

MERCERTRIGIANI

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

Board Meetings

The Virginia Condominium Act and the Virginia Property Owners' Association Act require association boards of directors to conduct business at meetings open to members. However, under the threat of contagion posed by Coronavirus and Executive Order Number Fifty-Three ("Order") issued by the Governor of Virginia restricting public and private gatherings, convening a meeting presents challenges.

Boards first must decide whether meeting is necessary. If there is no immediate concern requiring board or committee action, boards should consider suspending all board and committee meetings indefinitely – or at least until the Order expires at 11:59 p.m. on Thursday, April 23, 2020. If an urgent matter arises, a special meeting may be called, or the board may use methods that allow action outside a meeting discussed in more detail below.

When Board Action may be Necessary

- Consideration of a contract
- To meet deadlines for review of architectural change applications
- Postponing annual meeting
- Taking action to limit access to community facilities

If boards decide to meet or board action becomes necessary, boards must implement a plan for meeting conduct that complies with open meeting requirements and the Order. Several options are discussed below. Boards and managers need to be prepared with a plan to continue governance if circumstances prohibit meetings, or in the case of Coronavirus, make meeting dangerous to the health of boards and community members. Once developed, the plan should be published and distributed throughout the community – transparency and communication remain stalwarts of good governance.

The Order does *not* obviate the statutory requirements for open meetings of boards and committees.

Utilizing Technology

In order to convene a meeting, a quorum of directors must be present, as dictated by association governing documents. Directors *cannot* vote by proxy – director *presence* is required to take action. But, the Virginia Property Owners' Association Act and the Virginia Condominium Act authorize participation by phone and other means on two conditions:

- *Two* Board members must be *physically present* at the meeting location *and*
- Audio equipment must allow for any member in attendance to hear what is said.

Although technology may reduce the number of board members that must be physically present, meetings must be open to members.

Physical Attendance – In observance of the Order, physical attendance at meetings **must be limited** to no more than ten people. As long as all members are provided an opportunity to observe the meeting, the *open meeting* requirements established in Virginia community association statutes may be satisfied. Boards may provide members with the call-in conference line number or access to the video meeting service the board is using (e.g., Skype, Google Hangouts, Facebook Live, Zoom). As long as all members can hear board discussion and participate in open forum, the Board may limit physical attendance at the meeting.

Open Forum – Community association statutes require boards to provide a period for members to comment during the meeting, *subject to reasonable rules adopted by the board*. Under the circumstances presented by Coronavirus, the board can wield some creative authority. For example, boards may (i) request comments in advance or (ii) have members preregister for an opportunity to speak during the meeting. The requirement – the Board only must provide a time for members to comment during the meeting.

** Boards *always* should endeavor to conduct business at meetings open to members in accordance with statutory requirements. Taking action *outside* of meetings should be limited to extraordinary and emergency circumstances. **

Unanimous Written Consent

For **incorporated** common interest communities, boards may exercise limited authority established in Section 13.1-865 of the Virginia Nonstock Corporation Act to take action outside of a formal board meeting. Unless the association articles of incorporation expressly provide otherwise, **every** board member (**not** a majority of the board) must consent, **in writing**, to an action proposed to be taken by the board. So long as the consent is **unanimous**, the proposed action becomes effective when the last written consent is delivered to the association.

For **unincorporated** common interest community associations (typically condominium unit owners associations), board authority to take action outside of a meeting must be established in the association governing documents – often the bylaws. In most cases when action outside of a meeting is authorized for unincorporated associations, **unanimous** written consent is required.

Although it cannot be emphasized enough that boards should take action *only* in meetings open to members, extraordinary circumstances like those posed by Coronavirus require consideration of extraordinary measures. Association governing documents should be reviewed to confirm authority and the requisite majority needed to take action by written consent.

Delegation of Authority

Boards may choose to delegate authority to a designee (such as the association president or the community manager) to act on behalf of the board between meetings. When delegating authority, the board may and should establish clear and definite parameters for that authority. For example, the manager may be authorized to spend up to \$1,000 (or another amount deemed appropriate by the board) *without* board approval. Delegation of authority requires board action, so care should be taken to act in a meeting or by unanimous written consent.

Officer Authority

The fallback position is to rely on governing document provisions and Virginia corporate law establishing authority for association officers. Under Virginia law, officers of business entities enjoy day-to-day operational authority to exercise on behalf of the entities the officers are elected to govern. While this authority is not without limits, association officers may rely on established corporate doctrine to take necessary action between board meetings. When officers are compelled to act, best practice is to alert the board and obtain unanimous written consent. If circumstances prevent board prior consent, steps should be taken to ratify officer action at a subsequent meeting. In any case, it is best to confirm authority to act outside of a meeting before taking any action that obligates the association.

In the meantime, primary focus should be on the care of your health and the health of your family members, neighbors and community. Heed the advice of the Center for Disease Control and Prevention and the Virginia Department of Health and take action now to prevent contracting and spreading the disease. More information is available through the Virginia Department of Health and additional recommendations for community associations can be obtained through Community Associations Institute.

Prevention

- Adopt a Disaster Preparedness Plan.
 - Identify operational concerns (payment of assessments, contracting, communicating with vendors and residents).
 - Identify and discuss possible solutions.
 - Confirm communication methods.
 - Maintain in written form.
- Confirm insurance policies do not exclude *communicable pathways*.
- Inform and engage Community.
 - How association will continue to operate.
 - Share pertinent information when available.

Acting

- Keep lines of communication open.
 - Among board members, management and authority delegates.
 - Between board and members.
- *Be responsive!*
- Follow disaster response protocol diligently.
- *Be prepared to be flexible!*
- Ask for help, when needed.

Tips for Virtual Meetings

- Announce yourself when joining the meeting.
- If you are leading the meeting –
 - Take attendance so all participants know who is present.
 - Set ground rules for the meeting (e.g., talk one at a time; mute your line when you are not speaking)
 - If a participant joins the meeting late, identify participants and provide a brief overview.
 - At the end of the meeting, provide a brief recap, making sure to include conclusions reached and follow up action to be taken.
- Mute your device when you are not speaking.
- Avoid distractions (e.g., use headphones, sit in a closed-off area).
- When speaking, state your name.
- If you need to *leave* the meeting, inform everyone.
- Project a cheerful and positive tone when you speak.

Action Without Meeting

- Unanimous written consent
 - Incorporated Associations – Section 13.1-865, Virginia Nonstock Corporation Act
 - Unincorporated Associations – Review governing documents
- Expressly delegate authority
- Officers act within scope of authority