



The Coronavirus and Your Community

By Leslie Brown

lbrown@reesbroome.com

The Coronavirus (Covid-19) is on everyone's minds.

As of the date of this alert, there are 3 reported cases in the Washington, D.C. area, located in Montgomery County, Maryland.

The extent of the spread of the virus remains unknown and it is unclear whether there will be the need for the type of large-scale isolations and quarantines that are currently occurring in other countries.

Board members may be thinking about whether it is a good idea to meet in person given how contagious the virus appears to be based on current reporting and data. Experts are saying to maintain a 3-5 foot distance from anyone who appears sick, referred to as "social distancing." Furthermore, if mandatory quarantines are put in place, prompting the closures of schools, community centers, libraries, and other places where Boards generally hold their meetings, Boards may not be able to meet in person in accordance with the open meeting requirements of the community's governing documents and state law.

If Board members are sick, can our Board meet?

The laws pertaining to community associations in Virginia, Maryland, and D.C. all favor and mandate that Boards meet physically, in person, and openly (except for the discussion of certain executive session matters allowed under state law). The public policy behind these requirements is that Boards are fiduciaries entrusted with the care of homeowner assessments and property, and, therefore, should operate in a manner that is open and transparent to the community.

If a Board member cannot meet in person because he or she is sick, the Board may still have a quorum of Board members to be able to meet and conduct the affairs of the Association without problem. So long as a quorum of Board members is present in person (usually a majority of the Board), then the Board will be able to continue to conduct business without problems.

In some jurisdictions, Board members may be able to participate in Board meetings via conferencing. In Virginia, both the Condominium Act and the Property Owners' Association Act permit Board members to participate in Board meetings via telephone or video conference call, so long as at least two (2) Board members are physically present at the meeting and everybody can be heard. So, if a Board member is sick, he or she can conference into the

physical Board meeting remotely, so long as at least two (2) Board members are there in person. For D.C. Condominiums, the D.C. Condominium Act also permits meetings of the Board to be conducted by telephone or video conference so long as everyone can be heard.

In Maryland, Boards must meet “openly” when taking action that binds the association. The Montgomery County Commission on Common Ownership Communities recently resolved that even informal “work sessions”, where no association business is being transacted, but is being discussed, constitutes a “meeting” under the open meeting requirements, and, as such, these informal discussions must occur in a manner “open” to the membership. But, if your community is incorporated under the non-stock act, the statute permits the conduct of Board meetings by telephone and video conference, so long as the governing documents do not restrict such use of technology and everyone can be heard. So, a Board may be able to rely on the corporate statute to use technological means, so long as the meeting still remains “open” to the membership. The nuances of each situation will need to be reviewed on a case-by-case basis.

But what if our Board can’t meet at all?

In the event the Board can’t meet in person at all because most of the Board members are sick or there is a mandatory isolation in place, Boards have options.

Most sets of Bylaws permit Boards to utilize what is known as a “unanimous written consent” process which lets Boards take actions outside of a duly called Board meeting so long as the action taken is unanimous. If your community is a D.C. Condominium, the D.C. Condominium Act also expressly permits Boards to use the unanimous written consent process, so long as a copy of the Board’s resolution is attached to the minutes of the next Board meeting.

Furthermore, if your community association is incorporated as a non-stock or non-profit corporation, then Virginia, Maryland and D.C. laws allow for Boards to take action outside of a meeting. To do so, the directors must unanimously consent to the proposed action item in writing. The consent of each director must be filed with the Board meeting minutes. In Virginia and D.C., the written consent simply needs to be filed with the Association – typically via management (but see above for the D.C. Condominium Act’s specific requirement that the resolution be attached to the next meeting’s minutes).

So, your Board can utilize the written consent process outside of a duly called meeting to take action. Make sure that the action is filed appropriately in the books and records of the Association. When the Board is able to meet in person again, we recommend that actions taken outside of a meeting are ratified at the next meeting of the Board.

Our annual meeting is coming up. What if we can’t hold it?

If you think that your upcoming membership meeting may be impacted, the better option is to either 1) postpone the meeting until the isolation is lifted or more members are healthy enough to attend the meeting, or 2) determine if electronic means of conducting membership business is available.

The simplest solution would be to postpone the meeting. Most sets of governing documents contain provisions that allow a membership meeting to be reconvened when quorum is not

present without additional notice, but in this specific situation, we recommend that when a meeting is postponed in advance of the original meeting date, that the meeting be fully re-noticed. This is especially the case for Maryland condominiums where associations are obligated to re-notify the meeting at least 15 days in advance under the Maryland Condominium Act.

Communities also need to check their governing documents closely. If your community's governing documents require that the meeting be held at a certain time of the year or in a certain place (like on the Association premises, for example), you have to ensure that any postponement or relocation of the meeting complies with such requirements.

The other option is to use available technology to conduct the meeting. Both the Virginia Property Owners' Association Act and the Virginia Condominium Act allow associations to use and integrate technology into their meetings and elections procedures. Under these statutes, unless the governing documents expressly provide otherwise, any notice required to be sent or received, or any signature, vote, consent, or approval required to be obtained may be accomplished using the most "advanced technology" available at that time. E-mail and other internet based notice and voting websites, forums or networks generally qualify as "advanced technology". For communities that are incorporated, the Virginia Nonstock Corporation Act also permits members to participate in meetings of the membership via remote communication if the Board allows for it (and it is otherwise not prohibited by the governing documents).

