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**TO: HOA Directors, Managers and Community Leaders**

**FROM: Jordan Price Community Association Attorneys**

**DATE: April 3, 2020**

**RE: Jordan Price Update 4 – Global Advice to HOAs in Response to COVID-19 Virus Outbreak**

With the first of the month upon us, we are seeing many more questions about the appropriate way to handle assessment collection and financial issues for your HOAs. We have provided some new information below as well as more perspective on those most pressing questions from this week.

We hope that many of you are using the resources of CAI-NC for your communities, and you can find additional information at [/https://www.cai-nc.org/page/Covid-19](https://www.cai-nc.org/page/Covid-19). We have been proud of our client's leadership throughout this crisis, and we are struck by how dedicated you are to banding together as communities during this time. Please let us know if we can help.

In addition to the prior weeks' FAQs, please see new updates below:

#### **4.3.20**

##### **What should we do about assessment collections?**

We do not think a blanket suspension or forgiveness of assessments is prudent. We would caution that the worst financial exigencies may be yet to come, not necessarily to be implemented in the present time. It is important to remember that an HOA is a nonprofit corporation whose only source of revenue is the payment of assessments from its members. Unlike utility companies and mortgage lenders who are very publicly advertising suspension of fees for late payments or even forgiving monthly payments for a time, an HOA has no profit cushion to fall back upon. Boards need to seriously consider long term planning before any short term or temporary financial decision is made.

HOA Boards must also remember that they have a fiduciary obligation to all members. By choosing to suspend or forgive assessments at this time, it may be placing the Association in a more dire predicament several months from now. It could be potentially damaging to have to issue a special assessment months from now, when the economic impact could be greater, to address necessary functions of the community. That may put the Association in a position where it cannot get the necessary funds it needs to properly operate.

We are also advising HOAs to continue current collection policies up to the point of lien. Given our specific experience with HOA collections during the national Recession of 2009-2012, it is important that the HOA's position be secured with a lien against the property. The claim of lien in North Carolina is valid for 3 years without the need to initiate a foreclosure or civil action to perfect the lien. Given the high number of bankruptcy filings we saw 10 years ago, it is important the Association be proactive to file liens and position itself to be in secured creditor status. It is our advice that collections not proceed beyond the point of lien

for at least the next 60 days, but it is important to get the lien in place to protect the Association's position. Again, specific requests of owners with COVID-19 related hardships should be given lenient consideration.

We understand that these are difficult times for many members of the community. That is why we are recommending that HOAs suspend foreclosures during this time of crisis. The recent directive from HUD to suspend initiation and completion/progress of foreclosures applies only to FHA-backed mortgage loans and does not apply to foreclosure of HOA liens. Nonetheless, we are recommending a suspension of all foreclosure activity until after June 20, 2020. We think this is the best course of action in the current state of emergency. It also allows HOA Boards to continue to seek assessments, preserve their rights through a lien, without members being concerned of losing their homes during the height of the pandemic.

Take Away Bullet Points:

- Continue assessment billing, late notices, etc. in the ordinary course
- Adopt an attitude of cooperation and leniency for those who respond with hardship requests related to COVID-19 situations
- Do file liens to secure the Association's position even if on extended payment plans
- Do not threaten or proceed with foreclosure until further advised

**Can the Board suspend normal meeting requirements, notice, open meetings, etc. under the Bylaws?**

Yes. NCGS Section 55A-3-03 allows the board to suspend certain ordinary requirements during a time of declared emergency. If you are getting pushback from your membership about these practices, we do recommend you adopt a formal emergency resolution, and if you are a larger association with several committees, onsite management and multiple amenity functions, we do recommend this step. This will likely become more important in terms of a need to document if the crisis continues beyond the initial projected period. The time to document is now, not waiting until a problem arises.

**Can the Board adopt a rule banning guests and/or renters from the community?**

While having guests in one's home in many cases will be a violation of NC Executive Order 12 (statewide Stay at Home Order), the question is whether associations have the ability to actually ban guests pursuant to the Order. We would encourage the Association only to adopt rules that it can enforce. Certainly, encouraging owners to abide by the state mandate is advisable, and educating and informing owners about the requirements is also a good idea. It would be very difficult for the Association to discern the difference between a guest and a care giver, for example. We advise Boards refrain from demanding or requiring that owners prohibit guests.

With respect to rentals, the main cause of concern we have seen relates to short-term, or vacation rentals. Although State Order 121 does not place restrictions on rentals in any fashion, certain local governments have enacted temporary bans on all short-term rentals or have simply recommended that short-term rental activity cease. In the circumstance where an association's local government has enacted such a restriction, it would be appropriate for a Board to encourage or support its membership's compliance. In some cases, an association's declaration may already contain a rental restriction which could be applied. In most situations, however, the only proper way for an association

to effectively restrict rental activity is to adopt an amendment to its declaration. Absent an amendment, a Board cannot adopt a unilateral ban on short-term rentals.

