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Client Alert: Coronavirus – What Condominium Associations Need to Know

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With the coronavirus having been declared a pandemic and rapidly spreading throughout the United States, many Florida community associations are confronting unique issues and need to know how to combat the spread of coronavirus and comply with recommendations from health professionals while remaining compliant with governing documents and Florida law. If you serve on your association's board, you may be asking:

1. What are the association's emergency powers?
2. Can the association reschedule or cancel board and membership meetings or prohibit members from attending meetings in person?
3. Can the association close the recreational facilities and amenities?
4. Should the association forgive payment of assessments for owners facing hardship due to the coronavirus or stop its collection efforts?
5. Should the association stop sending violation letters or imposing fines?

The answers to some of these questions will depend on the language in your community's governing documents and you may need to consult with the Association's counsel regarding your unique legal situation. Notwithstanding, this article is intended to give general guidance and a place to start when looking for answers to coronavirus questions.

- 1. Community associations have broad emergency powers that allow boards to take action when a state of emergency is declared.**

Chapter 718, 719 and 720 provide emergency powers to the boards of condominium, homeowner and cooperative associations. These statutes were clearly drafted to address more common emergencies caused by hurricanes, flooding and other disasters. Notwithstanding, we believe the language is broad enough to allow action in an effort to 'flatten the curve' of the coronavirus in your community.

Section 718.1265, Florida Statutes, addresses emergency powers for condominium associations as follows:

(1) To the extent allowed by law and unless specifically prohibited by the declaration of condominium, the articles, or the bylaws of an association, and consistent with the provisions of s. 617.0830 [which requires directors to discharge their duties in good faith], the board of administration, ***in response to damage caused by an event for which a state of emergency is declared pursuant to s. 252.36*** in the locale in which the condominium is located, may, but is not required to, exercise the following powers:

(a) Conduct board meetings and membership meetings with notice given as is practicable. Such notice may be given in any practicable manner, including publication, radio, United States mail, the Internet, public service announcements, and conspicuous posting on the condominium property or any other means the board deems reasonable under the circumstances. Notice of board decisions may be communicated as provided in this paragraph.

(b) ***Cancel and reschedule any association meeting.***

(c) Name as assistant officers' persons who are not directors, which assistant officers shall have the same authority as the executive officers to whom they are assistants during the state of emergency to accommodate the incapacity or unavailability of any officer of the association.

(d) Relocate the association's principal office or designate alternative principal offices.

(e) Enter into agreements with local counties and municipalities to assist counties and municipalities with debris removal.

(f) ***Implement a disaster plan before or immediately following the event*** for which a state of emergency is declared which may include, but is not limited to, shutting down or off elevators; electricity; water, sewer, or security systems; or air conditioners.

(g) ***Based upon advice of emergency management officials or upon the advice of licensed professionals retained by the board, determine any portion of the condominium property unavailable for entry or occupancy by unit owners, family members, tenants, guests, agents, or invitees to protect the health, safety, or welfare of such persons.***

(h) Require the evacuation of the condominium property in the event of a mandatory evacuation order.

(i) Based upon advice of emergency management officials or upon the advice of licensed professionals retained by the board, determine whether the condominium property can be safely inhabited or occupied.

(j) ***Mitigate further damage***, including taking action to contract for the removal of debris and to prevent or mitigate the spread of fungus, including, but not limited to, mold or mildew, by removing and disposing of wet drywall, insulation, carpet, cabinetry, or other fixtures on or within the condominium property, even if the unit owner is obligated by the declaration or law to insure or replace those fixtures and to remove personal property from a unit.

(k) Contract, on behalf of any unit owner or owners, for items or services for which the owners are otherwise individually responsible, but which are necessary to prevent further damage to the condominium property.

(l) Regardless of any provision to the contrary and even if such authority does not specifically

appear in the declaration of condominium, articles, or bylaws of the association, levy special assessments without a vote of the owners.

(m) Without unit owners' approval, borrow money and pledge association assets as collateral to fund emergency repairs and carry out the duties of the association when operating funds are insufficient.

