

BURR ALERT

South Carolina Homeowners Association Responses to Covid-19

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Governor Henry McMaster issued Executive Order No. 2020-08 on March 13, 2020, declaring a State of Emergency in South Carolina due to the 2019 Novel Coronavirus (“COVID-19”). Since March 13th, Governor McMaster has issued more than a dozen additional Executive Orders, which had the overall impact, among other things, of closing all non-essential business, including but not limited to the closure of all public schools and universities, gyms, salons, and dine-in restaurants. The Governor has also authorized law enforcement to disperse any congregation or gathering of people, unless authorized or in their homes, in groups of three (3) or more people, as well as limited movement outside of the home with certain exceptions. While there has been a large focus on certain industries hit particularly hard by COVID-19 (e.g., restaurants, hotels, sporting and concert events), the ripple effects reach all South Carolinians and the communities where they reside. Residential homeowners associations (“HOAs”) in resort communities across South Carolina are now grappling with how to best ensure the safety and welfare of community members as well. As a result, several HOAs have suggested limiting access to their communities in order to combat the spread of the virus. Such a decision could have wide ranging and significant legal liability issues that the HOAs in question might not have considered.

There are a myriad of issues that HOAs face in this difficult time, but for the purposes of this article, we are focusing on access as it is a common question with significant potential consequences if inappropriately addressed. While this article is not a complete summary of every issue that HOAs may face, here are some issues that any HOA limiting access should consider:

1. **OWNERSHIP OF ROADWAYS.** The first thing for HOAs to consider in determining whether a community can limit access is who owns the roadways, bike paths and/or leisure trails that provide access to the community. Typically roadways, bike paths, and leisure trails within a gated community will be owned by the HOA, but confirming this is a crucial first step.
2. **OWNER RIGHTS TO USE ROADWAYS.** Assuming that the roadways are privately owned by the HOA, the second thing for HOAs to consider is what rights the owners, as well as their family members, guests, or tenants, have to utilize these roadways. Some HOAs appreciating that they own the roadways, assume that the HOA has absolute authority to control access to the community. However, these HOAs will typically include provisions in their governing documents (covenants, bylaws, rules and regulations, and other policies) stating that the HOA’s common areas (e.g. roadways) are for the common use and enjoyment of all owners, their families and guests. The governing documents typically grant an easement in favor of each of the owners (who are also the members of the HOA) to use and enjoy the common property. Therefore, in a HOA where owners are granted easement rights over the roadways under the governing documents, the applicable HOA could not unilaterally limit access to the community (unless there is another provision in the governing documents granting this authority or granting special emergency powers). Restricting access to owners only would infringe upon the easement rights of property owners within the community.

3. **THIRD PARTY RIGHTS.** Another element in this analysis is to determine if there are other parties, besides property owners, that might have access easements to and from the community. For example, private communities will often grant easements in favor of various utilities (electric, water and sewer, cable, internet) or to local municipalities. In some communities identifying other parties might be straight forward; however, for larger communities identifying other parties might be straight forward; however, for larger communities (especially semi-private communities that cater to tourists), there are often numerous easements and access rights going back decades. A decision to close the gates, therefore, would require not only the permission of property owners, but all parties with easements and recorded rights for access to and from the community. Examples of potential third party rights include:
 - a. *Shopping/Dining.* Communities with shopping and/or dining areas accessible by the general public may include in their governing documents access easements in favor of these commercial establishments.
 - b. *Golf Courses/Tennis Courts.* Communities that include a golf course or tennis facilities operated by a 3rd party may have granted easement rights in favor of that private provider.
 - c. *Perpetual Care Cemeteries/Grave Sites.* Communities that include a cemetery, burial ground, or grave is located must allow access to the cemetery, burial ground, or grave to certain persons, including family members and descendants.
4. **POTENTIAL INTERFERENCE WITH CONTRACTUAL AGREEMENTS.** Even if an analysis of access rights determines that an HOA could close or limit access to the community (with or without the consent of the other parties noted above), a very important piece of this analysis centers on the potential for significant legal liability due to interference with contractual agreements. For example, closing access to the community impacts residential real estate purchase and sale contracts, loan closings, construction and renovation contracts, leases, and service and supply agreements. Closing access could contribute to events of default in various contractual agreements throughout the community to which the community is not a party. In the event others are harmed, the community may be subject to liability for the harm caused. If the Association Board limits access despite contractual rights to access in existing covenants and easements, the act might be determined to be void for lack of authority.

For an HOA monitoring the daily updates across South Carolina and the country at large, it can seem like the ground is constantly shifting. Burr & Forman has a team of attorneys monitoring updates and providing additional guidance to our clients. Burr attorneys have extensive experience handling HOA issues and have adapted their practice to meet the needs of our local community clients.

If you have any questions regarding how your HOA should respond to COVID-19, please contact any of the following attorneys or the Burr attorney(s) with whom you regularly work.

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