One effective way to promote compliance with local and state orders is for a Board to adopt a resolution which supports or urges compliance while not mandating or requiring that owners comply. This serves a dual purpose of informing the membership of the local or state order, in the event members may not have notice, as well as advancing the policies of the state or local government in controlling the spread of COVID-19. Such a resolution could give the Board flexibility to enforce egregious violations of safe practices, such as house parties or frequent abuses, while not staking out on a broader ban that would be difficult to enforce in every situation.

### 3.27.20

#### **Big Picture Take-Aways for the Week:**

- Documented board resolutions are recommended during this time – you will need a paper trail for all the decisions a board is making now if liability questions arise later.
- Any decision you make today or tomorrow, will need to be re-examined in a week. You might need more frequent meetings/board check-ins. The Board should consider deferring all non-essential agenda items for the time being. Give yourselves time for mental rest and decompressing.
- The HOA is compelled to act, but it is also important to emphasize personal responsibility for individual behavior. Don't fall into the trap of thinking you can control all aspects. Avoid adopting rules that you cannot enforce
- Resist the temptation to enforce every rule in your bylaws during this crisis. There may be tensions between following the rules and keeping people safe, and safety should win.

#### **Should we pay the pool company?**

Pool season is close at hand, and we do advise every pool-owning HOA board to be engaging in this discussion now. The key question factor here will be to balance costs and contract liability risk with the association's preparedness to open pools should the pandemic abate before the end of the pool season. The first step would be to reach out to your pool company to engage cooperatively with questions about whether they will be able to perform and what they have developed as an internal policy. Otherwise, the answer will vary depending on the relative financial position of each HOA, the projected impact of the current public health crisis on your continued revenue stream given your community's demographics, and the relative demand for pool use in your own community.

Some of your contracts may be fairly simple and not provide for a significant monetary commitment on the HOA's part until service is actually provided. Many pool contracts have scheduled payments that are due in specified months; still others may call for equalized monthly payments, even though service is provided most heavily only 4 or 5 months during the year. Frankly, these more complex contracts will

likely need an attorney's interpretation to determine whether the HOA has any defenses to performance as a result of the COVID-19 pandemic. There are a number of legal theories that might be applicable in your situation depending on the wording of your individual contract. Whether any of these legal defenses apply is, of course, heavily dependent on the progress of the current public health crisis and whether any governmental emergency declarations will continue in force to impact pool operations this summer.

### **What do the Stay at Home Orders Issued by the Governor and local authorities mean for our HOA?**

Governor Cooper's statewide Stay at Home mandate released this afternoon is attached for your review. Please note per Section 4 that the statewide order does not supercede any more restrictive local order. So, you must follow the most restrictive order in place for your particular location. These orders do have several differences, and please do review any order for your individual location carefully.

- **Are Community Management Services "essential" and exempt from stay at home restrictions?**

First and foremost, management companies, like all businesses and citizens are being mindful that the first priority for everyone right now is preventing community spread of the COVID-19 virus. Most management company staff are working from home except for necessary office functions such as processing mail, bank deposits, etc. Keeping in mind the intent of these stay at home orders is to protect the public health, we believe that through a combination of provisions in the applicable stay at home mandates ("professional services" "real estate services" and/or "critical trades" exceptions), essential community management services would be exempt from the general prohibitions of these orders. Some specific scenarios come to mind, including examples of what we think would not be covered:

- a community manager (or responsible management staff person) can go on site to a community to respond to a repair need or emergency for any of the common area facilities
- Community managers who need data, equipment, files, etc. to manage the affairs of their community association clients are "professionals" (the compliance with legal mandate part makes no sense to me, however)
- accounting staff would be allowed at mgmt. company facilities to process accounts receivable and payable, process payments, send invoices, etc.
- office staff, as needed, can be on site to check mail, process mailings for associations, make deposits (and can travel to post office, bank, pick up supplies as needed, etc.)
- office staff or managers, can be on site as needed to answer homeowner calls and questions, take maintenance requests, dispatch work orders, etc.
- managers should not attend board meetings in person
- board meetings should not be held in management company offices
- homeowners and board members should not be allowed to visit management company offices in person (consider a lockbox or mail slot outside to drop off payments, with appropriate signage posted)
- managers should not be conducting routine community inspections for non-emergent covenant violations; managers can conduct inspections for safety, health and common area maintenance