(2) The special powers authorized under subsection (1) shall be limited to that time reasonably necessary to protect the health, safety, and welfare of the association and the unit owners and the unit owners' family members, tenants, guests, agents, or invitees and shall be reasonably necessary to mitigate further damage and make emergency repairs.

(Emphasis added). Similar statutes exist for Co-ops and HOAs. See Fla. Stat. § 719.128, and Fla. Stat. § 720.316, respectively.

Before exercising emergency powers, two preconditions must be met:

First, a board cannot exercise an emergency power if the association's governing documents prohibit the board from exercising the power. While an association's governing documents likely contain certain requirements for scheduling and conducting meetings, entering contracts or spending association funds, these provisions probably do not expressly prohibit the board from rescheduling meetings, entering contracts or spending funds in response to an emergency situation. If you have any questions as to whether your governing documents prohibit certain action, please contact your legal counsel. Counsel will need to review your documents in order to render an opinion.

Second, the emergency power must be exercised in response to "damage caused by an event for which a state of emergency is declared pursuant to Fla. Stat. § 252.36". In light of the more typical natural disasters we face in Florida, a strict reading of this statute suggests that the condominium property or surrounding areas must face physical damage or threat of imminent physical damage in order to justify emergency powers. Courts have not yet decided whether this provision could justify action in response to a threat against the health and physical welfare of community residents. However, we believe that if the issue were litigated, a court would more likely than not, find that boards may reasonably exercise emergency powers in response to the threat posed by the covid-19 pandemic. On March 9, 2020, the Governor of Florida declared a state of emergency exists in the entire State of Florida due to the coronavirus. Fla. Exec. Order 20-52 (Mar. 9, 2020). Moreover, the CDC and the White House have issued serious warnings and advisories designed to curb the spread of this virus. To the extent boards reasonably determine that emergency powers must be exercised in order to comply with such advisories, we do not believe the courts in our state or the Florida Department of Business and Professional Regulations (DBPR) would penalize the association for taking action in an effort to protect the community.

In exercising emergency powers, boards should be mindful that they are required to discharge their duties in good faith and in the best interest of the Association. Section 617.0830, Florida Statutes, requires that directors act with the care an ordinarily prudent person would exercise in the situation. Directors are entitled to rely on information, opinions and reports from legal counsel and other professions in making their determinations. In this situation advice published by the CDC, the World Health Organization or other similar organizations and health professionals can and should be given great weight.

2. Can the association reschedule or cancel board and membership meetings or prohibit members from attending in person?

In most instances, the governing documents of an association will not prohibit the board from rescheduling a board or membership meeting. However, many governing documents require associations to hold annual membership meetings within designated months or within a certain number of months after the prior annual meeting. If this requirement exists in your governing documents and the board chooses to postpone the annual meeting anyway, a court or arbitrator considering the issue could still find that a reasonable postponement was permitted under the board's emergency powers.

Even if postponement cannot be justified under emergency powers, an owner wanting to challenge the postponement would need to file a lawsuit or a petition for arbitration with Florida's DBPR in order to have the postponement considered by the appropriate authorities. If the postponement were found to be unreasonable or not justified by emergency powers, the remedy would likely be an order requiring the meeting to be promptly scheduled. Authorities cannot, however, order an association to hold a meeting in the absence of a quorum and if members choose not to attend a meeting due to concerns over the coronavirus, most governing documents will not require the board to reschedule in an effort to obtain quorum. Rather, the current board would remain in place until the next election.

Given that the coronavirus is considered a highly infectious disease and is currently understood to be transmitted primarily when people are in close contact with each other, boards should consider rescheduling any meetings that may reasonably be postponed. For meetings that cannot be postponed the board should consider precautionary measures:

- Ask that anyone exhibiting signs of illness refrain from attending.
- Ask that attendees wash hands or use hand sanitizer.
- Place seats as far apart as possible.
- Evaluate options for telephonic or other electronic attendance.
- Evaluate whether action can be taken by proxy, mail-in ballot or written consent.

