



Opening Your Community Amenities in 2021

By: Jay Lazega, Jamie Lyons

Can we safely open our amenities in 2021? This is the question on the mind of every community association director, manager and member. This conversation started last year around this exact time, and many communities chose not to open their amenities last summer because of the great risks of the COVID-19 pandemic. Other communities opened their amenities with greatly reduced capacity and substantially new protocols covering social distancing, disinfecting of surfaces, reservations systems and updated guest policies.

During 2020's amenity season, there was much uncertainty about the spread of COVID-19. The Centers for Disease Control and Georgia Department of Public Health issued guidelines for operating things like community recreational facilities, and Governor Kemp executed new Executive Orders almost weekly imposing obligations on communities that chose to open and operate recreational facilities. While some things remain the same as last year, quite a few other aspects of this discussion have changed in the last 12 months, and some in the last few days.

Here are some things that remain the same. On March 31, 2021, Governor Kemp issued an Executive Order renewing the Public Health State of Emergency for Georgia until April 30, 2021, which you can view [here](#). It's not clear if Governor Kemp will extend the State of Emergency after April 30, but many believe that this is likely, even with his relaxation of COVID-19 operating protocols. Also, many community association liability insurance policies continue to exclude coverage for claims related to the transmission of communicable diseases. So, if sued for COVID-19 exposure and illness on association property, associations may be obligated to defend those claim directly, without liability insurance coverage.

However, many things have changed since 2020. On March 31, 2021 Governor Kemp issued a different Executive Order called "Empowering a Healthy Georgia" that began on April 8, 2021 and expires at 11:59 pm on April 30, 2021, which you can view [here](#). The Healthy Georgia Executive Order largely reduces or eliminates prior required protocols for safe operations of recreational facilities and other amenities. Also substantially changing its earlier guidelines, the CDC recently updated its guidelines regarding cleaning and disinfecting surfaces, which you can view [here](#). Additionally, a substantial portion of the adult population has received COVID-19 vaccines, and many more are likely to do so by the customary amenity opening time for community associations.

Many, including Governor Kemp, clearly want communities to open and operate recreational facilities. And, the likelihood is that nearly all Georgia community associations will open and operate their recreational facilities in some fashion during the 2021 season. But, what COVID-19-related practices and protocols should we follow, if any, to minimize both health risks and liability risks for our community? To help evaluate this, let's look at the current Executive Order and the revised CDC guidelines.

Healthy Georgia Executive Order

The Healthy Georgia Executive Order makes **optional** previous guidelines that were mandatory for non-profit corporations, which includes most community associations. Protocols that previously were mandatory, but now are optional, include:

*Individual situations may vary and this document is not intended as specific legal advice to any party.

- Taking measures that have been proven effective at controlling the spread of COVID-19;
- Screening workers and volunteers for COVID-19 symptoms;
- Posting signs at facility entrances prohibiting people from entering if they have been diagnosed with COVID-19, have COVID-19 symptoms, or have had contact with a person who has had or is suspect of having COVID-19 within the prior 14 days;
- Enhancing sanitation; and
- Regularly disinfecting frequently touched surfaces.

The Healthy Georgia Executive Order no longer makes the above protocols mandatory. However, the Order does still require community associations and other organizations to implement measures to mitigate the exposure to, and spread of, COVID-19, but the Order does not identify any specific required measures.

Additionally, under the Healthy Georgia Executive Order, there continue to exist certain **mandatory** protocols for community **gyms and fitness centers**, including:

- (1) providing antibacterial wipes near the equipment, and requiring users to wipe down the equipment after use;
- (2) Enforcing social distancing and prohibiting non-cohabitants from congregating (specifically in group fitness classes and other areas where group sports occur);
- (3) Requiring no less than six feet between users;
- (4) Encouraging the use of face masks; and
- (5) Requiring rooms and equipment used for **group** fitness classes to be cleaned and disinfected regularly.

