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EMERGENCY POWERS, VIRTUAL MEETINGS, AND MASKS FOR FLORIDA CONDOS, CO-OPS, AND HOAS

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As you may be aware, the State of Florida is no longer under a state of emergency in response to the COVID-19 pandemic and Governor DeSantis has not given any indication that he will issue another. Throughout the pandemic, our office has published a number of articles on the implications of the Governor's executive orders, association rulemaking authority, holding association meetings, and emergency powers. With information about the threat of the delta variant growing on a daily basis and the influx of coronavirus cases in the State of Florida, the purpose of this article is to remind you of the what your association likely can and can't do going forward.

I. EMERGENCY POWERS

Many of you are aware of the recent amendments to the statutes that govern Florida condominiums, cooperatives, and homeowners associations which became effective July 1, 2021. Included in the legislative updates were some changes to the statutory emergency powers allowing community associations to conduct board meetings, committee meetings, elections, and membership meetings, in whole or in part, by phone, real-time videoconferencing, or similar communication with notice of the same as is practicable. This is a welcome addition to the statutory emergency powers which could have eliminated some pushback during the earlier part of the pandemic from members who wanted to continue in-person meetings. However, these emergency powers only apply when a state of emergency *is* declared.

Generally speaking, the emergency powers under Sections 718.1265, 719.128, and 720.316 of the Florida Statutes are triggered by the declaration of a state of emergency by the Governor. The statutes state that a board of directors may utilize its statutory emergency powers "in response to damage or injury caused by or anticipated in connection with an emergency...for which a state of emergency is declared pursuant to Section 252.36," in the area encompassed by the association or cooperative, or in the locale in which a condominium is located. With the expiration of the state of emergency concerning COVID-19 earlier this year, condominium associations, cooperatives, and homeowners associations lost their statutory emergency powers. Associations may wish to consider consulting with legal counsel to amend their governing documents to allow the association to act with enumerated emergency powers in particular

circumstances even in the absence of a state of emergency (provided they do not otherwise violate the statutes). Even though the language on videoconferencing was only recently added to the statute, many associations were relying on emergency powers to conduct meetings in as practicable a manner as possible.

II. HYBRID VIRTUAL MEETINGS

A. Community Association Membership Meeting

So where does this leave the associations that are concerned with the safety of their residents during annual and special membership meetings in light of the local rise in COVID-19 cases? The answer is relatively simple, hybrid meetings.

Chapter 617 applies to Florida not for profit corporations, including condominium associations, cooperatives, and homeowners associations, except where there are conflicts between Chapter 617 and Chapter 718, 719, or 720, in which case the latter will control. Section 617.0721(3) of the Florida Statutes states as follows:

“If authorized by the board of directors, and subject to such guidelines and procedures as the board of directors may adopt, members and proxy holders who are not physically present at a meeting may, by means of remote communication:

- (a) Participate in the meeting.
- (b) Be deemed to be present in person and vote at the meeting if:

1. The corporation implements reasonable means to verify that each person deemed present and authorized to vote by means of remote communication is a member or proxy holder; and

2. The corporation implements reasonable measures to provide such members or proxy holders with a reasonable opportunity to participate in the meeting and to vote on matters submitted to the members, including an opportunity to communicate and to read or hear the proceedings of the meeting substantially concurrent with the proceedings.

If any member or proxy holder votes or takes other action by means of remote communication, a record of that member’s participation in the meeting must be maintained by the corporation in accordance with s. 617.1601.” (emphasis added).

However, Section 718.112(2)(d)1 of the Florida Statutes requires an annual meeting to be held at the location provided in the bylaws, and if the bylaws are silent within 45 miles of the condominium property. Section 720.306(2) of the Florida Statutes indicates that the association must hold a meeting of its members annually for the transaction of any and all proper business at a time, date, and place stated in, or fixed in accordance with, the bylaws. The election of directors in a homeowners association must be held at, or in conjunction with, the annual meeting. Chapter 719 defers to the bylaws of a cooperative association for the method of calling meetings of the shareholders.

It is important to keep in mind that your governing documents may specifically contain language which requires physical, in-person, meetings. The safest and best approach to holding membership meetings going forward is to hold the membership meeting at a physical location and allow virtual participation in lieu of physical attendance, i.e. a hybrid meeting. A hybrid meeting would arguably satisfy any statutory or bylaw requirement to hold the membership meeting at a physical location. Unit and parcel owners would be given their opportunity to participate or vote in person and those who wish to participate virtually would be given the opportunity to do so. Whether those participating by remote means are counted towards a quorum is not settled in the law, so our office is still advising the use of proxies to safeguard any concerns about whether the quorum requirements are met. We also advise the use of limited proxies or submission of written ballots in order to keep accurate voting records unless the association is utilizing electronic voting software that complies with the statutory requirements.

