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**Public Law Department**

**MOVEMENTS OF ADULTS AND CHILDREN IN COMMON AREAS BELONGING  
TO RESIDENTIAL OWNERS' ASSOCIATIONS**

Since publication in the Spanish Official Gazette on 25 April of Order SND/370/2020, setting out compulsory conditions for children to be out and about during the COVID-19 health crisis, ("**Order SND/370/2020**") doubts have arisen regarding the reach of the aforesaid Order with regard to how it applies to movements of adults and minors within common areas run by Residential Owners' Associations. In this sense, not even the subsequent order SND/380/2020, of 30 April, describing conditions under which non-professional physical activity may be carried on outdoors during the COVID-19 health crisis, published on 1 May 2020 ("**Order SND/380/2020**"), has served to throw any light on the issue.

The General Council of Associations of Property Administrators sent out Circular 24/2020, dated 25 April 2020, for dissemination among its members. The circular literally states:

*"Finally, thanks to official steps taken by the General Council and the support of Regional Associations, we have managed to avoid Residential Owners' Associations becoming responsible for regulating the use of common areas of buildings by children under 14 years old. The Health Ministry Order prohibits access to outdoor recreational areas and sports facilities. There is no authorisation to open Residential Owners' Associations common areas. As a result, all common areas and elements not currently open for use should remain closed."*

Additionally, the Madrid Property Administrators' Association ("**CAF Madrid**") also sent out Circular 158/2020 to Administrators of associated properties. Under 'Conclusions', the Circular states:

- People may only move about on public roads and in areas for use by the general public. Therefore, the prohibition on using common areas pertaining to Residential Owners' Associations continues in place, as these are deemed private areas.*
- As a result, children may not play or remain in these areas, nor may they walk about these areas, other than for the aforementioned purpose of accessing the public roads.*
- In view of the above, Residential Owners' Associations are not permitted to reach agreements that contravene the provisions of the Ministerial Order.*

Some property administrators, taking it upon themselves to construe the aforesaid Order SND/370/2020 referred to in the above Circulars and have placed notices in visible locations on properties, prohibiting the passage of adults accompanying underage children through common areas.

The issue itself is somewhat open to interpretation.

Articles penned by some authors maintain that Article 7 of Royal Decree 463/2020, of 14 March, which declared the state of emergency to deal with the health crisis caused by COVID-19 ("**RD 463/2020**") "*brought in restrictions on movement, and those restrictions are in no way altered by this Order insofar as common areas or spaces [belonging to Residential Owners' Associations]. The prohibition on movement continues to apply to those common areas or spaces.*" (Vicente Magro Servet, El Derecho.com, April 2020).

To support this argument, he turns to the Health Ministry publication "*Guía de buenas prácticas en las salidas de la población infantil del Ministerio de Sanidad*"<sup>1</sup> which states as follows on Page 5:

*"It is advisable to enter and leave common areas of residential buildings in a respectful manner, keeping up prevention and hygiene measures, acting to maintain good neighbourliness and doing one's best to touch common surfaces as little as possible."*

The inference given to that statement is that one should only move through common areas to "*enter and exit*" the public road, and nothing more. We would immediately point out that, in the opinion of this law firm, a guideline cannot serve as a valid parameter to construe a rule that affects or restricts fundamental rights, e.g. the right to free movement.

However, looking beyond reasonable doubts that may exist in relation to managing and coordinating the use of common areas in line with prescribed behaviour established in Order SND/370/2020, and given the manner in which a fundamental right such as the right to the free movement of persons can be affected or restricted, one may not impose such hindrances when construing the sense and reach of the Ministerial Order. Neither may one construe the prohibition in an expansive way, by deciding that all scenarios necessarily fall within the restriction, even those not expressly mentioned in the legal rule.

In effect, the Constitutional Court, in the Court Order of 30 April 2020, declared as follows when referring to the Judgment of the same court No. 83/2016 of 28 April: "*in contrast to constitutional state of exception<sup>2</sup> and state of siege<sup>3</sup>, the declaration of a state of emergency does not permit the suspension of any fundamental rights (Article 55.1 Spanish Constitution [CE] contrario sensu). Certain measures put in place, however, may amount to limitations or restrictions.*" Such measures, in the opinion of this law firm, are still subject to considerations of proportionality and must be properly weighed up.

At all events, juridical arguments exist to support allowing the movement of adults accompanying minors under 14 years of age when going outside as permitted under Order SND/370/2020.

