

Community Associations COVID-19 Guide

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COMMUNITY ASSOCIATIONS AND THE CORONAVIRUS PANDEMIC

These are exceptional times as association boards and management have been grappling with unique questions on how to respond to the coronavirus pandemic. We hope that this guide to legal issues will assist our clients in making good decisions for their communities. This information is general in nature; specific concerns should be addressed by contacting us for targeted advice.

Protecting Residents' Privacy

Should we report residents' illnesses to other residents?

There are no statutes that require community associations to report residents' illnesses to other residents. On the other hand, associations may not simply ignore the public health risk created by residents who have a communicable disease such as COVID-19. Although HIPPA laws regarding patient privacy do not apply to community associations, associations are obligated to respect the privacy of their residents and so must balance the need to warn residents against individual privacy.

Residents' identities should not be disclosed without their consent

Guidance for community associations is available from the Department of Housing and Urban Development's guidelines for multiple housing. HUD advises that housing providers may give notification of **positive** COVID-19 cases to other residents without giving the name, address or other personal identification of the ill person. Mere possible exposure to a person who may have contacted an ill person does not warrant notification. If an association becomes aware of a particular resident who is ill, residents may be warned that a case of the illness has been reported and advised to undertake protective measures for themselves:

- If you don't need to go out, don't; and if you do go out, stay at least 6 feet from others.
- If you are sick, stay home from work or school.

- Avoid close contact with those who are already sick.
- Cover your nose and mouth when coughing or sneezing with a tissue or the crook of your arm.
- Wash your hands often with soap and water.
- Avoid touching eyes, nose, or mouth.

The association also should discourage residents from spreading rumors or guesswork on social media about who is ill or where the disease has spread. If management or the board is informed by a resident that a resident or vendor has contracted the disease, the association may determine from the resident or vendor if he or she will be quarantining in the residence or elsewhere and may encourage the resident or vendor to self-report to the local health department. In addition, the resident or vendor may be asked if he or she authorizes disclosure of the illness and his/her identity to the community, so that people who have had contact with the resident or vendor may take appropriate protective measures. Any such authorization must be in writing.

If the resident or vendor does not want personal disclosure, identifying information should not be disclosed. These same guidelines apply if the association becomes aware that a staff member or a vendor who services residents or has contact with them, rather than a resident, is ill with the virus. Also, whatever information the association provides should be limited to owners and residents of the development and any known vendors, contractors, staff members and guests who have had contact with the ill person.

Sample Notice to Residents

Following is a sample letter to residents, where disclosure of identity has not been authorized. It should be modified appropriately if the ill person is a vendor or a member of the staff.

Dear Residents:

The Board of Trustees/Directors of _____ Association has been notified that a resident or vendor of the community has tested positive for the coronavirus, COVID-19.

The resident is quarantined in the resident's home.

All efforts have been and will continue to be made to maximize the safety of our residents, visitors and staff.

To comply with relevant privacy concerns, we are not permitted to disclose the identity of the resident. We also ask that you not distribute any rumors or guesses regarding any ill resident on social media.

This notice serves as an official notification of this occurrence. We urge all residents to follow the recommendations of the public health authorities such as the CDC, available at <https://www.cdc.gov/coronavirus/2019-ncov/>

On behalf of the Board and Management, we send wishes of a speedy recovery to our neighbors who are ill and appreciate their notifying us of their situations. We also appreciate everyone's patience and understanding during this difficult time.

Please let Management know if you have questions or concerns.

Protecting Maintenance Staff

In dealing with an ill resident, maintenance and repairs within homes also need to be taken into consideration. Non-essential maintenance or service within a home should be avoided to prevent inadvertent spread of infection.

The HUD guidelines indicate that where immediate maintenance or repair is required within a home, maintenance staff or contractors may ask whether any resident in the home has contracted the disease. Persons who do not feel safe entering a home cannot be required to do so. However, if maintenance or repair is necessary to protect health or safety, the staff or contractor should take appropriate protective measures when entering the home, including utilizing personal protection equipment and following public health and CDC recommendations.

