

# MERCERTRIGIANI

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

### *Common Spaces*

With Virginia schools closed for the remainder of the 2020 school year, most retail, fitness and entertainment venues closed and businesses closed or operating with remote staff, residents will be spending more time at home. And when people gather, the risk of exposure to contagious illnesses, such as Coronavirus, increases. Because boards of directors are responsible for administration, operation and governance of association common spaces, guidance offered in this changing landscape of health concerns suggests that boards should consider and implement practices that promote the health and well-being of residents while managing common spaces.

There is no universal solution to the viral threat facing our communities. Boards should note community characteristics when taking action:

- Are residents transient?
- Is there a significant number of residents in an at-risk category (e.g., age, ongoing medical issues)?
- Is access to common spaces controlled?
- How trafficked are common spaces?
- Are residents contained in close quarters (e.g., condominium vs. single-family homes)?
- What concerns have been raised?

In addition to community characteristics, the following policies should be considered when making common area operation decisions –

***Close Facilities*** – Generally, board responsibility for operating and maintaining common spaces includes the authority to restrict use, so long as the restriction is applied uniformly to association members and community residents. In other words, boards may close common spaces to ***all*** members and residents.

Leaving facilities open without limiting the number of users may conflict with Executive Order Number Fifty-Three (“Order”) issued by the Governor of Virginia. The Order prohibits public and private gatherings of more than ten individuals and requires closure of all fitness centers, gymnasiums, recreation centers and indoor sports and exercise facilities. The Order provides that violating the Order is a Class 1 misdemeanor. The Order went into effect Tuesday, March 24 at 11:59 p.m. and will continue until Thursday, April 23 at 11:59 p.m.

Associations ***must*** close any common facilities that fall within the terms of the Order. For other common spaces (e.g., outdoor playgrounds and playfields), it is unclear whether an association may be held responsible if residents gather in violation of the Order. If an association has the resources to enforce a limit of ten or fewer users, outdoor common spaces may remain open. But, because boards are aware of potential safety concerns with continued use of the community facilities, leaving common spaces open may expose associations to liability.

If the decision to close common spaces, boards should communicate with residents and take steps to prohibit access where possible (e.g., lock doors, install a temporary fence). If access cannot be restricted or controlled using reasonable measures, signs should be posted clearly around the common spaces.

***Increase Cleaning*** – The decision to keep allowed facilities open, increased cleaning and periodic sanitizing of common contact surfaces is a must. And, the association should make cleaning and sanitizing products available for patron use as well. Published information explains that Coronavirus is spread mainly from person-to-person contact, most often after touching eyes, nose and mouth with unwashed hands. The virus may survive on surfaces touched by an infected individual for a period of hours or up to three days, depending on the surface. [Recommendations](#) for cleaning and disinfecting community facilities have been issued by the Center for Disease Control and Prevention (“CDC”). If associations are without resources to meet recommended cleaning standards, facilities should be closed.

***Promote Every-Day Preventive Hygiene*** – Encourage residents to cover coughs and sneezes, but not with hands. Hands should be washed frequently – 20 seconds with soap and water. Residents should avoid touching their eyes, noses and mouths. Social distancing should be encouraged. The CDC has published [flyers](#) that boards may place around the community to encourage preventive hygiene.

***Limit Guests*** – Boards should adopt rules limiting the number of guests using common spaces to ten as the Order requires, in consultation with legal counsel to confirm the scope of board authority.

***Cancel or Postpone Community Meetings and Events*** – Because the Order bans all public and private gatherings of more than ten people, all association-sponsored events inviting participation by more than ten people – including board and annual meetings - ***must*** be canceled or postponed.

***Disseminate Information*** – Communicate, communicate, communicate! Information concerning steps being taken by the association should be disseminated to residents regularly. Residents should be reminded that associations are ***not*** responsible for health, safety and security, but that reasonable steps are being taken to mitigate the risk of disease transmission in common spaces.

***Remain Calm*** – Encourage residents to exercise courtesy to others. Remember that community associations are housing providers subject to federal and state fair housing laws that protect persons with disabilities and persons who are members of other protected classes.

Boards should request guidance from association insurance brokers when evaluating decisions how to operate and maintain common spaces - Do property insurance policies provide for cleaning of communicable diseases? Do directors and officers liability insurance policies cover claims made arising from communicable diseases? Guidance from insurance professionals indicates that most associations do ***not*** have coverage – with some exceptions. Nevertheless, an inquiry with written response is recommended.