Both the Maryland Homeowners Association Act and the Maryland Condominium Act provide that, regardless of what is stated in the governing documents, the Board may give the association authority to provide meeting notices or deliver information by electronic transmission provided that the owner provides the association with prior written authorization to provide such notices via electronic transmission. Likewise, in the District of Columbia, the D.C. Condominium Act permits associations to incorporate electronic voting and notice procedures.

Please note that these statutes require that there be non-technology alternatives for those owners who do not have the capability or desire to use technology to receive notices or to vote. Hopefully in the case of a health emergency, nobody will have any issues with the use of electronic means so that the association can continue to operate during the crisis.

Are there any precautions our community can take to protect against the virus?

The virus is highly contagious and it may be impossible to fully protect your community from exposure. But Boards should work with management and their janitorial service providers to make sure that common areas are wiped down regularly and cleaned. Service providers may be aware of special chemicals and sprays that can be used to deeply clean surfaces. Boards can circulate the tips to avoid illness generated by the Center for Disease Control and Prevention to the membership. These tips can be found at: <https://www.cdc.gov/coronavirus/2019-ncov/about/prevention-treatment.html>. You can also look to the Community Association Institute's (CAI) guidance: <https://hoaresources.caionline.org/steps-to-safeguard-your-hoa-from-illnesses/>.

Boards can set up hand sanitizer stations in high traffic areas around the community, especially near doors and elevators. When making arrangements for community gatherings, space chairs farther apart from each other to maintain the recommended social distance mentioned earlier in this alert. Boards can post additional notices in bathrooms to remind people to wash their hands often with soap and water for at least 20 seconds, per the CDC recommendations.

Should we limit access to certain common areas in the community?

Boards may be grappling with the decision as to whether to close or limit access to certain high-use common areas in the association, such as community rooms, clubhouses, fitness centers, elevators, etc., in order to maintain social distancing and to reduce the risk of the virus being transmitted throughout the community.

As always, the governing documents need to be reviewed to verify the Board's ability to suspend access. Temporarily closing non-essential facilities down altogether for all residents, as opposed to targeting individual residents, is a less controversial and more effective approach to managing health concerns.

While Boards may have the ability to take such emergency steps under their general powers to operate and maintain the property, the decision to suspend common area access will depend upon the recommendations of local and federal health officials and how significantly the virus impacts our area, based on mapping and tracking of known cases by health officials and the local news media. Again, the governing documents must be consulted and we recommend that you discuss the decision to suspend access with one of Rees Broome's community associations attorneys.

Boards must also be mindful not to assume that someone has the virus because they are of a certain ethnicity or come from a certain country. Suspending someone's access to common areas is drastic and doing so on an assumption that the person *might* be contagious, could run afoul of the law, including fair housing laws. Accordingly, if your Board is concerned about a particular individual in the community who may be sick, you should contact one of Rees Broome's community association attorneys for specific advice on how to handle the situation appropriately.

What if service providers suspend or cancel services to our community?

Given the unexpected nature of the outbreak, in a severe situation, service providers may not be able to provide regular service to the community. For example, a trash service provider may not be able to perform regular service if their haulers call out sick. Janitorial service providers may have concerns about their employees contracting the virus while performing cleaning services at communities.

The question is whether such delayed or non-performance of service is excused. Contractors may try to invoke "excused performance" and "force majeure" provisions in contracts in order to excuse delay or non-performance of services to communities.

Whether contractors have the ability to rely on these provisions depends on the precise language of the contract. "Force majeure" refers to a circumstance or event that is beyond the control of the parties bound by a contract. Events covered by force majeure typically include acts of God (floods, hurricanes, earthquakes, etc.), riots, crimes, wars and strikes. The precise language of

the force majeure clause is important. Force majeure provisions expressly referencing “diseases” and “acts of government” are stronger than those without.

Parties have a duty to minimize the force majeure event (can the contractor provide services remotely, for example) and the suspension of service lifts once the event has ended.

Communities should have legal counsel review contractual provisions regarding delayed and excused performance and termination rights if non-performance occurs for a long period of time.

Does our community need an emergency plan?

If your community has not updated its emergency preparedness procedures, it should do so. There are good resources available at www.redcross.org and www.ready.gov on what communities should do in the event of an emergency and what items residents should to keep on hand in the case of a loss of power, inaccessibility to roads, etc.

The Washington, D.C. Metropolitan Chapter of CAI also provides information to community associations regarding emergency preparedness: <https://www.caidc.org/issues/may-2019/>.

The situation of the coronavirus is changing daily. Please contact one of Rees Broome, PC’s community association attorneys for more specific advice based on your community’s individual needs and concerns.

For further information, we invite you to read Jim Slaughter’s blog posts. Jim is a lawyer representing community associations in North Carolina. The information provided in his posts served as guidance for this alert and is useful and applicable to our region in many ways: <http://lawfirmcarolinas.com/blog/>.

Marketing material only. This material does not constitute legal advice. Reproduction and use prohibited without the permission of Rees Broome, PC. Copyright 2020.