Prior executive orders from Governor Kemp required associations to comply with CDC and GDPH guidelines for cleaning and disinfecting amenity areas and surfaces. But, the Healthy Georgia Executive Order eliminates this obligation and only **suggests** appropriate enhanced sanitation and disinfecting frequently touched surfaces for most community amenity areas. And, at gyms and fitness centers, the new Order eliminates the obligation for associations to perform the gym cleaning and disinfecting. Instead, the new Order allows associations to simply provide sanitation stations for the users to clean the equipment.

Governor Kemp's new Executive Order makes it appear that community associations can fully and safely open and operate most amenities, with little obligation to comply with COVID safety protocols. But, the issue is not that simple. Even though Governor Kemp's Executive Order does not specifically require community associations to comply with CDC sanitizing guidelines, communities still have legal obligations to safely maintain and operate community common areas. It is likely that, regardless of Governor Kemp's executive order, courts would say that the standard for determining whether communities satisfy this duty is based on the guidelines published by the CDC and GDPH. **This means that community associations still should follow CDC and GDPH guidelines for amenity operations. And, while the CDC has loosened certain guidelines related to disinfecting surfaces, which will be discussed below, the GDPH has not yet update its guidelines from 2020, creating a conflict between CDC and GDPH guidelines.**

Changes in CDC Guidelines

While the Healthy Georgia Executive Order requires that Georgia residents and visitors practice social distancing (remaining six feet from other people, avoid assembling in groups, avoid crowded places, and avoid large crowds) and to comply with CDC guidelines for sanitation, these CDC Guidelines have changed recently. Current CDC guidelines state:

- In most situations, the risk of infection from touching a surface is low. The most reliable way to prevent infection from surfaces is to regularly wash hands or use hand sanitizer.
- When no people with confirmed or suspected COVID-19 are known to have been in a space, cleaning once a day (with products containing soap or detergent) is usually enough to sufficiently remove virus that may be on surfaces and help maintain a healthy facility.
- **If there has been a sick person or someone who tested positive for COVID-19 in your facility within the last 24 hours, you should clean AND disinfect the space.** (Cleaning is the use of soap or detergent and disinfecting is the use of a product or process registered with the EPA that is designed to inactivate the virus that causes COVID-19 surfaces [here](#).)
- High-touch surfaces should be prioritized and cleaned at least once a day. More frequent cleaning might be needed when the space is occupied by young children and others who may not consistently wear masks, wash hands, or cover coughs and sneezes. If the space is a high traffic area, you may choose to clean more frequently.

The new CDC guidelines create a different standard by which an association will be evaluated when proving it is not negligent in maintaining its common areas. With this lower threshold, association can more easily comply with the guidelines and still meet the standards set by Georgia law in the COVID-19 Pandemic Business Safety Act (“Act”).

COVID-19 Pandemic Business Safety Act

As a reminder, this is the law that was passed last summer that limits liability and grants limited civil immunity to corporations (including, we believe, associations) for damages in a COVID-19 liability claim unless the person bringing the action proves that the association, corporation, director, or officer showed gross negligence, willful and wanton misconduct, reckless infliction of harm, or intentional infliction of harm. Last summer, because the cleaning, disinfecting, and monitoring requirements in the CDC guidelines were so much more onerous, it was possible that associations not complying with the guidelines could be considered “grossly negligent” and therefore lose the protection of the Act. This year, with the more relaxed guidelines, that outcome is much less likely.

Remember, the Act provides that if the association posts a specific sign that warns of risk of COVID-19, then the court can presume that the person bringing the lawsuit assumed the risk of being exposed to and possibly getting COVID-19. So, in addition to the signage still suggested in the new Executive Order, community associations can help protect themselves from liability by posting a warning sign at a point of entry to each amenity that complies with the Act. The wording on the sign is required to be printed in at least one-inch Arial font and be placed apart from other any other text. The warning sign must state the following:

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.

Please note, however, that there is sunset provision in the Act. The Georgia legislature has adopted a law extending the Act through July 14, 2021, but Governor Kemp has not yet signed the new law to extend these liability protections. However, it is likely that the law will become effective soon.

