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CLIENT ADVISORY

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RECENT DEVELOPMENTS IN CLIMATE CHANGE LEGISLATION

The Climate Mobilization Act (CMA) codified New York City's goal of reducing carbon emissions in its buildings sector by 30% by 2030 and 80% by 2050. Under the CMA's Local Law 97, most buildings above 25,000 square feet will be required to comply with new greenhouse gas emissions limits beginning in 2024, with stricter limits introduced in 2030. Covered buildings face potentially significant annual fines if they do not meet these emissions targets. Since the CMA's passage in 2019, our co-op and condo clients have grappled with the daunting changes that many of their buildings will need to make – and pay for – in order to comply.

The CMA has now received its first significant legal challenge. A coalition of building owners and residents has filed a lawsuit, **Glen Oaks Village Owners, Inc. et al. v. City of New York, Index No. 154327/2022 (Sup. Ct. N.Y. Co.)**, seeking to invalidate Local Law 97 on constitutional grounds. The plaintiffs argue, among other things, that New York City's CMA is preempted by New York State's climate legislation (known as the Climate Leadership and Community Protection Act). The plaintiffs also assert that the CMA's penalty fine scheme violates property owners' due-process rights and that the fines constitute an unauthorized tax. The City has moved to dismiss the lawsuit. The parties will complete briefing the motion by October 2022, after which the court will issue a decision, which will then undoubtedly be subject to appeals. We will be monitoring litigation developments concerning the CMA.

We are also monitoring proposals that have been made to modify or delay some CMA requirements. At the present time, it is unknown what changes if any, will be adopted, so co-ops and condominiums should be proceeding on the basis that they will need to comply with the requirements as they currently stand.

Separate from the emissions-reductions requirements, the CMA also instituted an energy "letter grade" program for buildings. This is the source of the colored placards bearing a letter "A" through "D" that are now displayed in building lobbies throughout the City. The goal of this legislation was to increase awareness of buildings' energy practices and to spur building owners to adopt more energy efficiency measures. For this purpose, the law has been an undoubted success. Our co-op and condominium clients have frequently cited a desire to improve their buildings' letter grade as one reason to pursue new energy efficiency projects.

However, the letter grades have also been the source of confusion, because a good or bad letter grade may not be correlated with a building's energy usage or what the owner must do to comply with Local Law 97 and avoid fines. As noted above, monetary fines for noncompliance with Local Law 97 are assessed based on the amount of a covered building's carbon emissions, calculated from a formula based on the building's energy usage and fuel source. On the other hand, a building's letter grade is derived from its "ENERGY STAR" score, which attempts to assess the building's overall energy characteristics derived from, among other things, the building's size, location, number of occupants, and nationwide peers. The upshot is that a building's letter grade is not predictive of the same building's potential Local Law 97 fines. A building with an "A" grade could still face significant fines, and a building with a "D" grade may actually be fully compliant with Local Law 97. Rather than relying on these letter grades, co-op and condo boards concerned about potential fines should consult with their professionals.

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CONDOMINIUMS, LIKE COOPERATIVES, MAY NOW CONDUCT ANNUAL MEETINGS ELECTRONICALLY

During the early days of the coronavirus pandemic, cooperatives and condominiums were required to move their annual shareholder and unit owner meetings, including the election of board members, from their traditional in-person format to online. Many buildings found that holding their meetings virtually was more convenient for many owners and increased participation. In 2021, the Business Corporation Law was amended to authorize cooperatives to conduct their annual and special shareholder meetings virtually on a permanent basis. This legislation did not apply to condominiums. It was arguable that similar authorization for condos was at least implied, and many condos continued to conduct their meetings in this fashion, but condo advocates urged that a similar law be passed to cover condos so as to eliminate any uncertainty.

On July 1, 2022, Governor Hochul signed new legislation confirming that condominiums may hold their annual and special unit owner meetings virtually. The new law took effect immediately. Electronic meetings should be conducted on a virtual platform that gives all unit owners the ability to participate. Another option is a "hybrid" meeting, with some owners present in-person at a meeting location while others participate remotely. The decision whether to conduct an annual meeting remotely or in-person is up to the board. If the board wishes to convene the annual meeting in-person, it retains that option.

Two years ago, conducting an annual meeting remotely was a challenging task, especially in larger buildings and in the case of contested elections. Over the past two years, managing agents and election service providers have developed the ability to assist with virtual annual meetings more routinely. Boards seeking information on the procedures for virtual meetings should consult with their legal counsel.

CONDOMINIUM THAT PREVAILED IN LITIGATION MAY NOT RECOVER LEGAL FEES UNDER NARROW BY-LAW PROVISION

A cooperative or condominium board that prevails in litigation against a tenant-shareholder or unit owner will often seek to recover its attorneys' fees. However, the general rule in the United States is that the parties to a litigation are each responsible for their own attorneys' fees, regardless of the outcome of the litigation, unless a specific statute, court rule, or contract provision provides otherwise.

In **Board of Managers of 207-209 East 120th Street Condominium v. Dougan, 2022 N.Y. Misc. LEXIS 2392, 2022 N.Y. Slip Op. 31491(Sup. Ct. N.Y. Co. May 4, 2022)**, the condominium sued one of its unit owners alleging that the unit owner was not using his condo unit as a residence, but was renting it out on a short-term basis on websites such as Airbnb, in breach of the by-laws and house rules. The court granted the board a preliminary injunction prohibiting the unit owner from any further short-term rentals of the unit, and thereafter the unit owner defaulted by failing to answer the board's complaint. The board then sought relief including an award of the attorneys' fees it had incurred in the litigation.

The board relied on by-law provisions that empowered the board to commence litigation to enjoin violations of the by-laws and house rules, and required unit owners to comply with governmental requirements for lawful uses of their units. Neither provision mentioned the recovery of attorneys' fees. The court stated that if the by-laws had contained a section providing for the board to recover attorneys' fees if it prevailed in litigation – as many sets of coop and condo by-laws do – the court would have enforced it. However, in the absence of a specific provision allowing the board to recover attorneys' fees, the court lacked authority to award them. Boards may wish to review their governing documents and consider whether to seek to amend them, if possible, to include a legal fee provision if there is none currently, and to maximize the scope of any legal fee provision that already exists.