COMMUNITY MATTERS

LUEDER, LARKIN & HUNTER

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A Virtual Reality: Update to Georgia Law for Holding Virtual Meetings

by | **Brendan R. Hunter, Esq.**

Most community associations have been holding board meetings and membership meetings virtually this past year due to the COVID-19 pandemic.

The Georgia Nonprofit Corporation Code already permitted board meetings to be conducted through the use of remote communication (i.e., virtually). Additionally, Governor Brian Kemp issued Executive Orders over the course of the past year providing that associations shall hold all meetings virtually as practicable, although the most current Executive Order (April 30, 2021) does not contain this requirement.

The Georgia Legislature has now enacted a new law, House Bill 306 that specifically authorizes holding membership meetings by means of remote communication unless the articles of incorporation of bylaws of the association provide otherwise. House Bill 306, which was signed by the Governor and made effective on April 29, 2021, provides that the board of directors may hold annual, regular, and special membership meetings wholly or partially by means of remote communication.

There are several requirements that must be adhered to in order to properly conduct a virtual meeting under the new law. First, all members must be provided an opportunity to read or hear the proceedings of the meeting substantially concurrently with such meeting. The various platforms community associations have been using (Zoom, for example) already meet this requirement.

Next, for members not physically present at the meeting, such members must also be able to participate in the meeting. Again, the platforms that have been used by community associations permit this participation of the members through direct communication and text features.

Further, the new law provides that the community association is required to implement reasonable procedures to verify that each person deemed present at the virtual meeting is a member or a proxy holder. There are several procedures the board can adopt in order to comply with this requirement. The association can implement a pre-registration process wherein each member is provided unique login information for attending the virtual meeting. This would permit the association to verify membership information prior to the virtual meeting. The association can also utilize a "waiting room" before permitting a member to join the virtually meeting. This enables the association to verify the membership information of each participant prior to such participant entering the meeting.

Finally, the new law requires the community association to maintain a record of any vote or such other action conducted virtually during the meeting. The manner in which the association conducts the vote or takes such other action will dictate how such record will be maintained. For instance, if the association utilizes electronic ballots, the association is required to maintain these records. However, if the association conducts a voice vote, the association should make a recording of such vote through the virtual platform.

Many community associations have benefited greatly from conducting virtual meetings this past year. This new law is helpful to associations in providing a statutory framework to properly conduct virtual meetings going forward. However, it is imperative that the board continues to work with its association's attorney to ensure that all aspects of this new law are complied with and all requirements are met.

Georgia is Open for Business

by | **Joseph C. Larkin, Esq.**

Over a year after it began, the COVID-19 global pandemic is still ongoing. Indeed, as this article is being written in early May of 2021, Georgia remains in a "State of Emergency." Thankfully, the data maintained by the Georgia Department of Health shows that the number of confirmed COVID-19 cases has declined dramatically since January of 2021, when Georgia's confirmed case count crested at 10,000 new cases per day. As of early May, daily confirmed infections rarely cross 1,000.

Now that highly effective vaccines are readily available to all Georgia residents, and recognizing the trend in the reduction of cases, Governor Brian Kemp has committed to fully reopening Georgia. On April 7, 2021, the Governor held a press conference declaring that Georgia is "open for business." He stated that, beginning on April 8, 2021, he will be eliminating the ban on gatherings and eliminating the remaining shelter in place requirements. He further stated that the distance requirements for bars, restaurants, and other places of business "is a thing of the past," and he will no longer allow businesses to be closed for failure to comply with his Executive Orders.

The Executive Orders, he said, were meant to consolidate guidance into a single, easy-to-use list. On April 30, 2021, Governor Kemp signed his latest Executive Order for Empowering a Healthy Georgia (the "Order"). The Order further loosens COVID-19 mandates, specifically with regard to

associations that have "gyms" and "fitness centers," which until this Order, were required to implement multiple mandatory safety measures. Those measures, which are now no longer mandatory, included utilizing contactless forms of check-in, providing antibacterial sanitation wipes near equipment, requiring users to wipe down the equipment after use, enforcing social distancing, prohibiting congregating between non-cohabitating users, and requiring rooms and equipment to be cleaned and disinfected regularly. The latest Order makes no mention of gyms or fitness centers whatsoever.