- **Can we keep amenities open?**
  - 1) All indoor amenities should be closed (clubhouse, pools, fitness centers).
  - 2) The board should communicate that playground equipment is off limits – the board does not have to physically cordon off the equipment or police this ban, but the board should take steps to publish this prohibition to all members (email/website update at a minimum; posting signage is a good idea if it can reasonably be accomplished).
  - 3) Walking trails and general unorganized group outdoor recreation is generally allowed. The Board should include an advisory to its members that proper social distancing is required by law.
  - 4) Golf and tennis are allowed under the State order, prohibited under some local orders but not others. Check your location or call us with questions.
- **Does the Board have an obligation to enforce the State and local orders?** No – you do not have an obligation to enforce, but you should encourage your members to comply and document that encouragement via website postings, eblasts, or other non-contact communications.
- **Can the Board enforce violations of emergency rules and regulations designed to achieve social distancing and compliance with State and local orders?** Yes, the fining authority granted to condominium and planned community associations under Chapter 47C and 47F of the North Carolina General Statutes is an option in response to a violation of any properly adopted rules of the Association. Your Declaration may contain a provision that prohibits the violation of any law or ordinance, and that, too may be an avenue to use this extraordinary enforcement remedy. This power should be used judiciously, and we would encourage you to not only use good common sense in your approach but also to seek a legal opinion before you hold a due process hearing.

**What if an owner demands we release the name of a community member diagnosed with COVID 19?**

Neither the HOA nor management should release that information and you should instead refer all inquiries to the county health department. Don't get into a debate about what state or federal regulations may or may not apply, just fall back on "per our attorney's advice..."

**Should we ban contractors from working on renovation/new construction in the community? What about the HOA's own construction/improvement projects?**

Construction activities are an essential business under most of the applicable stay at home orders, and it is our recommendation that the HOA communicate with contractors where possible to ask for a written policy on how they are complying with social distancing and other governmental requirements. The Board should also advise homeowners to do the same with contractors engaged by individual owners.

**Silver Linings??** Consider suspension of rules prohibiting the display of holiday lighting, pictures posted in windows or on doors, teddy bears in trees or other activities to encourage a sense of community and

uplifting spirits. Take advantage of recruiting more volunteers for HOA committees by tapping into owners who would like to organize these kinds of safe distancing activities.

Please be safe and be well.

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### **3.20.2020:**

#### **What should management companies/HOAs do about late fees, sending late notices, starting collections, etc.?**

It is our recommendation Associations continue in the regular course with assessing late fees, sending late notices, 15 day demand letters and following your established collection policy. That having been said, Boards should be willing to give consideration to any owner who presents a hardship related to the current crisis such as related job loss, illness, caring for ill family members, etc. This would include extending payment plans when requested and waiving late fees when requested. Because your Board has a fiduciary obligation to all members to keep the Association in good financial health and to be aware that we might only be on the cusp of an economic decline, we are advising HOA Boards not to apply a blanket exception and to stay the course on regular collection policies. Again, specific requests of owners with COVID-19 related hardships should be given lenient consideration.

We are recommending the following language (or similar) be added to your delinquency notices: "We recognize that these are trying times for many financially due to situations caused by the COVID-19 virus outbreak. Please contact us if you are experiencing financial hardship due to the current state of emergency, and we will be happy to discuss possible accommodations for you."

**Should we/can we suspend collection of monthly assessments for a period of time?** We do believe an HOA Board has legal authority to suspend monthly collection for a brief period of time, even if the annual assessment has already been levied. However, we do not think suspension of collection is prudent, and we are taking a global position that boards should not make that decision at this time. Any decision to suspend monthly collections should be made only after the board has thoroughly evaluated the HOA's specific 2020 budget, and a determination is made as to which budget line items will be cut. Any reduction in collection of assessments should follow only a corresponding realistic and verifiable reduction in budget. We would caution that the worst financial exigencies may be yet to come, not necessarily to be implemented in the present time. It is important to remember that an HOA is a nonprofit corporation whose only source of revenue is the payment of assessments from its members. Unlike utility companies and lenders who are very publicly advertising suspension of fees for late payments or even forgiving monthly payments for a time, an HOA has no profit cushion to fall back on. Boards need to seriously consider long term planning before any short term or temporary financial decision is made.

**Should HOAs suspend foreclosures during this time of crisis?** Yes. The recent directive from HUD to suspend initiation and completion/progress of foreclosures applies only to FHA-backed mortgage loans and does not apply to foreclosure of HOA liens. Nonetheless, our firm is recommending a suspension of all foreclosure activity for a period of 60 days, and as of yesterday, we are not filing new foreclosures, setting sales or continuing existing hearings until after June 20, 2020. We think this is the best course of action in the current state of emergency.