We do not believe that any special notice besides warning the virus has been reported is required in the unfortunate case of a death. It is important to notify residents of an occurrence of the illness so that they may take recommended precautions, but the precautions to be taken by other residents do not change because an ill person has died. Where an association routinely announces resident deaths in order to share its condolences, we suggest that the association suspend that practice to avoid giving an impression, possibly incorrect, that all recent deaths are due to the virus and thereby spread further anxiety.



Closing Common Areas to Reduce the Spread of Disease



We have received a number of inquiries whether association boards may close their clubhouses and other common facilities where people tend to congregate or share equipment, such as pools and gyms, to help prevent the spread of the COVID-19 virus. We recommend that associations close non-essential facilities.

Authority to Regulate Use of Common Areas

Section 44b of the Planned Real Estate Development Full Disclosure Act, N.J.S.A. 45:22A-21, et seq., (PRED) requires each community association to "exercise its powers and discharge its functions in a manner that protects and furthers the health, safety and general welfare of the residents of the community." N.J.S.A. 45:22A-44b. Section 14(c) of the Condominium Act, N.J.S.A. 46:8B-1, et seq., authorizes the

association to adopt and enforce rules governing the use and operation of all condominium property and, particularly, the common elements. N.J.S.A. 46:8B-14(c). Generally, the governing documents for condominiums and other types of community associations provide similar authority.

Thus, during a health crisis during which a communicable disease may be transmitted among residents by social interaction, such as the current situation involving the

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COVID-19 virus, the association may impose rules pertaining to common property to prevent the congregation of people. Such restrictions may include closing common areas where people tend to congregate, such as the clubhouse, so as to promote social distancing. Moreover, because there is evidence that the virus may be transmitted via contact with surfaces, the association may close non-essential common amenities that are likely to result in the spread of the virus, such as gyms, pool areas, playgrounds, gazebos, bocce courts, and tennis courts.

Closing Facilities

Therefore, we recommend that associations impose such restrictions to help arrest the spread of the virus and avoid claims of liability by persons who contract the virus. Such areas should be locked if possible and notices should be placed stating that the facility is closed until further notice due to the current health crisis to avoid or reduce the spread of the COVID-19 virus. If an amenity cannot be locked, the notice also should state that anyone entering or using the facility will do so against advice, at his or her own risk, and that the association will not be responsible for any injury or illness.

Sanitizing Other Items

On the other hand, common areas and equipment that cannot be restricted, such as elevators, entrance ways to residential areas and common hallways should be frequently cleaned, disinfected and sanitized to reduce the chance of the spread of the virus. The Centers for Disease Control have published recommendations to clean and disinfect facilities at <https://www.cdc.gov/coronavirus/2019-ncov/prepare/disinfecting-building-facility.html>. Associations also may install hand sanitizer dispensers in common areas to help residents maintain sanitary conditions.

Board Meetings

Even during times of a state and/or federal emergency such as the COVID-19 pandemic, it is important for a common interest community association to keep functioning in order to promote and protect the health and safety of its residents and their financial interest in their homes. Some would argue that this is especially important during such times.

In order to comply with their fiduciary duty to their association members and residents, executive boards must periodically meet to discuss the issues facing their communities, both ordinary and extraordinary, make decisions that they consider to be in the best interests of their association members, and take action to implement those decisions. While New Jersey state law allows executive boards to conduct “work sessions” to which members are not invited, the law requires that nearly all such decisions and actions are only valid if made at a meeting for which the membership received adequate notice and were invited to attend. There are a few statutorily limited exceptions to this requirement involving confidential matters.

In times like these, how is a board to conduct an “open” meeting in order to conduct the business of the association? As has been said before, extraordinary times demand extraordinary measures. To find the answer we must look to applicable state law and the association’s governing documents, and be creative. In this technologically advanced age, it is possible for many people to join together remotely in conference telephone (audio) calls, and also

internet-based video meetings (e.g. Zoom, WebEx). Are these meeting methods recognized by state law and thus valid?

A review of applicable state law reveals that it has not yet fully caught up to the technological advances noted above as neither the N.J. Condominium Act nor the N.J. Planned Real Estate Development Full Disclosure Act addresses virtual/remote attendance at meetings. The N. J. Nonprofit Corporation Act, on the other hand, does authorize trustees or directors to “participate” in executive board meetings by “conference telephone or any means of communication by which all persons participating in the meeting are able to hear each other...”, but it doesn’t

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specifically address whether members of the association may do so. In the meantime, what to do?