For membership meetings, attendance is usually permitted "in-person or by proxy." Moreover, governing documents often permit unit owners to express approval via written consent. To the extent your community chooses to hold a membership meeting or conduct a membership vote, it should consider asking all members to appear by proxy or, if permitted by your documents, asking members to send in a written consent. The association may still provide a call-in number or a videoconference option so that members may ask questions, but any membership vote scheduled to take place at the meeting, would take place via proxy, in accordance with the association's governing documents. Your association may also want to consider the benefit of enacting a resolution to establish electronic voting. We recommend you consult with the association's counsel to make sure these options are available under your governing documents and to approve the form of any proxy, written consent or resolution establishing electronic voting.

For board meetings, unless otherwise provided in the governing document, the association should encourage all directors to participate by telephone conference or other electronic means. Although owners have the right to attend board meetings, we believe a decision by the board to prevent in person attendance would be found reasonable as long as owners are given the same options as board members to attend and participate in the board meetings by telephone conference or other electronic means. If an action must be taken immediately, as a result of coronavirus concerns, or as the result of a bona fide emergency, we believe a board may use the above emergency powers to give notice as is

practicable under the circumstances and may hold the board meeting without giving the statutory-mandated 48 hours posted notice.

3. Can the association close the recreational facilities and amenities?

Boards should follow the mandates of all Federal, State or local governmental authorities having jurisdiction over the association. If no specific orders have been issued by a governmental authority requiring closure of recreational facilities and amenities, we believe that boards still have the authority to close the association's recreational facilities and amenities, based on emergency powers and in reliance on recommendations from healthcare professionals and Florida Emergency Management officials. Any unique factors relevant to the community should also be considered. For example, in a 55+ community, a large population of members may be considered high-risk should they contract the coronavirus. In a condominium building, recreational facilities may be located in close proximity to residential units where unit owners may have chosen or been instructed to quarantine. If a board decides to keep amenities open, consideration should be given to whether adequate staff is available to clean and sanitize the facilities and whether sufficient supplies of soap, paper towels and hand sanitizer are available to stock the facilities. Decisions should be reviewed as circumstances change. If a claim for injury is brought by any person against an association, liability, to the extent it exists, would likely be determined based on the standard of care that a reasonably prudent person would have taken in a like situation.

4. Should the association forgive payment of assessments for owners facing hardship due to the coronavirus or stop its collection efforts?

A board may not waive an owner's obligation to pay assessments for common expenses that come due under the governing documents and Florida Statutes. Further, we recommend that associations do not cease or even postpone collection of assessments, as unforeseen economic factors could put the association at risk of defaulting on its various financial obligations. The last recession taught us that boards which chose not to vigorously pursue their association's income stream may place their members and their property at risk when insurance premiums go up, hurricanes approach and mortgage foreclosures commence. Consequently, we recommend that associations continue sending delinquency notices and continue following their standard timelines for collection.

We are not recommending, however, that boards take an unsympathetic approach to collection. Many in your community may face legitimate financial hardship as a result of the coronavirus. As a result, we recommend that boards consider accepting reasonable requests from those who ask for a payment plan. Boards may also consider waiving interest and late fees to the extent owners timely comply with payment plans. Such policies should be tailored in consultation with legal counsel and should apply equally for all owners who request them.

5. Should the association stop sending violation letters or imposing fines?

Board members in community associations have a fiduciary obligation to enforce their governing documents and the failure to enforce the governing documents may have direct correlation to diminished property values. Consequently, we do not recommend that boards cease sending violation letters, unless the violation, itself is caused by the current crises. To the extent any owner requests an exception to a particular restriction or an extension of time in which to correct a violation due to the coronavirus or other health issues, the board should give serious consideration to the request and may need to consult with counsel to determine whether exceptions must be granted. Unless the governing documents provide otherwise, the board may consider suspending fining efforts. Keep in mind that

finances must be approved by the board and then the unit owner must be given an opportunity for a hearing before an independent committee that approves or disapproves of a proposed fine. To the extent fining committee hearings cannot be effectively conducted through telephone or videoconference the board should consider cancelling or postponing such meetings.

We understand that this article may address only a fraction of the coronavirus concerns your community association is facing. If you have further questions or concerns, please do not hesitate to contact us.