The portions of the Order that are relevant to community associations are mildly confusing, as it states that community associations "shall implement measures to mitigate the exposure and spread of COVID-19 among its workforce." "Workforce" is not defined, and this makes it unclear whether it was the Governor's intention to include the membership of a community association within this term. Regardless, the Order no longer includes mandatory COVID-19 mitigation measures. Instead, the Order now provides that "such measures **may** include" a list twelve separate actions, most of which had previously been mandatory since the spring of 2020. That "simple, easy-to-use list" of suggested measures applies to all "Organizations." Although this list is not very well-tailored to community associations, it provides the following optional actions:

1. Any measures that have been proven effective to control the spread of COVID-19;
2. Screening and evaluating Workers who exhibit Symptoms of COVID-19;
3. Requiring Workers who exhibit Symptoms of COVID-19 to not report to work or to seek medical attention;
4. Posting signage at the entrances to the facility stating that individuals who have been diagnosed with COVID-19, have Symptoms of COVID-19, or had contact with a person that has or is suspected to have COVID-19 within the past fourteen (14) days and have not completed the Post-Exposure Quarantine Protocol shall not enter the facility;
5. Enhancing sanitation as appropriate;
6. Disinfecting frequently touched surfaces regularly, including, but not limited to, PIN entry devices, signature pads, and other point of sale equipment, door handles, and light switches;
7. Increasing space between Workers' worksites to maintain social distancing;
8. Permitting Workers to take breaks and meals outside, in their office or personal workspace, or in such other areas where proper Social Distancing is attainable;
9. If the Organization engages volunteers or has members of the public participate in activities, prohibiting volunteering or participation in activities for persons diagnosed with COVID-19, having exhibited Symptoms of COVID-19, or having had contact with a person that has or is suspected to have COVID- 19 within the past fourteen (14) days and having not yet completed the Post-Exposure Quarantine Protocol;
10. Ensuring ventilation systems operate properly and increasing circulation and purification of air within facilities as practicable;
11. If the Organization provides childcare services, complying with the regulations for "Childcare Facilities" included in Section VI of this Order titled "Education & Children"; and
12. Any food service areas within an Organization's facility must adhere to the guidelines set forth in Section III of this Order, titled "Restaurants & Bars."

Because the measures which were previously mandatory are now optional, associations will need to make their own determination as to which measures they should implement to ensure that they are mitigating the exposure and spread of COVID-19 on common area facilities. Each community is different, and so each board of directors will need to decide which measures to implement. Some associations may choose to implement all of the relevant optional actions listed in the Order. Some association may decide to implement additional stricter measures, while other associations may want to implement only the minimum requirements.

As set forth in a recent communication to our clients, at a minimum, our firm suggests implementing the following measures:

A. Implement rules to include at least the following four actions: (1) prohibiting individuals who have been diagnosed with COVID-19, have Symptoms of COVID-19, or had contact with a person that has, or is suspected to have COVID-19, within the past 14 days and have not completed certain quarantine protocols, from entering the facilities; (2) informing individuals that they should disinfect frequently touched surfaces before and after use; (3) informing individuals that they should regularly wash their hands; and (4) informing individuals that they should practice Social Distancing (maintaining six feet from non-household persons).

B. Post a sign on the facilities (such as pool area, clubhouse, fitness center, etc.) that includes the following language, which is set forth in the latest Order as an optional measure:

> Individuals who have been diagnosed with COVID-19, have Symptoms of COVID-19, or had contact with a person that has or is suspected to have COVID-19 within the past fourteen days and have not completed the Post-Exposure Quarantine Protocol shall not enter the facility.

C. Post a sign in compliance with the Georgia COVID-19 Pandemic Business Safety Act, codified at O.C.G.A. Section 51-16-1, et. seq. As our firm notified clients and community association managers last year, Governor Kemp signed this Act into law on August 5, 2020. This Act limits liability of associations if a person is infected with COVID-19 while using association property, except in cases involving gross negligence, willful and wanton misconduct, reckless infliction of harm or intentional infliction of harm. Please see our firm's Summer 2020 Legislative Update for a more detailed discussion of this law. In order for the protections to apply, an association must post signage complying with the specific requirements of that law. The text of the sign must be in at least one-inch Arial font, and the sign must be placed apart from any other text at the point of entry to the area and include the following language:

> Warning
>
> Under Georgia law, there is no liability for an injury or death of an individual entering these premises if such injury or death results from the inherent risks of contracting COVID-19. You are assuming this risk by entering these premises.