We recommend that if an open executive board meeting is required for the board to address pressing association business that can't wait until the ban on public gatherings is lifted, the board should set up the capability to conduct their meeting remotely, by either conference audio telephone call, or internet-based video conferencing, or both. In this way the members of the association will be able to "attend" these meetings and hear and/or see what decisions and actions are being made by their board, thereby rendering those decisions and actions valid and enforceable

Regarding membership meetings, the law is not so clear. In response to the COVID-19 pandemic, on March 20, 2020, New Jersey's Governor Murphy signed into law a bill (A3861/S2290) which permits corporations to hold meetings with their shareholders/members by remote communication during states of emergency. This law, however, only applies to "for profit" corporations in

New Jersey organized under Title 14A of the N.J. Statutes. Most condominium and community associations in New Jersey are "nonprofit" corporations organized under Title 15A, so this new law does not expressly apply to them. Efforts are being made to introduce a bill that would extend these 14A provisions to 15A corporations.

While the law of New Jersey does not yet recognize such virtual participation in Title 15A meetings, it is a reasonable argument to make, under the circumstances of a statewide and nationwide emergency, that the new law recognizing such meetings of Title 14A corporations should logically apply by analogy to those of Title 15A corporations also. It is also suggested that the association's bylaws be amended to include a provision recognizing a member's ability to "attend" board meetings and membership meetings virtually by conference calls or other electronic means, to avoid such a situation entirely in the future.



Elections

If your association's annual election is approaching, you likely have questions about how the COVID-19 pandemic and the resulting governmental restrictions will affect your ability to hold your election. Should we reschedule the election? What if we have already sent out the request for nominations? What if there are no more candidates than there are open seats? What if we've already sent out the ballots? The answer is...it depends.

First and foremost, in compliance with existing state and federal restrictions during this state of emergency, all in-person meetings must be cancelled. So, if your association's governing documents require an in-person meeting in order to conduct an election, that meeting cannot be held. If, however, your governing documents provide for "ballot/voting by mail" (also known as "absentee ballot") and/or an electronic voting method, it is still possible to conduct the election, but only by way of mail-in or electronic ballots. If you haven't considered amending your bylaws to authorize electronic voting, this is a good time to do so.

- If the election isn't scheduled for several more months, there is no compelling reason to act now in as much

as no one knows how long these restrictions will remain in place.

- If the election is scheduled soon but you haven't yet sent out requests for nominations, it would be reasonable under the circumstances for your board to reschedule the election for later in the year. Or, if the board prefers to move forward with the election as scheduled, it may do so, but only with voting occurring by way of ballot/voting by mail and/or electronic voting as noted above.
- If the election is scheduled soon and you've already received nominations and sent out ballots, again it would be reasonable under the circumstances for the board to reschedule the date of the election, or as noted above, hold the election as scheduled but only if the members are notified that votes may only be cast by mail or electronically, not at an in-person election meeting.

If your governing documents do not provide for mail-in or electronic voting, it's likely they do provide for the submission of proxies as a means of "attending" and voting at an election meeting of the members. If this is so, the recent "Radburn" law addressing, among other things, election procedures in common interest communities in New Jersey, requires that if an association's

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documents provide for proxy voting, it must also provide for the ability to vote by absentee ballot. So, even if your governing documents do not expressly provide for voting by absentee ballot, if they do provide for proxy voting, then the association must also utilize mail-in ballots for its election or any other issue on which the membership has the right to vote.

Finally, as for uncontested elections (that is, if the number of qualified and announced candidates equals or is less

than the number of open board seats up for election), it is recommended that in such cases the board either postpone the election and appoint the announced candidates to fill the vacancies, or declare that unless there is written opposition by a majority of owners, the announced candidates will be deemed “elected by acclamation”, leaving no reason to delay or complete the election process.

Pool Contracts

One of the big questions facing associations at this moment is whether to go through the process of opening the pool. Should we do it now, as most pool companies are pushing—or should we wait and see what happens in a month? What if we haven't even signed our pool contract? Should we sign it or just forget this season?