**Should HOAs suspend the filing of liens during this time of crisis?** No. We are advising HOAs and management companies to continue current collection policies up to the point of lien. Given our specific experience with HOA collections during the national Recession of 2009-2012, it is important that the HOA's position be secured with a lien against the property. The claim of lien in North Carolina is valid for 3 years without the need to initiate a foreclosure or civil action to perfect the lien. Given the high number of bankruptcy filings we saw 10 years ago, it is important the Association be proactive to file liens and position itself to be in secured creditor status. It is our advice that collections not proceed beyond the point of lien for at least the next 60 days, but it is important to get the lien in place to protect the Association's position. Again, specific requests of owners with COVID-19 related hardships should be given lenient consideration.

**Should HOAs suspend fines for noncompliance/violations during this time of crisis?** Generally, yes. For ordinary violations such as street parking, trash cans, failure to power wash, debris on the porch, etc., it is reasonable to pause the imposition of fines for the next 60 days, in line with our foreclosure suspension recommendations. We would also advise HOAs to consider a proactive program of grace period to bring property into compliance, with a waiver of any accumulated fines for all violations corrected before April 30<sup>th</sup> (or other date agreed upon by the HOA board). With more people spending time at home, this is a good time to encourage people to clean up their yards, pick up debris, paint the mailbox, etc. However, there may be exceptional situations which warrant swift and certain action, including the imposition of fines. These would include situations which are threatening the safety or health of the community or irreparable situation such as unauthorized tree removal, pouring foundation for unapproved new construction, etc. Please reach out to one of our attorneys to discuss any specific situation you feel may fall into these categories. Likewise, if you have been considering instituting legal action for enforcement of covenants, please contact us to discuss whether we recommend holding off or proceeding, which is dependent on situational particulars.

**Can we hold in-person fine hearings?** No. The requirement for in-person attendance at a due process hearing given current personal distancing restrictions is unreasonable and would not be compliant with due process. We also are of the collective opinion that conference call participation and video “virtual” meeting technology will result in predictable challenge months from now when and if we are at the point of trying to enforce fines that were levied in these “virtual” meetings. Owners will undoubtedly argue that they did not have the technology or reasonable opportunity to participate, and we think it is more advisable to simply take a 60 day pause here. Again, please call us if you feel you have an exceptional situation.

**Can our Association ask owners to voluntarily advise if they have been diagnosed with COVID-19?** We have received this question from a number of our condominium association clients. The answer is Yes – you can ask for voluntary disclosure. Any request should be accompanied by assurance that the information will be kept in strict confidence by the Board – you cannot by law disclose that information to other community members. Any request for that information should be sent with an offer of corresponding assistance – can we help take out your trash? Can we help with meal delivery? Medicine pick up? Whether or not you should take extra precautions to clean common areas such as hallways and elevators should not be a consideration – you should be doing that now, and we do not advise that you imply to owners that you have the capability of cleaning to the degree that you can insure their safety in any event.

**Silver Linings??** As suggested above, given consideration during this time to offering a grace period to encourage clean-up of yards, correction of property-related violations. Also, one of our attorneys suggested this is a good time to catch people at home to sign and mail back written consents for amendments if that is something your community has been trying to achieve. We do not recommend going door to door to collect signatures, but this may be a good time to get members to focus on community issues.

Please be safe and be well.

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### **3.13.2020**

First, use your best judgment and keep in mind your fiduciary responsibility to consider all members of the community. We are recommending a move to conference call or virtual meetings where possible and postponement of annual meetings, budget ratification meetings or other general gatherings for the next 30 days in line with state and national policy recommendations. From a legal perspective, the current unprecedented situation would justify a decision to postpone meetings, elections, votes on any matter. The fiduciary decisions to protect the safety and welfare of your membership, and the potential liability to the Association, should be weighed against procedural concerns. Should you have specific questions that would involve critical timing for a vote or other issue, please feel free to reach out to one of us.



We have also had questions about closing clubhouses, fitness centers or other amenities, cancelling club meetings, social gatherings, Zumba classes in the rec center, etc. Our general advice from a liability standpoint is to take a 30-day pause. Stress to your membership that any cancellations or suspension of activities/services is temporary and in line with the call from state and national leaders to impede the spread of the COVID-19 virus. If you decide to continue operations/activities, it is important from a liability standpoint that you communicate to the membership that each individual should participate at his or her own risk, and the Association is not taking any special measures to disinfect areas after use. You should further communicate that participants are required to follow all of the public safety and health protocols for handwashing and social distancing and not to enter the facilities if someone is symptomatic.

Again, we advise you stress that this situation is temporary, and we are recommending just a 30-day pause in the interest of public health and safety. We are all hopeful that this situation will be much improved in the coming weeks and life will return to normal for all of us. Please do not hesitate to contact any of our attorneys if we can answer further questions.