

COVID-19 Presents Unique Issues for Community Associations

03.20.20

The COVID-19 pandemic has caused a unique set of issues for community associations. States, counties, cities, and the federal government have taken unheard of measures in an attempt to slow the spread of COVID-19. These governmental entities have declared states of emergency in connection with the spread of COVID-19. The President and many governors, including the governor of Texas, have recommended that individuals avoid gatherings in excess of 10 people. Many aspects of community life involve socialization. This national emergency necessitates that community associations be aware of the issues and plan accordingly. Although the situation is fluid and changes hourly, the following is a summary of the issues and some courses of action that are available to community associations in Texas:

1. Use of Amenities and Other Facilities

If your community has recreational facilities, those facilities should be closed if possible. This includes fitness centers, swimming pools, amenity centers and other common facilities ("Common Facilities"). Common Facilities only serve to increase the risk of the spread of viruses and closing these facilities will reduce the risk of COVID-19 spread. Your association may lack the ability to physically close some facilities like outdoor playgrounds, but your association should consider sending notice to residents and Owners that these facilities are closed and/or erecting closure notice signage near or adjacent to these facilities. Your local municipality and the State of Texas has ordered places like bars, restaurants, gyms, and other public businesses to close. Common interest communities should support and obey that direction. Notify your residents of your decisions and solicit the support of your owners. The owners will appreciate your concern for their health and the efforts you are taking.

2. Guests

Guests and invitees to your communities may create the risk that COVID-19 will be spread within the community. Guests and invitees may include caretakers, housekeepers, dog walkers, repairmen, contractors, moving personnel, food delivery individuals, and numerous other persons. Some categories, such as caretakers, are of course required and should be permitted to access your community to provide services. Others such as contractors, non-essential repair persons and social guests, may not be essential to the health and welfare of the owners. A complete prohibition of non-residents from accessing your building or curfews is not advisable unless mandated by governmental authorities. Associations should encourage owners to avoid allowing nonessential visitors to visit them in the community.

3. Regular and Special Board Meetings

The Board of Directors (the "Board") of the association should strongly consider either postponing Board meetings to a time in the future or consider having regular or special meetings by conference call, and provide access to all owners via the same conference line which process is acceptable under Texas law.

4. Annual and Special Meetings for Members

If annual or special meetings of members are scheduled to occur in the next three or four months, conducting these meetings will violate governmental mandatory number restrictions for meetings (10 persons in Texas). Annual and special meetings should be postponed until these governmental guidelines are removed or relaxed. The fact that your governing documents require a fixed time for the meeting, should not affect the moving of the annual meeting in light of a "National Emergency." Whether an annual or special meeting should be conducted by absentee or proxy vote only, is a matter that should be discussed with your legal advisor. The position of courts in any case challenging the regularity of an annual meeting, is uncertain, but due to the facts during this crisis, courts may be hesitant to interfere, especially when there is likely no harm to an individual member.

Annual or special meetings can be held by electronic means (conference call), but keep in mind that Texas law requires that the facilities allow all owners to listen to and participate in the meeting and quorum requirements must still be met.

The Association should consult with their legal advisor as to whether an electronic meeting is advisable under the circumstances.

5. Board Meetings

As noted above, Texas law does give the Board of a nonprofit corporation the ability to meet by electronic/telephonic means. In order to hold a Board meeting by electronic or telephonic means, the association must ensure that: (1) each board member may hear and be heard by all other board members; (2) owners are permitted to use the same communication method used by board members to participate, and owners in attendance may hear all board members (except for any portion of the meeting conducted in executive session); and (3) the notice of the meeting sent to the owners includes instructions for owners to utilize the same communication method. Electronic and telephonic Board meetings may be difficult to conduct depending upon the size of your community and the level of owner participation in attending the meeting, and the use and process should be discussed with your legal advisor. Allowable actions without a meeting are permissible in certain instances. Please discuss with your legal advisor your specific needs and whether Texas law allows the actions you contemplate.