The decision is largely a business one, as the particular facts and circumstances of associations vary greatly. There are, however, a few key concerns that face all associations:

- Will the pool be damaged if we don't open it and run the filtration system?
- If we have a signed contract, will we be liable to the contractor for the entire amount?
- If the “social distancing” requirements are lifted, do we want to be ready or risk facing an angry reaction from the owners? Or if this continues, will we be criticized for wasting our members' money?

First, our research indicates that even if pools are not going to be open for swimming this season, it is necessary to open, chemically treat and run the filtration system from a pool health standpoint. There is a real possibility that if you don't open the pool, the pool surface may become irretrievably stained and there might be permanent damage to the filtration system. Remember that if it's opened but not used, you need to keep it running and maintained but at a reduced level (sufficient to protect the pool but not suitable for swimming).

If you are under contract, there are legal theories that may excuse the association's performance. The coronavirus pandemic is an unforeseen circumstance that may relieve your association from legal responsibility. The extent of the relief will depend on the length and scope of the states' prohibitions as contained in executive orders of the governors. It will also depend on the guidance from the Centers for Disease Control (CDC) and the state and local departments of health. You should consult with the association's attorney regarding the legal grounds for termination or excused performance under a particular

contract. At the very least, credits should be issued by the pool companies for unused lifeguard services or reduced pool maintenance during the period of non-use.

A more difficult issue is whether to postpone or cancel the pool season. An association board should balance both the financial and social risks of moving forward. Is it likely that the pool facility will be permitted by the state to be opened at all? Should you spend the money on opening it so when and if restrictions are lifted, the pool will be available to the owners? If you open the pool and it cannot be used, will the members accuse the board of wasting money? Some associations have already made the decision to close the pool for the season. Others are waiting to see what happens in the next month. Either way, the board is protected by the business judgment rule, which leaves substantial discretion to the board. We think that because the pre-season pool opening process is necessary to maintain this valuable association asset, associations should have that process completed. Not only will it protect the physical asset, but you will have the pool ready to go in the event that it is safe to open it this season. Yes, you will incur the cost of opening and closing the pool, but the funds are in the budget and the pool then will be available if use is permitted. We urge you to consult with your professional advisors, like your managing agent and attorney to determine the best option at this time.

As additional information becomes available, new developments occur, and other questions are raised, we will continue to update you. In the meantime, use common sense and follow recommended sanitation protocols to protect yourselves, your families and your community.

How the Coronavirus (COVID-19) Affects Community Association Finances



As the COVID-19 crisis wreaks havoc on our economy, it will undoubtedly impact members within your community association. Given the expected economic downturn, associations throughout the region should anticipate a rise in delinquencies. Moreover, many association boards have already received requests to reduce or waive common expense assessments (maintenance fees) during this time as well as to reconsider budgetary items and reserve funding implemented before the crisis hit.

It is no secret that most community association boards will be faced with difficult decisions in the coming months. Since assessments are the “lifeblood” of community associations, any significant delinquency issues may hinder an association’s ability to meet its operating expenses. Further, a high delinquency rate may also disqualify a community association from obtaining a bank loan or it may impact the ability of a potential purchaser to obtain a mortgage to purchase a unit or lot in the association. Accordingly, it is important that community associations are proactive in order to review expenditures and maintain a low delinquency rate.

The following recommendations can be useful in promoting the association’s financial health:

1. ANTICIPATE WHAT IS COMING. Association boards should work closely with management and their professionals to anticipate the scope of their potential delinquency issues early on so that they may be able to adjust their budget for the remainder of the year.

2. BUDGETING MATTERS. If it is budget time, take a close look at the coming year’s proposed assessment and expenses. In addition, if your budget is already in full swing, most governing documents allow for amendments to the budget when the yearly common expense assessment proves to be insufficient for an immediate need or emergency. Boards should review their documents to determine what flexibility is available should delinquencies cause budget shortfalls.

3. DELAY NON-ESSENTIAL PROJECTS. Associations should consider delaying any non-essential construction or other projects until this imminent crisis passes. While essential services must remain in effect, it is prudent to defer spending on discretionary items, such as painting, upgraded clubhouse furniture, or other enhancements. Even if only temporary, delaying these projects will not have a significant negative impact or reduce property values.

