

UNDERSTANDING ABOUT ADDING LEASING RESTRICTION TO YOUR COVENANTS

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It has become common for associations to adopt leasing caps and other restrictions by amending their covenants. The most common amendment is for limiting the total number of homes that can be rented at any one time. Some associations prohibit all leasing, except for hardship exceptions. The Georgia courts have ruled that associations may amend covenants in these ways, and enforce the restrictions through the use of daily fines.

I. PURPOSE OF LEASING RESTRICTIONS

There are several reasons for the trend in adding leasing restrictions to covenants.

- (a) Many owners want to retain the neighborhood's character as an owner-occupied subdivision, rather than a rental community.
- (b) Sometimes tenants are less invested in their surroundings because they lease rather than own. This can result in a greater amount of covenant violations, and even cause a depreciation of property values.
- (c) At times, it can be difficult to locate and contact absentee owners. In turn, makes it challenging to communicate with them regarding maintenance issues, and their participation in membership voting.
- (d) The popularity of short-term rentals through online services, such as VRBO and Airbnb, has encouraged owners to amend their covenants.
- (e) Most importantly, the rental market is booming, and investment companies are seeking out subdivisions that have not yet added leasing restrictions to their covenants. Once such a subdivision is identified, the investment company can purchase any homes that come up for sale.

II. SECTION 8 HOUSING

Another consideration is Section 8 renters. (See article on Section 8 leasing.) Those who qualify for Section 8 assistance are issued coupons the landlord can convert to cash. Furthermore, the renters can live in whatever subdivision they choose, as long as the owner/landlord is willing to accept the coupons. It is against the law for covenants to discriminate specifically against Section 8 renters, but any leasing restrictions that apply to all owners, will also apply to Section 8.

III. LEASING CAPS & HARDSHIP EXCEPTIONS

Leasing caps typically vary from 5% to 15%, but can go as high as 25% or more. The leasing cap amount is one of the variables to consider for getting the amendment voted in by the required percentage of owners (often two-thirds). Including temporary hardship exceptions above the cap may also be helpful in passing the leasing restrictions. Examples of hardship might include such things as: (i) active military deployment; (ii) recent death of a spouse; (iii) terminal illness; or (iv) the inability to sell at fair market value after a certain period of time.

IV. GRANDFATHERING

What type of grandfathering provisions are included in the leasing restrictions, will probably be the most important factor in obtaining the necessary number of votes.

Grandfathering Only The Current Lease Terms Is No Longer Available Under Georgia Law.

The option of only grandfathering in current leases (as opposed to the owners who are renting) is no longer available. As of January 1st, 2021, the Georgia legislature, with encouragement from the rental industry, eliminated the choice to only grandfather current leases. Any leasing restriction amendments recorded prior to January 1st, 2021, which only grandfathered current leases, will

remain valid and enforceable. Therefore, those same owners would be subject to the other leasing restrictions in the amendment once the current lease terminated.

Owners Who Are Currently Leasing. Pursuant to Georgia law, this is now the minimum, required grandfathering. It gives an owner who is renting at the time the leasing amendment is filed, the right to lease numerous times outside the restrictions until there is a transfer of title. The future owners would then be subject to the provisions of the leasing restriction amendment.

All Current Owners. This is the most liberal alternative, and includes all owners in the subdivision even if they are not currently leasing. Once the current owner sells their home, all future purchasers are subject to the leasing restrictions. This is often the choice when there are already numerous rentals in the subdivision, and the Board feels it is the only way to obtain the number of votes required to pass the leasing amendment. On the positive side, passing this type of amendment would still discourage investors and leasing companies from buying into the neighborhood. This is especially true if the amendment includes a provision requiring an owner to reside on property for at least 12 months prior to qualifying for leasing.

V. ATLANTA LEASING TRENDS, AND SINGLE-FAMILY HOMES BUILT FOR RENTAL (BFR)

The Atlanta metro leasing market has exploded, and the latest demand is for homes in upscale neighborhoods. For whatever reason, many consumers who have the financial resources to purchase their own home, only wish to rent. This has created a dilemma because investment/rental companies are actively searching for subdivisions without any leasing restrictions. Once they locate such a community, the investors can purchase any homes that come up for sale. As a result, numerous associations have amended their covenants to include leasing restrictions.

In response to this increase in the leasing market, the latest trend for new construction is the development of subdivisions built specifically for the purpose of residential leasing. The community could consist of free standing houses, townhomes, or condominium units. They are usually sold immediately to investment companies, and are not meant to ever be owner-occupied. This trend could be a win-win for both the established subdivisions and the investment companies hoping to take advantage of the new rental market.

VI. NECESSITY OF AMENDING INTO THE GEORGIA POA ACT

If your covenants are not already part of the Georgia Property Owners Association Act (“Act”), then it will be necessary for subject the covenants to the Act, as part of the amendment. Although the POA contains various provisions, there is one aspect that is critical when adding leasing restrictions. Under the Act, the leasing amendment will apply to all the owners, whether or not they voted in favor of the restrictions.

This is important because a different Georgia statute, states that any covenant amendment adding restrictions to the ‘use of the property’ will only apply to owners who voted in favor. For this reason, the amendment will need to also submit the covenants to the Act. It is important to note that the POA requires the amendment to be passed by at least two-thirds of the owners who are eligible to vote. This will apply even if your covenants require a simple majority vote.

The above article is not a substitute for consulting with legal counsel in your State regarding the specific fact situation.