6. Notification of COVID-19 in the Community

Whether the Board should notify owners of a person testing positively for COVID-19 is problematic. If the Board or individual owners obtain information (reliable or not) that an owner (or other resident) has tested positive for COVID-19, any notification that identifies the presumed infected person can present problems for the Board or any person that spreads the information within the community. The potential issues involve liability to the individual if the information received by the Board is incorrect, potential right of privacy issues, and other issues. The Association should not publish any information to owners or other residents that would identify any individual who may have contracted the virus. If a resident in the community is infected, the Association should consult with its management company and the Association's legal advisor.

7. Reduction in Assessments

The Board may receive questions relating to the reduction in assessments due to the closing of community facilities. e.g., gym, pool, or clubhouse. If a reduction in assessments is warranted, the governing documents should be examined to determine the proper procedures to implement the reduction. However, due to the uncertainty as to the duration of the closure and the costs which will need to be incurred by the Association related to re-opening the amenities it may not be advisable to adjust assessments. To the extent funds budgeted for operation or maintenance of the administration of amenities are not used during closure, or if funds collected exceed the amounts necessary to re-open the facilities, those funds can be held in the Association's operational reserve account. During the next annual budgeting session, the Board can review funds on hand and projected expenses for the coming year and may make adjustments to the budget as necessary. Any course of action, whether to keep assessments in their current amounts or reduce assessments, should be reviewed by the Association's legal advisor.

8. Development of a Plan for the Community

The Board of Directors of the Association should develop a COVID-19 plan for the community (the "Plan"). The Plan should include consideration of and policies or procedures relating to: (a) vendor access and activity within the community, (b) allowable access to the amenities and other common areas, (c) insurance coverages in place and other contractual obligations to ensure knowledge of potential legal and liability issues that may arise with COVID-19 and how to address these issues, (d) timing of Board and Owner meetings and alternatives to in person meetings, (e) rescheduling of planned or current improvement projects, (f) restrictions on non-critical home improvements, (g) active and known infections within the community, (h) limitations on events and meetings within the community including in common areas to ensure compliance with "social distancing" recommendations and any national, state, and/or local guidance, lockdowns, curfews, and restrictions, (i) the need for hand washing/sanitizing stations and continual monitoring of the need for the restocking of soap, paper towels, tissue paper, and/or other supplies for use within the community, including management offices, bathrooms, and other common areas, (j) actively updating and enhancing cleaning protocols within the community, especially for actively used common areas, which should be coordinated with the Association's management company, and (k) a process to monitor and follow CDC information and guidelines relating to COVID-19. The Plan,

changes to the Plan, and any policies, procedures or directive adopted by the Association to address the COVID-19 pandemic should be actively and immediately communicated to residents and Owners.

Given the rapidly changing and unprecedented nature of the situation, it will be key for the Board to stay well informed of the current status of the situation so that it (and property managers/management companies) are able to quickly adjust current protocols, practices, and/or procedures in your community or implement new ones to meet and handle the existing circumstances at the property. In this regard, the Board must make an informed decision as to operations and develop a reasonable plan for the community that benefits all members and residents within the community and also be transparent and clearly communicate with the members of the Association the actions taken by the Board in relation to this crisis.

We are already starting to see litigation arising from COVID-19, including a case against the Princess Cruise Line for allegedly failing to take precautions to ensure safety of the passengers while on the ship. As the number of persons who have contracted COVID-19 increases, we anticipate more litigation, including disputes that arise from claims that an individual contracted COVID-19 at a private property. Having protocols, practices, and procedures in place and then following them will be vital to an Association's defense of any such claims if any litigation arises.

Contacts:

Bob Burton | 512.370.2869 | rburton@winstead.com

Jeanne Katz | 214.745.5143 | jkatz@winstead.com

Disclaimer: Content contained within this news alert provides information on general legal issues and is not intended to provide advice on any specific legal matter or factual situation. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this information without seeking professional counsel.