

Frequently Asked Questions Regarding Homeowner Associations (HOA's) and COVID-19

The Novel Corona Virus, known as COVID-19, has undoubtedly affected every facet of our lives, including homeowner associations (“HOA’s”). From small HOA’s of two units, to large HOA’s of hundreds of units, there are still ongoing requirements to remain compliant with the Davis-Stirling Act. Due to these regulations, as well as the close proximity of residents within a typical HOA building, there are a handful of issues that warrant discussion and action in your own HOA.

The following is a summary of the most frequently asked questions regarding HOA’s and COVID-19.

1. How can the Board conduct an HOA meeting during the shelter-in-place order?

Board meetings must offer a physical location in which to conduct the meeting. The notice of a Board meeting must identify one physical location, with at least one director present. Civ. Code § 4090(b). During the “shelter-in-place” order, Board members are likely not allowed to gather in person for a meeting and may prefer not to so long as COVID-19 remains a high risk. To maintain compliance with the requirements of a Board meeting during this time, the notice of meeting should still provide a physical location, ideally at one Board member’s home, but only allow that one Board member to be physically present. The notice should instruct all other members to attend remotely, citing to the pandemic and current shelter-in-place orders.

The Board may still conduct business with only member physically present, while the others appear remotely. The Board may establish a quorum where a sufficient number of directors are present by electronic means, through audio or video, or both. Civ. Code § 4090(b). A teleconference meeting shall be conducted in a manner that protects the rights of members of the association and otherwise complies with the requirements of this act. Civ. Code § 4090(b). Participation by directors in a teleconference meeting constitutes presence at that meeting as long as all directors participating are able to hear one another, as well as members of the association speaking on matters before the board. Civ. Code § 4090(b).

2. Does the Board have the power to set temporary emergency rules?

There are certain situations, such as the current COVID-19 crisis, that may warrant temporary rule changes. During an emergency, such as a pandemic, a meeting of the Board may be called by the president or by any two members of the Board other than the president. Civ. Code § 4923. No notice to members is required. Cal. Civ. Code § 4923. A 48-hour notice to directors applies, however, this can be waived in writing. Corp. Code § 7211. Once a quorum is established, emergency action can be approved by a majority of the directors present. Civ. Code 4090(a). Emergency rule changes are effective for 120 days unless the rule itself provides for a shorter effective period. Civ. Code § 4360(d). Within 15 days on an emergency rule change, a written notice shall be given to all members including the text of the rule change, a description of the purpose and effect of the rule change, and the date that the rule change expires. Civ. Code § 4360(c).

In this trying time, it will likely become necessary to create new rules to protect homeowners from the spread of COVID-19. The Board should comply with the procedural requirements of the Davis-Stirling Act, as outlined above to effectuate temporary rule changes. The Board should set an emergency teleconference or videoconference meeting to vote on temporary rule changes that will last up to 120 days. The Board will need a majority vote to pass the rule change.

3. Can the HOA continue to collect assessments as normal?

Boards must collect assessments regularly to maintain the property, as well as enforce the governing documents. Civ. Code § 5600(a). Even during the pandemic, the HOA is obligated to continue collecting assessments to the extent possible. As of March 18, 2020, there is a 60-day moratorium on foreclosures for single family homeowners, per the Department of Housing and Urban Development. However, this moratorium does not affect foreclosures by HOA's against owners with delinquent assessments.

Should the Board elect to refrain from foreclosing on homeowners during the COVID-19 crisis, it has statutory authority to set up a payment plan with the delinquent homeowner. Civ. Code § 5665. Payment plans do not impede the HOA's ability to record liens or secure payments, and if a homeowner defaults on a payment plan, the HOA can resume all methods to collect delinquent assessments. Civ. Code § 5665 (d-e).

4. What are the Board's obligations if it learns that a resident or occupant of the HOA has tested positive for COVID-19?

