GANFER SHORE LEEDS & ZAUDERER LLP

CLIENT ADVISORY

APRIL 2022

NEW YORK CONTINUES TO IMPLEMENT CLIMATE LEGISLATION

We have reported in past issues of this *Client Advisory* and in our year-end reports to clients on important New York legislation seeking to address climate change. In recent months, there have been several such developments that will affect real estate interests, including cooperatives and condominiums.

We previously reported that the New York City Council was poised to approve a bill banning the use of gas heating in new construction. The bill was passed and is now known as Local Law 154 of 2021. The ban takes effect at the end of 2023 for new buildings comprising less than seven stories, and in 2027 for buildings of seven stories or more, with certain limited exceptions for new construction of affordable housing.

The New York City Climate Mobilization Act's flagship financing program, known as Property Assessed Clean Energy (PACE), was delayed for over a year before finally debuting last summer, and then almost immediately went back into hibernation after closing two high-profile transactions. In the interim, the program administrators revised the program requirements to deal with, among other things, the ban on gas in new construction. New PACE guidelines were released in March and the program administrator is now accepting new applications, opening a potential new source of financing for energy-efficiency capital projects.

Perhaps the most notable development in recent months has been New York State's release of its draft Scoping Plan under the Climate Leadership and Community Protection Act (CLCPA). The CLCPA sets a target of 85% reduction in greenhouse gas emissions in New York by 2050, with an interim target of 40% reduction by 2030. The CLCPA's draft Scoping Plan was assembled by a number of working groups and is intended to provide the legislative and regulatory framework for these reductions. It is difficult to overstate the breadth of the Scoping Plan. It outlines potentially significant changes to literally every sector of New York's economy in an effort to achieve the CLCPA's goals. The Scoping Plan is now in a public comment period, after which a final Plan will be delivered to the Governor and State Legislature by the end of the year.

COURT LIMITS SPONSOR'S CONTROL OVER CONDO BOARD OF MANAGERS

In a recent decision, an appellate court enforced provisions of a condominium's offering plan and by-laws in which the Sponsor agreed to relinquish control of the Board of Managers. **Tsui v. Chou, 2022 N.Y. App. Div. LEXIS 1932, 2022 N.Y. Slip Op. 2082 (1st Dep't Mar. 24, 2022)**,

A condominium offering plan and the by-laws provided that after a certain period of time, the Sponsor would relinquish control over the Board of Managers. A group of unit owners brought a lawsuit against the Sponsor, alleging that she had breached this requirement by having family members, including her husband and her daughter, run for seats on the Board of Managers. (In this case, the Sponsor was an individual rather than an entity.) After a trial, a lower court agreed with the plaintiffs and entered an injunction, effective for the next six elections, precluding the Sponsor and her family members from seeking more than two seats in any election for the six-member board.

360 Lexington Avenue, New York, New York 10017 Tel: (212) 922-9250 Fax: (212) 922-9335 http://www.ganfershore.com

On appeal, the appellate court upheld the injunction, because "a trial court is within its authority to grant relief prohibiting a sponsor from 'frustrat[ing] its obligations under the offering plan … by transferring its shares to puppet entities to siphon votes away from resident shareholder candidates in order to control the board well beyond the period contemplated by the Attorney General.'" The court found that the "limitation of allowing defendants to hold a maximum of two seats on the board for six elections simply enforces the bylaws, thus precluding the sponsor's domination of the board." The court emphasized that the Sponsor and her family members remained free to vote for candidates of their choice in future elections, as long as they did not vote for candidates who would give the Sponsor control over the board.

DEFAMATION CLAIM BASED ON STATEMENTS MADE AT CONDO BOARD MEETING IS DISMISSED

A condominium board of managers met to consider allegations that the Treasurer had harassed the condominium's employees. During the meeting, the President made statements concerning the allegations and called for a vote on a motion to rebuke the Treasurer. The motion passed and this fact was reported in the board minutes. The Treasurer asserted that the President's statements were false and sued her for defamation.

The court dismissed the claim. "As [the President] and the attendees of the board meeting constituted a group with a common interest, the statements at issue are cloaked in common-interest privilege," meaning that they could not be the basis of a defamation claim. Although this type of privilege can be overcome by showing that the disputed statement was made maliciously, here the plaintiff's allegations of malice were "conclusory" and therefore insufficient. The Treasurer admitted that condominium employees had complained about her to the building's managing agent. There were no allegations that the President knew the employees' complaints were false, that the President recklessly disregarded the truth, or that the statements were made out of ill will or spite. Accordingly, the complaint was dismissed. **Harpaz v. Dunn, 2022 N.Y. App. Div. LEXIS 1935, 2022 N.Y. Slip Op. 2062 (1st Dep't Mar. 24, 2022).**

APPEALS COURT AGREES THAT PURCHASER COULD TERMINATE CONTRACT AFTER SELLER FAILED TO PURSUE REZONING AS AGREED

A contract purchaser of real property sought to terminate the purchase contract and recover its down payments, because the seller failed to pursue a rezoning application as required. A lower court ruled in the purchaser's favor and the Appellate Division affirmed. **ZL Elmhurst, LLC v. Sunshine Elmhurst Real Estate LLC, 2022 N.Y. App. Div. LEXIS 1582, 2022 N.Y. Slip Op. 1671 (1st Dep't Mar. 15, 2022).**

The purchase contract required that as a condition of the purchaser's obligation to close, the seller had to successfully apply to have the premises rezoned as "residential with a commercial overlay." Under this zoning classification, a structure's upper floors are reserved for residential use, but commercial use (such as retail stores) is permitted on the ground floor and basement. The seller submitted a rezoning application, but subsequently withdraw the application for the commercial overlay.

The appeals court held that "[t]he terms of the parties' purchase agreement unambiguously provided that a condition precedent to closing was issuance of a rezoning of the property, defined to mean 'residential with a commercial overlay,' and that in the event that such rezoning was not issued in a specified time, plaintiff was entitled to terminate the agreement and be refunded the down payment." Because the rezoning could not take place because the Seller had withdrawn the application, the purchaser was entitled to terminate the contract and recover its full down payments. Ganfer Shore Leeds & Zauderer LLP represented the successful contract purchaser in this case.