

“COVID-19 Presents Unique Questions for Associations - Part II,” News-Press

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By: Joseph E. Adams



On March 9, 2020, Florida Governor Ron DeSantis, declared a state of emergency in response to confirmed COVID-19 cases in Florida. On March 13, 2020, U.S. President Donald Trump, declared a national emergency. Numerous units of state and local government around the nation have enacted similar proclamations and have

implemented a variety of different measures intended to impede transmission of the virus.

As noted in my first column, most associations appear to be primarily relying on Section 718.1265 of the Florida Condominium Act and Section 720.316 of the Florida Homeowners' Association Act for guidance.

For example, those statutes permit the conduct of board meetings and membership meetings with notice given “as is practicable.” The statutes list publication, radio, U.S. mail, the internet, public service announcements, and conspicuous postings on the condominium property, as examples.

The statutes also specifically permit associations to cancel and reschedule any association meeting. These laws also state that based upon advice of emergency management officials or “upon the advice of licensed professionals retained by the board”, the board may determine any portion of 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.

The statutes contemplate fairly broad and extraordinary emergency powers, but were written to address natural disasters creating property damage, primarily hurricanes. The extent to which they can be applied to COVID-19 remains one of the many uncharted waters that must be navigated by boards, their managers, and their legal counsel.

Of note, on March 13, 2020, the Director for The Division of Florida

Condominiums, Timeshares and Mobile Homes requested the Condominium & Planned Development Committee of the Florida Bar to advise its members that it was the Division's position that the condominium statute could be applied to the COVID-19 pandemic.

While the Division is not empowered to render general pronouncements of law, or expand scope of existing law, and has virtually no jurisdiction over homeowners' associations, this at the least, demonstrates that the Division will be viewing this issue generously from a regulatory standpoint. However, to the extent there are challenges after the dust settles, most of them will be heard in court.

Although these are certainly challenging times for everyone, boards should take some comfort in knowing that there is support in the law affording deference to the "business judgment" of a board. In a decision released on March 18, 2020 (in a case having nothing to do with COVID-19), a Florida appeals court reiterated that "Florida courts have extended business-judgment deference to common interest associations if a decision is within the scope of the association's authority and is reasonable." The court also noted that the law gives the board "wide latitude in the management of the affairs of a corporation provided always that judgment, and that means an honest, unbiased judgment, is reasonably exercised."

This is a long-standing rule of law commonly known as the "business judgment rule," which is codified at Section 617.0830 of the Florida Not For Profit Corporation Act. The statute specifically states that directors are entitled to rely on the opinions of persons they reasonably believe to be competent in the subject matter. Doing so creates an absolute immunity against personal liability.

Unfortunately, there is a tremendous amount of misinformation (though likely well intentioned) and "urban legends" that seem to be developing in this arena. I have seen lawyers giving medical advice, property managers giving legal advice, and elected politicians giving public health advice that is not consistent with what the actual agencies with expertise in the field are saying. None of these pass muster under the business judgment rule.

So, my advice is stay calm, rely on the people you have relationships with and who will stay in their lane of expertise, and do the best you can do. No one can ask for anything more.