Directors of HOA's are fiduciaries, and as such have fiduciary duties. *Raven's Cove v. Knuppe*, 114 Cal. App. 3d 783 (1981). One of these duties is the Duty of Care, which means directors must be "diligent and careful" in performing tasks such as making reasonable inquiries and making decisions. *Burt v. Irvine Co.*, 237 Cal. App. 2d 828 (1965). An HOA can be held liable for negligence in failing to protect a homeowner from a third-party when they knew, or should have known, about the risk from the third-party. *Frances T. v. Village Green Owners Assn.*, 42 Cal. 3d 490 (1986). However, any choices that the Board decides to make are protected under the Business Judgment Rule, a presumption that directors' decisions are based on sound judgment. Corp. Code § 7231(a). Only a showing of fraud, bad faith, or gross overreaching defeats this rule. *Ritter & Ritter v. The Churchill Condo. Assn.*, 166 Cal. App. 4th 103 (2008). The Davis-Stirling Act also protects volunteers, which almost all directors are, from personal liability while acting on behalf of the HOA. Civ. Code § 5800.

The coronavirus pandemic is an unprecedented situation. It is difficult to predict how courts will interpret the HOA's obligations, if any, if it learns that a resident/occupant tests positive for COVID-19 (or if one of the Board members themselves tests positive). At a minimum, the Board should enforce all state and local shelter-in-place orders on HOA property, and take action if any members or occupants are violating the orders, such as attending mass gatherings or failing to abide by the social distancing requirements on the property. It would not be appropriate to identify the resident/occupant who has tested positive, though the Board may encourage the resident/occupant to self-identify voluntarily. (That information may help others in the HOA to obtain a test if they are experiencing symptoms, as testing remains limited and exposure to a known infected person meets one of the criterion for getting a test).

The Board should also ensure that all common areas for which it is responsible for maintenance are indeed properly maintained and regularly cleaned to protect homeowners from COVID-19, especially if there is a confirmed case. This is especially important for areas exposed to high traffic; e.g. front door lobby, elevators, stairs, garages. The Board may consider increasing the frequency of their regular maintenance/cleaning schedules to minimize the risk of exposure.

5. Can or should the Board restrict the use of common areas during the shelter-in-place order?

In general, the Board should ensure that members and their occupants are not congregating in common areas in violation of the shelter-in-place orders and social distancing requirements. But whether the Board may restrict use of the common areas altogether will depend on the type of common area and facility in question. An outdoor space, such as a backyard, may not be as prone to spreading germs as an enclosed facility, such as a gym. Pools and hot tubs are also less clear. The CDC states that it does not believe COVID-19 can be transmitted through properly maintained and chlorinated swimming pools and hot tubs, but the surrounding areas, such as the handrails, tiles, and other surfaces, may be an area of concern.

Whatever the Board decides – to restrict, limit, or not limit at all the use of common areas – the Board will be protected by the Business Judgment Rule. In order to exercise good business judgment, the Board should at a minimum ensure social distancing requirements and ensure that people are not congregating in any common area. If members are not self-enforcing these requirements, the Board should consider prohibiting use of the common area, altogether.

If the Board decides to prohibit use of common areas during the shelter-in-place order, it should do so only for as long as the order is in effect and/or when the community has been advised it is safe to go out. The Board should also be prepared to analyze whether the loss of use of such common areas warrants a corresponding decrease in assessments for the HOA members for this time period.

If the Board decides to only restrict use of the common area – for example, limit the use of the gym to 1-2 people – it should be prepared to implement a policy for how the common area will be used, such as an electronic sign-up sheet on a first-come, first-served basis. And if the Board elects to allow continued use of all common areas by its members, it should be especially vigilant that such common areas are being properly maintained and cleaned and that people are maintaining social distancing requirements. Note that a Board's decision to not restrict or regulate common areas while the shelter-in-place orders are in effect may only be appropriate if the HOA is a relatively small size, and there is less risk of a high volume of people using the same area.

Note that some common areas, such as stairs and elevators that provide a means of ingress and egress, may not be restricted. The Board should consider increasing its cleaning schedule for such areas to minimize exposure.

While the Corona Virus is constantly changing how we go about our daily lives, it is important to keep up with HOA duties to remain compliant and keep homeowners safe. HOA's should still be collecting assessments, Board meetings should still be held, albeit remotely. Lastly, remember, a proactive Board that implements policies to protect homeowners from sources of infection and ensures strict compliance with all local and state orders is more likely to be considered exercising good "business judgment" during these unprecedented times.