

MERCERTRIGIANI

Living & Governing Through Coronavirus (and other Acts of God or *Force Majeure*)

Contracts

It is unlikely that boards of directors and community residents had a pandemic in mind when negotiating and entering into contracts. Concerns about unknown contractors and other workers entering communities and ensuring against disruptions in important services are real concerns. The unknown length of time when our movements are restricted also may impact certain contracts. Boards should consider the impact of contractual relationships with associations and residents and begin taking steps to mitigate negative impacts on communities.

Association Contracts

Boards should begin with an inventory of on-going contractual relationships. Whether for management, trash removal, landscaping, construction or other services, boards must begin planning for potential disruptions in service by contractors. Or, in other instances, boards may consider taking steps to suspend performance where services may not be needed – such as pool management services when pool opening may be delayed.

After inventorying contracts, boards should contact vendors and obtain any protocol being put in place by the vendor that accounts for impacts of the Coronavirus pandemic. Boards should require that vendor or contractor responses be in writing. Once information is compiled, boards should evaluate association contracts, considering the following –

- *Has performance begun?* – If a contract has been signed but performance has not begun, consider potential benefits from suspending performance of the contract. Boards also may consider the contractor's position on suspending services.
- *Do changes need to be made to current performance?* – Consider the number of individuals who will be onsite and whether the number conflicts with orders and recommendations from federal and state government and health organizations to limit community spread. Consider also whether increased cleaning and sanitizing requirements should be incorporated into contractor practices.
- *Should a backup plan be identified?* – Depending on information provided by vendors, boards may need to prepare a backup plan in the event service is disrupted.
- *Have payment procedures been altered?* – With reduced in-office personnel, some management companies are making adjustments to payment processes.

If changes need to be made, care must be taken to work within contract requirements. Being proactive with vendors and contractors, identifying concerns and proposing rational solutions, may be the best course of action. If the parties agree to modify the agreement, changes should be properly documented in writing in a signed addendum. Boards should be prepared to negotiate with vendors and contractors thinking through and developing creative solutions.

It may not be possible to resolve all concerns amicably. Boards may need to be prepared to enforce or yield to contract terms. Legal counsel should be consulted to evaluate position strength and to offer guidance in preparing a strategy. For example, a *force majeure* clause or similar contract provision may excuse a party from performing contractual obligations.

Resident Contracts

Concerns have been raised whether to limit access to communities by contractors working in individual units or lots. While boards are responsible for maintaining and operating common spaces, the authority to restrict access to resident guests and contractors may not be without limit.

Refusing access to contractors may be considered interference with a contract, exposing the association to liability. In addition, work being performed may be necessary to fulfill owner maintenance responsibility or to address critical concerns. If the board prohibits contractors from accessing units or lots, the association may be held responsible if damage results.

While contractors may not be prohibited from entering a community, residents should be strongly encouraged to postpone work that is not essential or necessary. Boards should put a protocol or policy in place (or update existing policies) to address requirements and expectations for contractors. For example, contractors may be required to register daily and take steps to keep common spaces clean. Boards may, within proper authority expressly established in governing documents, assess a cleaning charge to residents for contractor access. Boards should work with management and legal counsel to put a protocol in place – *and communicate the protocol clearly to owners and residents.*