**Homeowners’ association (and other nonprofit) meetings,**

**social distancing and the statutes**

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The issue is, how does a homeowners’ association such as Board or member meetings without endangering Directors and members, under Covid-19 social distancing protocols? It may come to pass that some decisions must be made, either by the members or by the Board. The following discussion starts with Association documents, and then addresses State law, governing documents in light of State law, ratification, and, finally, what to do if you are at a dead end.

This is intended to apply generally to all emergencies: pandemic, war, nuclear meltdown, earthquake, flood, fire, and so on.

Note 1: this does not address how notice of meetings is to be given. Board and membership meeting notice requirements also come from the governing documents and statutes. It also does not address timing of meetings, from the governing documents. Generally, if a meeting is supposed to happen the second weekend of January, then it must happen then; there is no workaround for that, unless it is a significant emergency, see V below.

Note 2: this does not address condominiums or common interest communities under RCW 64.90. It is way too long already. It may be useful for these owner associations as a general guide, and also for other kinds of nonprofits as well.

Summary: In order of the seriousness of the emergency, least first,

1. Follow the governing documents and statutes;
2. Try to find a way to support virtual access meetings;
3. Use unanimous consent written documents;
4. Do what you need to do, and perhaps ratify later.
5. **Association governing documents.**

Each Association will need to review covenants, Articles, Bylaws, and anything else that may have to do with how member or Board meetings are held. Usually, this will be found in the Bylaws, but not always. It must then compare them to the statutes to see how they work together.

1. **Statutes.**

The following is organized this way:

1. Statutes, member meetings, 24.03 and 24.06, the two nonprofit state statutory schemes, followed by comments in red;
2. Statutes, board meetings, 24.03 and 24.06, followed by comments in red; and
3. Unanimous consent statutes.

Note 1: for homeowners’ associations, there is nothing really helpful in either 64.38 (homeowners’ association act) or 64.90 (common interest communities act), except that it is sort of possible to have a member meeting just by proxy, if proxies are mailed in, but that may or may not be realistic.

Note 2: the members have the right to go to all Board meetings, so, if you are going to do a virtual access Board meeting, you must allow all members to attend as well. This will take some doing. Perhaps *Go to Meeting* is a good option.

1. **Statutes, member meetings:**

24.03.075: **Except as otherwise restricted by the articles of incorporation or the bylaws**, members and any committee of members of the corporation may participate in a meeting by conference telephone or similar communications equipment so that all persons participating in the meeting can hear each other at the same time. Participation by that method constitutes presence in person at a meeting.

If they fall under 24.03, then they can have member (or member committee) meetings with what I will call virtual access. But if their documents otherwise specify, there is no help for them here.

24.06.100: **If the articles of incorporation or bylaws so provide**, members or shareholders may participate in any meeting of members or shareholders by any means of communication by which all persons participating in the meeting can hear each other during the meeting. A member or shareholder participating in a meeting by this means is deemed to be present in person at the meeting.

If they fall under 24.06, then the rule is opposite. They can only use virtual access if their Bylaws or Articles so provide.

1. **Statutes, Board meetings:**

**Note: for each statute, if it is a homeowners’ association, the members have the right to go to all Board meetings, so, if they are going to do a virtual access Board meeting, they have to allow all members to attend as well.**

24.03.120: …**Except as may be otherwise restricted by the articles of incorporation or bylaws**, members of the board of directors or any committee designated by the board of directors may participate in a meeting of such board or committee by means of a conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other at the same time and participation by such means shall constitute presence in person at a meeting.

Under 24.03, then, virtual access is allowed, unless the documents say it isn’t. But when arrangements are being made, they need to be made so that all members can be “at” the meeting.

24.06.150: **Unless the articles of incorporation or bylaws provide otherwise,** any or all directors may participate in a regular or special meeting by, or conduct the meeting through the use of, any means of communication by which all directors participating can hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting.

Under 24.06, then, the default setting, again, is yes, virtual access, unless otherwise provided. Again, all members must have the opportunity to be “present.”

1. **Unanimous Consent statutes.**

RCW 24.03.465: Any action required by this chapter to be taken at a meeting of the members or directors of a corporation, or any action which may be taken at a meeting of the members or directors, may be taken without a meeting if **a consent in the form of a record**, setting forth the action so taken, **shall** **be executed by all of the members** entitled to vote with respect to the subject matter thereof, or all of the directors, as the case may be.

Such consent shall have the same force and effect as a unanimous vote and may be stated as such in any articles or record filed with the secretary of state under this chapter.

RCW 24.06.510: Any action required by this chapter to be taken at a meeting of the members, shareholders or directors of a corporation, or any action which may be taken at a meeting of the members, shareholders or directors, may be taken without a meeting, if **a consent in writing**, setting forth the action so taken, is signed by all of the members and shareholders entitled to vote thereon, or **by all of the directors**, as the case may be, **unless the articles or bylaws provide to the contrary**.

Such consent shall have the same force and effect as a unanimous vote and may be stated as such in any articles or document filed with the secretary of state.

