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CLIENT ADVISORY

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CLIMATE CHANGE LEGISLATION AFFECTS OWNERS OF AT LEAST 50,000 NEW YORK CITY PROPERTIES

New York City recently adopted a package of nine local laws collectively known as the "Climate Mobilization Act" or New York City's "Green New Deal." The legislation primarily affects the City's 50,000 largest buildings, including many cooperatives and condominiums, which account for 5% of the City's properties but 50% of its energy consumption. The most significant of the new laws sets maximum limits of carbon emissions on residential and commercial buildings over 25,000 square feet commencing in 2022. It seeks to reduce these buildings' collective carbon emissions by 40 percent by 2030 and 80 percent by 2050.

Emissions compliance will be important for New York City cooperatives and condominiums for the foreseeable future. The first step for any affected building is for the board to undertake an energy audit to determine whether the building is over the mandated emissions limits and to assess energy usage going forward. If the building is or will be over the emissions limits, the board will need to identify and install energy conservation improvements and/or purchase or install renewable energy sources. Buildings will have to consider changes to their mechanical (heating, cooling, and lighting) systems and/or to their exteriors (windows and façades), all of which can be expensive and time-consuming. However, the penalties for noncompliance could reach into the seven figures annually, depending on the size of the building and the amount of energy consumed.

Many properties are currently exempted from the emissions program. Buildings containing any rent-stabilized apartments are currently exempt, so as not to trigger capital improvement charges that could be passed on to tenants under current State law. However, the State Legislature is expected to modify the law regulating capital improvement costs, at which time the City Council has indicated that it will incorporate these buildings into the new emissions regime. In the meantime, such buildings will be required to perform energy-saving upgrades that do not qualify as major capital improvements.

In addition to the emissions bill, the City (i) has created a new financing program (known as a PACE program) to provide funding for energy efficiency retrofits and renewable energy projects; (ii) now requires green roofs or solar panels on certain new construction or buildings undergoing major renovations; and (iii) has modified the energy grading system under which buildings submit annual data on energy and water usage.

Given the scale of the legislative mandate and the significance of the changes that may be required, all affected building owners, including cooperative and condominium boards, should reach out to counsel and qualified professional engineers promptly.

SECOND LENDER'S MORTGAGE GRANTED PRIORITY OVER AN EARLIER MORTGAGE THAT WAS DISCHARGED AND LATER REINSTATED

It is ordinarily a basic precept that a first recorded mortgage will have priority over a subsequently recorded one. However, unusual circumstances led the court to make an exception in **Bank of New York Terrapin Industries LLC, Index No. 103643/2008 (Sup. Ct. N.Y. Co. May 13, 2019)** and a related action.

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Bank of New York (the "Bank") commenced a foreclosure action in 2008. It moved for summary judgment of foreclosure, but withdrew that motion in January 2009 and failed to pursue the action for three years. In March 2012, the Clerk of the Court marked the case as disposed. In March 2014, the borrower brought a new action seeking to discharge the Bank's mortgage because the statute of limitations had expired. The Bank did not respond, and in July 2014, an order discharging its mortgage was entered and recorded.

In February 2015, another lender known as KBS gave a mortgage on the property, believing it had a first mortgage because the Bank's prior mortgage had been discharged by the court. Two months later, the Bank moved to vacate its default in the discharge action. In 2016, the Appellate Division vacated the order discharging the Bank's mortgage, and the Bank moved to restore its foreclosure action. Meanwhile, KBS brought its own foreclosure action and intervened in the Bank's action, with each lender asserting that its own mortgage had priority.

The court granted summary judgment to KBS, holding that KBS's mortgage had priority. Its holding was based on the doctrine of laches, which is defined as unreasonable, prejudicial delay in asserting one's rights. The court characterized the Bank's prosecution of its foreclosure action as "apathetic and indifferent" and found that the facts showed "unreasonable delays and failures by [the Bank] that led to KBS taking over a note and mortgage with the absolutely reasonable understanding that [the Bank's] interest had been discharged." The court concluded that "equity and good conscience compel" granting priority to KBS's mortgage. Ganfer Shore Leeds & Zauderer represented the successful lender, KBS, in these cases.

STATE LAW PROVIDES NEW STANDARDS FOR SMOKE DETECTORS

Statewide legislation now requires that all smoke detectors manufactured or sold after April 1, 2019 must either be hard-wired or employ a non-removable battery that will power the device for at least ten years. Before any real estate is sold or leased, smoke detectors in the property must be upgraded to the new standards. Condominiums and cooperatives may wish to address this issue on a building-wide basis, and should require that the seller or lessor of a unit certify that the smoke detectors meet current standards.

COMMERCIAL LEASE CAN WAIVE TENANT'S RIGHT TO SEEK "YELLOWSTONE" RELIEF

When the tenant under a commercial lease violates a provision of the lease, the landlord may serve a notice to cure the violation, stating that the lease will be terminated unless the violation is cured within a specified period of time. What if the tenant disputes that it has violated the lease? If it does nothing and allows the cure period to expire without action, it risks losing the benefits of what could be a favorable lease. On the other hand, the tenant may not wish to expend money and effort to cure what it asserts is a non-existent breach. To resolve this dilemma, in 1968 New York's highest court authorized commercial tenants who have received a notice to cure or notice of default to bring a lawsuit asking the court to suspend the running of the cure period until the court determines whether a violation of the lease has occurred. This type of relief is referred to as a Yellowstone injunction, after the case in which it was first recognized. (Residential tenants in New York City, including both cooperative owners and renters, do not need this protection because the Legislature has provided by statute that they will be given an opportunity to cure any breach before their lease is terminated.)

In **159 MP Corp. v. Redbridge Bedford Corp., 2019 N.Y. LEXIS 1310, 2019 N.Y. Slip Op. 3526 (May 7, 2019),** the Court of Appeals upheld a commercial lease provision in which the tenant waived the right to seek a Yellowstone injunction in the event of a future dispute with the landlord. Instead, the parties agreed that any disputes arising from a notice given under the lease would be resolved in summary proceedings in landlord-tenant court. In a 4-3 decision, the court rejected the tenant's argument that the waiver was contrary to public policy, because the tenant still retained some recourse in court to resolve disputes. In light of this decision, one can expect commercial landlords to seek to include similar provisions in future leases.