The Healthy Georgia Executive Order and the CDC’s relaxation of certain guidelines make the risks of opening the amenities this season significantly less than last year. But, until the Georgia Department of

Public Health updates its COVID-19 guidelines, there remains a conflict that, at a minimum, creates some confusion or potential risk for associations.

Georgia Department of Public Health (Pool) Guidance

While the Executive Order and CDC guidelines may have changed, the Georgia Department of Public Health guidance from July 8, 2020 regarding public pools is still in effect. The [GDPH guidance](#) on public swimming pools provides that you should “[c]lean and disinfect frequently touched surfaces (based on daily usage but at least once during hours of operation and before opening).” If this minimum is followed at the pool, associations should be considered in compliance with this guidance and shielded from liability under the Act. The GDPH guidelines also continue to require associations to clean and disinfect shared objects at the pool (e.g., chairs, kickboards, etc.) each time they are used. It is likely that the GDPH will update its guidance to be consistent with the Healthy Georgia Executive Order and CDC guidelines, but until GDPH does this, its conflicting guidelines requiring disinfecting of surfaces could be a potential source of liability for associations who only clean daily, rather than disinfect more frequently.

Gatherings and Masks

We need to mention one last change in the new Executive Order. Governor Kemp removed the prohibition against “gatherings” (considered more than 50 people present in a single location, if being at that location meant a person had to be standing or sitting within six feet of someone else). While a “gathering” is no longer forbidden by the Executive Order and the Executive Order only encourages and suggests that people wear masks/face coverings, the Executive Order permits certain cities, counties and or other government entities to impose a “Local Option Face Covering Requirement” mandating that individual wear face masks or face coverings when they cannot maintain social distancing from non-cohabitating people. If adopted, these local laws or orders typically provide for make mandates on public property and on private property where the property owners or operators consent to that mandate.

If a community located in an area covered by a Local Option Face Covering Requirement, the association may be required to post reasonable public notice of this Local Option Face Covering Requirement and state whether the association consents to enforcement of such requirement on its property. The Executive Order also states that a Local Option Face Covering Requirement cannot be enforced against individuals on residential property. If association property is considered “residential,” then this issue is irrelevant for associations. However, it is not yet clear whether cities or counties will consider community recreational areas as non-residential property and attempt to apply local mask laws or orders to private community association property.

Release or Waiver Agreements

Many community associations who opened amenities in 2020 required users to sign release or waiver agreements, to attempt to reduce association liability risks. By signing a release or waiver, the amenity-users released the association from liability, promised not to sue the association, and agreed they were assuming the risks of using the facilities (including the potential risk of contracting COVID-19). While releases or waivers may not always provide absolute liability protection, they definitely are valuable for community associations.

On a positive note, many of the releases or waivers collected by associations in 2020 should continue to apply in 2021 (but associations should check with their attorneys on this issue). However, it is likely that communities that collected releases or waivers will have gaps of people who now need to sign releases or waivers, such as new owners, or children who were minors last year but have aged into adulthood. There are potential legal issues about whether communities can just generally require amenity use releases from

*Individual situations may vary and this document is not intended as specific legal advice to any party.

owners, since those users typically have easement rights to use community amenities. But, we believe that requiring releases or waivers is lawful in times like pandemics where boards of directors arguably have authority to keep the amenities closed due to reasonable health and safety concerns, and consistent with rule-making authority given in most community association governing documents.

Summary

The reduction in COVID-19 protocols in the updated Healthy Georgia Executive Order and CDC guidelines certainly minimizes liability risks for community associations opening and operating amenities and recreational facilities this season. Until the Georgia Department of Public Health updates its guidelines to match the CDC, and unless or until community association liability carriers accept coverage for COVID-19 related injury claims, there still is some liability risk to association in electing to open and operate facilities. But, on balance, when evaluating whether to open the amenities this season, the decision to do so appears much less worrisome for associations. Nevertheless, it still is important for associations to review these issues and their specific amenity opening plans with their attorneys.

*Individual situations may vary and this document is not intended as specific legal advice to any party.