So there is an exception for both statutes – unanimous written consent. An Association can hold a “meeting” which is informal, discuss everything it needs to discuss, but then vote by unanimous written consent. This will very likely only work with Boards, or very small associations, because they aren’t going to get unanimous consent from members on whether the earth is round. *See, e.g.,* Kyrie Irving (“[t]he earth is flat”).

This exception may be for when an association’s documents do not allow virtual access; or even if they do, there is just not enough time to give required notice of a member or a Board meeting (whatever the Bylaws or statutes say is required notice) or to arrange the virtual meeting. Some emergencies are more emergent than others.

There is no necessary requirement for what the consent looks like. It should at least be a scanned, emailed signature to a reasonably accurately described result. A Board has the authority to say how this process must work, within reason.

1. **Governing document discussion.**

Documents things vary widely. Few associations ever think of these issues. Few lawyers drag their clients through this part of their recommendations when they are making Bylaws amendments. Some associations want to make sure everyone is there to hear a discussion and vote. Some don’t. There is no uniformity. So, each association must look at its own documents, compare them to the statutes, and see where they are.

1. **Ratification.**

There are two lines of doctrines: first, a member can ratify what the Board does by payments over time, voting, serving on committees, and so on. This is going to be outcome-based appellate decision-making at its finest, though, in my opinion, so one must be careful about relying on this too much. The general rule is that a party (a member) ratifies a contract otherwise voidable if the party remains silent or continues to accept its benefits. But that is voidable contracts, not void ones. Void v. voidable is sort of a mess, but if the governing documents, or a statute, are contrary to what happened, then it may be void, and not voidable, and then ratification of this sort may not apply. Start with *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wash. App. 787, 793-94 (2007).

Second, the other kind of ratification is when a Board does things that are not valid, as in, void, or voidable; then it may be able to pick up the pieces later on and, when it has an actual meeting with a quorum, vote to ratify what happened that was not according to statute and/or governing documents.  Done properly this seems to meet statutory and governing document objections, but I am not aware of any serious evaluation of any of that in any Washington cases. This is called the loss of power to avoid a contract by affirmance (ratification) in the Restatement 2nd Contracts, 380; *see*, [*McLendon v. Snowblaze Recreational Club*, 84 Wash.App. 629, 929](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997036038&pubNum=0000661&originatingDoc=Ib0bea014da5e11e2aa340000837bc6dd&refType=RP&fi=co_pp_sp_661_1141&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_661_1141) (1997) (members of condo association did the ratifying, but same rules apply).

Ratification may be needed if things are falling apart and there is just not time to follow the formal rules.

1. **What to do if they are at a dead end?**

An Association has looked at their Bylaws and Articles, and the statutes, and these provide no clear path. They can’t, practically, get unanimous consent for member meetings, but they might for Board meetings, or they might not. They are wary of just doing something in the hope that it can be ratified later by either the Board or the general membership.

Is there a national emergency, war, pandemic, nuclear meltdown, earthquake, flood, fire, etc. exception to the rules that says if the times are extreme enough, then the process rules are adapted so that the association can make the best out of a bad situation?

Do they just go ahead and take care of business, trusting that the future will make it alright?

Practically, this works, except when it doesn’t. What if something looks like an emergency, emergency powers are invoked, someone’s ox gets gored, and then, it wasn’t so bad after all. I have much unfortunate experience with how far some members will go to work out their anger on their associations. A lawsuit from one of them is not outside the possibilities.

My advice is less conservative, and more solution-directed, than what others might say. I think that the sources of what Board members should do are the statutes about Director duties.

For both RCW 24.03 and RCW 24.06 associations, a Board member must perform their duties, (1) in good faith, (2) in a manner they believe to be in the best interests of the association, and (3) as an ordinarily prudent person would in a like position under similar circumstances. 24.03.127; 24.06.153.

I know of no case law that says that in an emergency, it is a per se violation of these duties to violate a statute that is standing in the way of an association doing what it must do to survive. Reasonableness will always be a test, but presumably that will include all the circumstances. And, as an extra added lawyer of protection, both statutes say that Directors can rely on their lawyers. So, if their lawyers tell them this is acceptable, what court is going to make them personally liable?

Finally, if there is a challenge later on, to help with the Association’s defense, there are the ultra vires statutes, that say that acts of an association are not invalid by reason of lack of power, but lack of power can be asserted by a member in an injunction proceeding; by the association against Directors for exceeding their authority; or by the attorney general.

If, (1) the normal process is suspended because of emergency circumstances such as a pandemic; (2) virtual access meetings are not possible under particular circumstances; (3) unanimous written consent won’t work either; then, (4) a Board may just want to go ahead, as opposed to risking harm to its members and property by don’t nothing; and hope for ratification, or some other path to a good result, later.

If a Board takes this approach, it should be sure to try to create the proper record. Be inclusive, transparent, and fair and reasonable in all things. And be able to prove that you were. Use it only when faced with a significant emergency, and the process for regular meetings, and unanimous consent, are not enough to provide enough protection for Association assets and/or members.