

**HOA health and safety rules in light of relaxed government orders:
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Governor Abbott has issued Executive Order GA-34, **effective March 10, 2021**, that **lifts all occupancy/capacity limits** and **lifts all mask requirements including mask requirements imposed by local governments**, except in counties with high hospitalizations. The Governor's order still "strongly encourages" mask wearing, as does CDC protocol, but the Governor's order supersedes/voids all mandatory mask orders throughout Texas.

This article will outline various FAQs and recommendations related to the changing governmental requirements. This is not meant as a substitute for individual legal advice but rather is only a summary: all HOAs should consult with an attorney to review individual dedicatory instruments and ensure proper legal protocol is followed.

HOA Mask Rules

Can we still require homeowners to wear masks in common areas?

In most cases, yes. The recent Executive Order prevents local governments from mandating masks, but it does not prevent any private business or HOA from setting and enforcing its own rules about masks. HOA rules can be more restrictive than government orders, and the Governor's order is clear that nothing prevents a business or other establishment from enacting its own hygiene/safety measures, including mask requirements (GA-34, Section 4).

A non-condominium HOA's governing documents must give the Association sufficient rulemaking power to cover a mask mandate. Condominium associations have rulemaking authority as a matter of law. All rules should be filed in the official public records of the county.

If your HOA is a condo or your documents allow rulemaking, I recommend adopting a rule that either requires masks in common areas or authorizes the Board to adopt resolutions that enact and rescind (as circumstances change) mask mandates and other safety/hygiene measures. For now, I recommend enacting a mask mandate via rule or resolution for common areas because the CDC, and State and federal health guidelines, still strongly encourage individuals to wear face coverings wherever it is not feasible to maintain six feet of social distancing.

Capacity Limits or Distancing Requirements for Amenities

Can we still place capacity limits on HOA amenities, such as a pool?

In most cases, yes. As with mask mandates, nothing in the recent executive order prevents HOAs from enacting measures that are more restrictive than government orders. Proper rulemaking procedures must be followed before capacity limits or any other similar rule can be enforced.

Capacity limits can be maintained in rules if desired, or some HOAs find it easier to enforce rules requiring 6' of distancing between parties in the common area (which in effect acts as a capacity limit). CDC guidance for swimming pools can be found at:

https://www.cdc.gov/coronavirus/2019-ncov/community/parks-rec/aquatic-venues.html#anchor_1612214349775

Ongoing Local Emergency Orders

With no mask mandates or capacity limits what is left?

Travis County emergency orders have expired but City of Austin orders are still in place – a number of Austin orders were not superseded by the Governor’s new order.

Austin’s mask mandates and capacity limits have been superseded by the Governor’s executive order. However, other portions of the Austin Health Authority orders (now extended through April 15, 2021) were not superseded by the Governor and are still in effect. These Austin orders still require all facilities (including HOAs and condos for their common area pools and other amenities) to:

- * clean and disinfect high-touch surfaces twice per day;
- * post signage at entrances to certain common areas;
- * require at least 6’ between groups of individuals;
- * provide a health check to workers; and
- * ensure that no more than 10 people ever gather on a site (including in HOA common areas.)

Some of the former Austin requirements, such as checking workers’ face coverings and posting a sign that says that visitors are required to wear masks, are no longer enforceable; other requirements, such as those outlined above, were not superseded by the Governor’s order and are still enforceable.

Adopting Health and Safety Rules

How can we adopt a mask rule, capacity limit, or other health policies?

There are two options for adopting hygiene and safety protocols, assuming the HOA documents grant the board rulemaking authority (condominium boards have rulemaking authority granted by state law): (1) adopt and file a rule mandating masks in common areas, limiting pool capacity, etc. or (2) adopt and file a rule that authorizes the Board to enact temporary health and safety protocols by resolution. I prefer option (2) because it allows HOAs to adapt their protocols to changing circumstances without the need for filing a new rule with the County Clerk each time.

For HOAs that are not condominiums, rules must be adopted at an open board meeting for which at least 72 hours’ notice has been given to the members (Property Code Section 209.0051). For most condos, a board meeting is not required, but notice of the new rules must be given to the members at least 10 days before they are adopted (Property Code Section 82.070).

If you have adopted COVID-related rules, I recommend reviewing the rules and any related resolutions to confirm that masks are required in the common areas. If masks are not currently required, we can draft updated rules and resolutions for you. We have drafted health and safety rules and temporary protocols for many HOAs trying to navigate the coronavirus pandemic, and we are happy to be of assistance.

Connie Niemann Heyer is a native of Austin and holds four degrees from The University of Texas at Austin: undergraduate degrees in Plan II and Honors Business, an M.B.A., and a J.D. She is a partner in the law firm of Niemann & Heyer, LLP. Her firm focuses almost exclusively on property owners' association law, representing over 400 property owners' associations in Austin, San Antonio, Marble Falls, and surrounding areas. She is a founding member of Texas Community Association Advocates, a state-wide legislative advocacy organization representing the interests of homeowners and their community associations in the Texas legislature. She is a former president and board member of the Austin chapter of the Texas Community Associations Institute. She received Austin CAI's lifetime achievement award in 2011. Connie has been directly involved in drafting most all community association legislation passed in Texas since 1995, including amendments to the Texas Uniform Condominium Act (Texas Property Code Ch. 82), the adoption of the Texas Residential Property Owners Protection Act (Texas Property Code Ch. 209), and numerous other chapters of the Texas Property Code affecting community associations.

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