

MELISSA R. CASANUEVA
JASON M. DEPAOLA
CURTIS D. HAMLIN * #
MARY R. HAWK +
TIMOTHY A. KNOWLES
GREGORY J. PORGES ++
BRYONY G. SWIFT
JAMES C. TURFFS

Of Counsel:
ALAN H. PRATHER **



PORGES, HAMLIN,
KNOWLES & HAWK, P.A.

OFFICE ADDRESS
1205 MANATEE AVENUE W.
BRADENTON, FL 34205
TEL: (941) 748-3770
FAX: (941) 746-4160
www.phkhlaw.com

*Board Certified in Real Estate Law
Board Certified in Condominium and
Planned Development Law
** Board Certified in City, County and
Local Government Law
+Florida Supreme Court Certified Circuit
Civil, Mediator Certified Arbitrator
Also Admitted in Georgia
++ Also Admitted in New York

April 20, 2020

Florida Statutes allow and indeed require the Board of Directors of a condominium association to exercise its best business judgment to safeguard and protect the condominium property and its residents and guests. This business judgment is afforded great discretion and protection by the courts.

The COVID-19 pandemic and all its legal ramifications is uncharted legal territory. We have advised our community association clients to close all common element amenities, including the pool and hot tub. The virus is so new that there is no evidence available yet that the virus is *not* spread in pool water. The CDC says that the risk of spreading the virus in pools is “expected to be low;” *i.e.* there is no empirical evidence yet available for the CDC to know for sure. And even a low risk is still a risk. Further, there *is* evidence that the virus can be contained in saliva, sweat, urine and fecal matter. All of these excrements can exist in a pool. Whenever there is saliva, sweat, urine, or fecal matter in a pool (including fecal matter that was on someone’s person even if they did not “poop” in the pool), the chemicals in the pool have to work harder to eliminate those filths, leaving fewer chemicals available to sanitize the pool. In addition, shared surfaces must be touched in order to access the pool area and the pool itself.

Closing the pool is within the Business Judgment Rule protecting the Board. Not only does closing the pool (and all other amenities) protect the Board from a later lawsuit, that is not the main impetus of our advice. We advise it because of the governmental directives that have been issued, and because *it is the right thing to do* to protect the health, safety and welfare of *all* residents.

Regardless of the Business Judgment Rule, if the Board were to not close the pool, or were to reopen it too early, and someone does get sick therefrom, the Association's Director's and Officer's Insurance may not cover harms such as injury or illness related to the directors' decision to open the pool. This may expose the Board members to personal liability.

The Governor's Orders 20-91 and 20-92 state that "all persons in Florida shall limit their movements and personal interactions outside of their home to only those necessary to obtain or provide essential services or conduct essential activities."

At least one Florida governmental entity has already banned swimming as an essential activity, proving that there are leaders who find that the virus is posing or has a potential to pose a threat to those who swim. Broward County Order 20-05 states: "All pools, pool decks, party rooms, hot tubs, golf courses, tennis courts, basketball courts, fitness centers, gymnasiums, and community rooms (collectively, "Recreational Amenities"), whether of a commercial or noncommercial nature, are closed for all purposes except as expressly excluded by this section. This section does not apply to Recreational Amenities that are: (a) required for the conduct of an essential service [not essential activity], as defined by the Governor's Executive Order 20-91, as amended; or (b) located on a single family residential lot, a single townhouse unit, or any part of a duplex lot, so long as the Recreational Amenity is utilized only by the inhabitants of that lot or unit."

A condominium association's pool is not a private pool within the Broward Act or pursuant to the Florida Building Code or the Florida Health Department. The Florida Building Code classifies a "Public Swimming Pool" to include a pool in ". . . subdivisions, or the cooperative living-type projects of five or more living units . . ." Sect. 454.1, Fla. Building Code. Furthermore, a condominium association pool must meet the Florida Health Department requirements concerning public swimming pools. Sect. 64E, Fla. Admin Code.

If one of your Association residents feels that they are a disabled resident and would like to make a request to use the pool during the pandemic as an accommodation for a disability, they are welcome to make such a request. The Association is allowed to require the statement of a health care provider that shows: the person meets the definition of a disabled person pursuant to the Fair Housing Acts; what major life activity the disabled person is prevented from accomplishing due to the disability; and how access to the pool ameliorates the disability. However, if the resident were to present an acceptable letter meeting all those criteria, the Association is only required by law to provide a "reasonable" disability accommodation to allow a disabled person the same opportunities to enjoy the premises as a non-disabled person. Since non-disabled

persons are not allowed to use the pool either, granting a disability accommodation for using the pool is not reasonable. Still, a case by case analysis is required and, if in the Board's discretion it is unreasonable to grant the request at this time, the request can be denied.

Now is not the time to slack off on restrictions. Until the "curve" is sufficiently flattened, and our leaders deem it safe to creep back into our normal routines, the pool and other recreational areas should remain closed. The Board can continue to assess the situation on a week by week basis.