAPHY

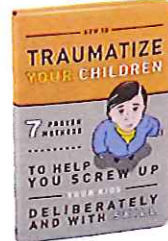
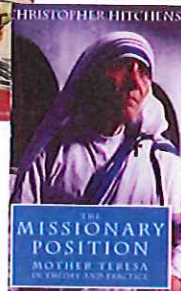
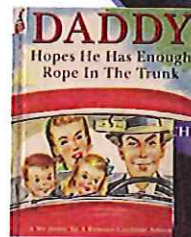
- Elvis Impersonator by Amal Shukkup
- My Youth in Detroit by Helen Earth
- Leo Tolstoy by Warren Peace
- Lewis Carroll by Allison Wonderland

#### GENERAL

- The Shrinking Society by Les Ismoor
- Take This Job And Shove It by Ike Witt
- The Fortuneteller by Reid Palms and Crystal Ball
- Erotic Adventures by Oliver Klozoff



Summer



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