Optionally, an association may want to require members to execute a waiver. In light of the Georgia COVID-19 Pandemic Business Safety Act, our opinion is that signed waivers are not essential, but, that said, associations may still choose to require waivers as an additional layer of protection. Signed waivers also can include an acknowledgment that persons using the facility (e.g. pool, clubhouse) will comply with the rules adopted by the association to mitigate the exposure and spread of COVID-19.

We are, of course, happy to assist our clients in formulating a plan that is narrowly tailored to their unique characteristics. Please do not hesitate to contact our firm if you have additional questions.

Revisiting the *Mountainbrook* Decision

by | **Brandon D. Wagner, Esq.**

It has been nearly five years since *Northside Bank v. Mountainbrook of Bartow County Homeowners Association, Inc.* was decided. In that case, Mountainbrook HOA filed suit against Northside Bank for failure to pay assessments on a number of properties the bank owned through foreclosure. The association's Declaration did not provide a specific figure for interest, but instead, provided that interest could be levied on unpaid assessments at "the maximum legal rate per annum." The question became, what is the applicable interest rate to be charged?

For condominiums subject to the Georgia Condominium Act ("COA") and for communities that have been subjected to the Georgia Property Owners' Association Act ("POA"), the question of the maximum legal rate of interest is expressly answered by statute: 10% per annum "to the extent the instrument provides." However, for common law homeowners associations with governing documents that allow interest at the maximum legal rate, the industry has debated whether the allowable interest rate is 7% or 18%. O.C.G.A. § 7-4-2 provides that the maximum rate of interest is 7% in contracts where the interest rate is not specified. Conversely, O.C.G.A. § 7-4-16 establishes the maximum of interest to be 1.5% per month (18% per annum) on commercial accounts. Mountainbrook HOA argued that the 18% rate for commercial accounts applied.

The *Mountainbrook* Court decided that the Mountainbrook HOA Declaration was ambiguous and concluded that the standard contractual interest rate of 7% applied instead of 18% under O.C.G.A. § 7-4-16. The Court held that the Declaration, which gave rise to the authority to collect interest, was not considered a commercial account, and thus O.C.G.A. § 7-4-16 did not apply.

In addition, the Court found that a provision setting late fees at the discretion of an association's Board of Directors without specifying a specific late fee amount may not be enforceable without evidence that the amount chosen was a reasonable pre-estimate of damages caused by non-payment of the assessments. The Court noted that the late fee provision provides no pre-estimate, reasonable or otherwise, of the probable loss associated with the late payment of assessments. The late fee was set at the total discretion of the Board. There was no indication as to what criteria the Board must use to determine the late fee amount, when the late fees are to be set, or whether there is any ceiling on the amount of late fees that can be charged. In short, the late fee was considered an impermissible penalty, not liquidated damages.

For those Associations that are submitted to either the COA or the POA, the Association may charge late or delinquency charges not in excess of the greater of $10.00 or 10 percent of the amount of each assessment or installment not paid when due. However, since *Mountainbrook* involved a community not subject to the POA or the COA, it is unclear how the Court would have ruled had the association been subject to either statute. Although a provision that directs a late fee amount "to be determined by the board" seems like the kind of ambiguous language that could constitute an impermissible penalty as discussed in *Mountainbrook*, the COA and POA specifically provide for late fees up to a "ceiling amount," and defer to the association instruments to provide any amount under that ceiling. In a prior case called *Spratt v. Henderson Mill Condominium Association*, the Court of Appeals employed that same logic when it ruled that fines were not an impermissible penalty because the COA specifically provided for them.

Finally, the Court in *Mountainbrook* ruled that the provisions of O.C.G.A. § 13-1-11, which limits the recovery of attorney's fees to a percentage of the principal, does not apply to HOA collection cases. The Court held that O.C.G.A. § 13-1-11 does not apply because the Declaration is not "evidence of indebtedness" as contemplated by the statute. Evidence of indebtedness makes reference to a "printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money." Put more simply, a contract that provides for a defined obligation to pay a sum of money, such as a Promissory Note, is "evidence of indebtedness." Here, the Mountainbrook HOA Declaration only indicates an obligation that *may* arise to pay assessments should they be levied. Moreover, in holding that O.C.G.A. § 13-1-11 does not apply to an attorneys' fees provision in a declaration of covenants, the Court rejected a common argument asserted by non-paying owners that if the words "actually incurred" did not appear in the attorney's fee provision, that O.C.G.A. § 13-1-11 would provide the legal calculation.

Please be sure to review your governing documents carefully and defer to your legal counsel for advice on whether your covenants pose the same questions reviewed in *Mountainbrook*.

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