It is very likely that your association has already hosted several virtual meetings during the pandemic as videoconferencing platforms have proven to be effective in allowing associations to conduct business without having to physically gather all the members. This does not mean, however, that conducting membership meetings through a videoconferencing platform is easy. There are a number of concerns associations have continued to wrestle with such as electronic or proxy voting, elections of directors, balloting, virtual attendance of members whose proxies have been submitted, virtual attendance of members whose proxies have not been submitted, authenticating the identity of participants, etc. Associations should consult with legal counsel to navigate these concerns.

B. Condominium and Cooperative Board Meetings

For board or committee meetings, condominium associations may continue to rely on Section 718.112(2)(b)5 of the Florida Statutes which specifically allows remote participation by board or committee members, and requires a two-way speaker so that those physically present may hear and communicate during the meeting. Cooperatives may rely on Section 719.106(b)(4) of the Florida Statutes which also allows remote participation by board or committee members, and which also requires a two-way speaker for those present in person. Whether the forgoing sections of Chapters 718 and 719 override the sections relating to remote meetings in Chapter 617, and therefore *require* in-person board meetings, or at the very least hybrid board meetings, is still the subject of considerable debate. To be on the safe side, condominium associations and cooperatives should be holding board meetings in a hybrid format if they wish to allow participation via remote means.

C. Homeowners Association Board Meetings

That said, homeowners associations may continue to rely on Section 617.0820(4) of the Florida Statutes which allows for fully remote board meetings so long as directors can simultaneously hear each other, keeping in mind that the board may not vote by email on any association matters under Section 720.303(2) of the Florida Statutes.

As our office has previously cautioned you, be careful to note that Chapters 718, 719, and 720 of the Florida Statutes all still provide that a meeting of the board takes place whenever a quorum of directors is gathered to conduct association business. Members have the right to attend and speak at all open meetings of the board. Boards must be very careful to avoid the temptation of conducting informal and unnoticed meetings via videoconferencing. In addition, association counsel should always be consulted to determine whether a closed board meeting, without Member participation, is permissible.

III. MASKS AND SOCIAL DISTANCING

With the expiration of the state of emergency earlier this year, and the influx of delta variant cases across the State, many community associations are starting to wonder whether masks and social distancing will be necessary in the near future. Many members are beginning to ask, “Can the association force me to wear a mask?” The short legal answer is, “It depends.”

The first question is whether the board has rulemaking authority over the common areas or common elements. More often than not, the board has such authority, however in some cases the membership has a right to vote on proposed rules and regulations. *Assuming that the board has rulemaking authority over those areas in its governing documents*, the association can implement a mask and social distancing requirement over common area or common element property at a duly noticed board meeting. Because the rule would solely concern common area or common element property, it would likely only require 48-hours posted notice (and any additional notice requirements your governing documents may contain). This is contrary to the statutory 14-day notice requirement under Sections 718.112(2)(c)1, 719.106(1)(c), and 720.303(2)(c)2 for rules concerning unit or parcel use. However, if a membership vote is required, the association must comply with the notice requirement for membership meetings (typically 14 days’ prior notice) and the rule must be considered at a membership meeting. In any event, the consideration of the new mask and/or social distancing rule should be placed on the agenda.

It is important to note that rules and regulations are held to a standard of reasonableness and whether such a rule would be considered reasonable in a State that has no declared state of emergency over COVID-19 is also going to be the subject of much, very spirited, debate. However, particular areas of Florida have seen a marked increase in coronavirus transmission rates and hospitalizations. Additionally, certain laws prohibiting public entities (also known as “state actors”) from imposing mask mandates do not apply to community associations because community associations are private entities. Even without a state of emergency, an association with rulemaking authority over common area or common element property may implement a mask mandate or social distancing requirement over that common area or common element property by rule, and arguably support the same using local coronavirus data. Associations that wish to impose masks and social distancing at this time should be careful in designating particular portions of the common area or common element property bound by those requirements since some may be less reasonable than others. Indoor areas with unavoidably high pedestrian traffic such as mail rooms, offices, lobbies, meeting rooms, enclosed hallways, and elevators may be a higher and more reasonable priority for facemasks than outdoor pool decks, tennis courts, and recreational facilities where members actively choose to go. Any association wishing to impose mask requirements or social distancing should consult with legal counsel.

A note to the reader: This article is intended to provide general information and is not intended to be a substitute for competent legal advice. Competent legal counsel should be consulted if you have questions regarding compliance with the law.

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