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HOAs Waive Restrictions on Above-Ground Pools-- Temporarily

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The Wall Street Journal is reporting that some HOAs are waiving restrictions—but only temporarily—against above-ground pools due to COVID-19. Sounds accommodating, with some community pools closed. But this also seems like a hard genie to put back in the bottle.

Are temporary waivers wise? Here, we ask our experts.

Let's Talk Waivers Generally

Before we talk about pools specifically, let's back up. When should you consider waivers? One of our experts has the following advice, though other experts might be less restrictive. The key is to ask your own legal advisors.

"When COVID hit, we got a plethora of questions from existing association clients," recalls Joe Wloszek, a member at Hirzel Law in Farmington, Mich., which represents more than 100 community associations; he lived in a condo for seven years and now lives in an HOA. "Can we waive restrictions? For instance, if someone is a medical professional, can we waive restrictions on campers or RVs?"

"The analysis we did is this," he explains. "If there's a prohibition in the governing documents against above-ground pools, for example, we wouldn't recommend the board knowingly violate the governing documents. That opens the board to breach of fiduciary duty claims. If there's nothing else in the documents that allows flexibility in that regard, our advice is that it's not a prudent thing to do.

"I recognize that approach might be harsh," says Wloszek. "But if you want flexibility, the method to achieve that is to amend to give the board the flexibility. It's not easy to amend documents, but this is a great time for boards to look at their documents and ask: Do our restrictions actually help or hurt?"

That's also the recommendation of Bruce Masia, LCAM, the Broward/Palm Beach County, Fla.-based vice president of the southeast region for KW Property Management. "I haven't seen this exception be granted, but my recommendation

is to not make exceptions to your rules," he states. "Making exceptions to your rules and regulations and declaration is only going to get you in trouble down the road.

"After you do it, homeowners will say, 'You did it that time, why not this time?'" he predicts. "I'd stick to your rules and regulations. Yes, we're in unprecedented times, but advise your homeowners to get a blowup pool instead of an above-ground one."

Your Docs May Give You Options

Double check all the provisions in your documents. Other provisions you're not thinking of may give you authority to act on these requests.

"There may be some outs in the governing documents," adds Wloszek. "In Michigan condo documents, there's often a modification or alteration provision. That does allow for some waivers to be approved in writing by the board. Boards can approve them on a temporary basis on certain items.

"A second avenue is often a waiver provision that says that even if an association has waived a right in the past, it doesn't mean they waive that right to enforce these restrictions in the future," he notes. "But there may still be an argument that providing a waiver during a pandemic wasn't a proper waiver, and the association isn't entitled to enforce a restriction anymore. So my question for clients is: What's their tolerance for defending against such a claim?"

Now, let's dip into the pools

Andrea L. O'Toole, a Walnut Creek-based principal at Berding Weil, a law firm that does only community association law throughout the state, has seen the reports but not actual association clients waiving prohibitions against above-ground pools.

"It's not just the regulations against them, but there are other questions about whether owners should do this," she explains. "We're technically not in a drought here in California, but people putting in pools isn't generally viewed favorably community-wise. And most pools have opened up here in California, anyway.

"That said, I suppose they could do it," muses O'Toole. "If the documents allowed for it, assuming they're not violating a covenant and the board had the power to do that, they'd have to have the person go through the architectural process. And I think they should allow the change only temporarily until the pandemic is over and people can go back to using community pools."

No Agreement, No Waiver

If your board does decide to waive a restriction—and it has that authority to do so—our experts insist on papering it up properly.

"We advise our boards that if they can and do such a waiver, the homeowner has to take full responsibility, pay all insurance requirements, and agree that they take full responsibility for the liability, including any added liability, that arises due to the waiver," says Wloszek. "Usually, that's through a modification agreement. That's often recorded so it puts all subsequent purchasers on notice

that there may be now, on a limited or temporary basis, a waiver but that the thing has to be removed in X amount of time."

O'Toole is right there with Wloszek. "If their documents permit them to do something like this, I think they could and if they do, they should do it properly from the beginning," she asserts. "I think they should have some kind of written agreement with the owner and even probably have it recorded so that potential purchasers will also know this was only temporary.

"That agreement should also have all the rights of enforcement with attorneys' fees provisions in case the owner gives you a hard time about removing it," suggests O'Toole. "That's what we do with other waivers. We had one situation where the owners didn't follow the architectural rules and put on a tile roof the association didn't allow. It was a \$40,000 roof with a 30-40 year life expectancy.

"The association filed a lawsuit over it," she recalls. "Eventually, the board said, 'We know you spent that money, and we think we have the right to make you change the roof. But we acknowledge it's a lot of money. So we'll let you keep the roof you have, but you have to sign an indemnity agreement and an agreement to change the roof back to whatever is allowed when you make any changes to the roof.'"