4. REVIEW EXISTING CONTRACTS. Now is a great time to review all of the associations contracts to see where savings could be had. If possible, consider reducing unnecessary services or, if a contract is up for renewal, obtain competitive bids. And as always, we recommend that associations have counsel review any contracts before execution to ensure proper provisions regarding insurance, indemnification, and termination, among other important provisions.

5. UTILIZING RESERVES. If an association is having significant financial issues due to the COVID-19 crisis, the board should consult with counsel, management, and the association’s accountant before making any drastic decisions concerning the use of funds designated for reserves or otherwise. Specific matters should be evaluated on a case by case basis.

6. CONSIDER A LINE OF CREDIT OR LOAN. Since most associations have only one source of revenue – owner assessments – it may be time to consider a credit line or a loan to make sure the association has adequate cash on hand to meet anticipated and unanticipated expenses in the coming months. As always, these decisions should be made in consultation with management and the association’s professionals.

How the Coronavirus (COVID-19) Affects Community Assessment Collection



In addition to the loss of lives, the coronavirus (COVID-19) has already created devastating financial conditions for citizens throughout the country, the likes of which have not been seen since the economic crisis in 2008. While community associations navigate through vitally important issues such as the closure of clubhouses, playgrounds, and other amenities, board members must also expect a rise in delinquencies created by the unprecedented loss of jobs and the ever-worsening economy.

As board members are keenly aware, common expense assessments (maintenance fees) are essential to every community association. Without the continued payment of assessments, associations cannot perform the required administration and maintenance of the association's buildings and common property. To the extent possible, boards should address each delinquent owner/member on a case-by-case basis, treating each situation with compassion while balancing the need for funds to meet expenses and maintain essential services. However, allowing non-payment and/or completely suspending efforts to collect delinquent assessments could negatively impact the community.

In these uncertain times, associations should consider the following recommendations regarding the collection of delinquent common expense assessments:

1. INCREASE COMMUNICATION. Associations should proactively advise their members why continuing to pay assessments is imperative in order to maintain the association's vital operations, such as management, insurance, and building/grounds maintenance.

2. ENCOURAGE ONLINE PAYMENTS. Due to possible delays with the postal service, members who do not already pay assessments electronically should be provided with that information from management and encouraged to pay assessments online to avoid any possible delays.

3. CONSIDER AMENDING COLLECTION POLICIES. All associations should have a collection policy to ensure the efficient collection of delinquent assessments and that all members are treated equally. While we do not recommend suspending these internal collection policies, we do recommend being flexible with members, including waiving late fees and/or granting liberal payment plans regarding any delinquent fees.

4. EXPECT DELAYS IN ROUTINE COLLECTION ACTIVITY. Although we can still record most liens electronically with the County Clerk, the recording times will in some cases be delayed. In addition, pursuant to the Supreme Court's Order of March 27, 2020, the entry of default and any mediations/trials in the Special Civil Part (cases up to \$15,000) have been suspended through April 26, 2020.

5. POSTPONE OR FOREGO MORE AGGRESSIVE ACTION. We do recommend holding off on more aggressive aspects of collection, such as foreclosure. While we can initiate foreclosure actions if necessary, the Office of Foreclosure is currently prohibited from reviewing motions for final judgment, Sheriff's sales have been adjourned in some cases until May, and the State has suspended processing evictions until at least two (2) months after the end of the state of emergency.

6. CONSIDER LONG-TERM ALTERNATIVES. If the crisis drags out for months (or longer) alternate strategies should be considered, including reviewing/revising association budgets and budgeting a larger amount for bad debt. However, while reducing assessments and/or not requiring owners to pay in difficult times may seem like a considerate gesture, it may ultimately have unintended consequences.

If you have questions about this or any other issues with your community association, please contact one of our community association attorneys.

The Community Associations Group of Hill Wallack LLP is recognized for providing insight and innovation in the representation of community associations throughout New Jersey and Eastern Pennsylvania. Our experience serving this industry spans more than 35 years, and our group includes well-known industry leaders.

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