Article 7, Royal Decree 463/2020, "*Restricting the freedom of movement of persons*", lays down the following:

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<sup>1</sup> TR. 'Guide to good practices for children going outside'.

<sup>2</sup> Defines a catastrophe

<sup>3</sup> Martial law

*"1. For the duration of the state of emergency, people may only move about public roads to carry on the following activities: (...)"*

The Decree limits the restriction of movement to public roads to carrying on certain activities, if one construes the word "only" as referring to the activities rather than to the physical space to which such activity is limited. This does not include private roads and areas for private use where there is no restriction on movement.

For its part, Royal Decree 465/2020, of 17 March, which amended Royal Decree 463/2020, by means of the Sole Article 1, amended the first point of Article 7.1 Royal Decree 463/2020, which now reads as follows:

*"1. For the duration of the state of emergency, people may only move about public roads or areas for public use to carry on the following activities, which must be carried out individually, unless accompanying persons with disabilities, minors, older persons or any other proven ground».*

This law firm is of the opinion that Royal Decree 465/2020 has been used to extend the restrictions on the movement of persons in areas for public use, irrespective of the nature, or public or private ownership, of that space. The significant element is that the area must be an area for public use, in line with the intended purpose of Royal Decree 465/2020.

Needless to say, areas for private use fall outside the remit of Article 7, Royal Decree 463/2020.

Furthermore, the first Final Provision of Royal Decree 492/2020, of 24 April, which extended the state of emergency declared in Royal Decree 463/2020 (hereinafter, "**RD 492/2020**") further amended Article 7 Royal Decree 463/2020, and section 7.1 now reads as follows:

*"For the duration of the state of emergency, people may only move about public roads or areas for public use to carry on the following activities, which must be carried out individually, unless accompanying persons with disabilities, minors, older persons or any other proven ground. (...)*

*Minors under 14 years of age may be accompanied by one of the adults responsible for their care, when the minor is carrying out any one or several of the activities referred to in the previous section (...)"*

Lastly, Order SND/370/2020 Article 2, *Permitted Movements*, describes the prohibition established in Article 7.1 Royal Decree 463/2020 in greater detail, where it states:

*"Underage boys and girls may, together with a responsible adult, move about public roads and spaces, pursuant to Article 7.1, paragraphs e), g) and h), Royal Decree 463/2020, of 14 March, which declared the State of Emergency to deal with the COVID-19 health crisis, insofar as permitted movement on grounds of assistance and care of minors, in scenarios of need and any other activity of a similar nature, as long as the requirements established herein for the avoidance of contagion are met.*

*The movements of reference are restricted to going outside once a day to take a walk of a maximum one hour's duration and going no further than 1 km from the child's home, between 09:00 hours and 21:00 hours.*

For its part, Article 4 of the Ministerial Order governs "Permitted areas":

*"1. People may move around any public road or public area, including designated natural spaces and green areas, but must remain within the maximum 1 km distance restriction from the child's home.*

*2. Access is not permitted either to children's outdoor recreational areas or to sports facilities."*

The first final provision of Order SND/380/2020 amends section 1, Article 2 of Order SND/370/2020 and specifies the times of day during which boys and girls under 14 years of age may go out, now established as any time between 12:00 hours and 19:00 hours.

In our understanding, the term "*permitted areas*", as referred to in Order SND/370/2020, includes areas for public use, i.e. Residential Owners' Association common areas. The fact that Article 4.2 of this particular Order restricts access to children's outdoor recreational areas and sports facilities cannot be taken as a criterion for construing the order in the sense of extending the prohibition to areas other than those expressly regulated in this legislation.

To conclude, and in view of the above, we find it surprising that Madrid Autonomous Region CAF Circular 158/2020 would uphold that "*the prohibition on using residential Owners' Associations common areas continues in place, as these are deemed private areas*". If that were so, i.e. if those common areas are in fact private, then they should never have been subject to the restriction on freedom of movement established in Article 7 Royal Decree 463/2020 in the first place.

Finally, whilst accepting that the new regulation lacks clarity, a Residential Owners' Association Group of Administrators has neither the authority nor legal powers to reconstruct a regulation that restricts fundamental rights, and especially if it seeks to specify how such restrictions on movement must be put into practice.

A professional association cannot validly argue, just on the basis that it is unquestionably complex to articulate reasonable and safe use of common areas belonging to Residential Owners' Associations during a State Emergency, to expand the scope of the regulation and construe the legislation in a *contra legem* manner that toughens the limitations applied to the movement and circulation of persons.