GANFER SHORE LEEDS & ZAUDERER LLP

CLIENT ADVISORY

FEBRUARY 2021

LENDERS ARE NOW PROCESSING PPP LOAN APPLICATIONS FROM COOPERATIVES

As reported in last month's *Client Advisory*, cooperatives are now eligible to apply for forgivable Payroll Protection Program (PPP) loans. Some lenders have now begun accepting applications from cooperatives for these loans. Loans under this year's round of PPP loans must be approved and funded by March 31, 2021, so cooperatives that wish to apply must act quickly. Cooperatives should bear in mind that while the goal will be to have the loan forgiven and become the equivalent of a grant, the PPP is structured as a loan program and the cooperative will be submitting a loan application. Cooperatives will therefore need to review their governing documents, as well as any mortgage or line of credit they may have, and obtain all approvals needed to apply for a loan (bearing in mind that these loans are not secured by a lien on the property).

The loan application requires borrowers to certify that "current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." This is a vague, subjective standard and to date, the government has not provided further guidance on how it is to be interpreted in the context of cooperatives. Thus, each cooperative will need to review its financial situation and consult with its advisors on whether it can make this certification in good faith. Borrowers should also be aware that their names and amounts borrowed are public information and may become the subject of press coverage.

As also discussed in last month's *Client Advisory*, Congress has also authorized employers that obtained PPP loans last year to apply now for a "second draw" PPP loan. The eligibility requirements for second-draw borrowers are more stringent and include a 25% reduction in the borrower's gross receipts between any calendar quarter of 2019 and the corresponding quarter of 2020.

Separate from expanding eligibility for PPP loans to include cooperatives, the recent federal stimulus bill includes other provisions that may benefit property owners, such as allowing some owners to elect changes to their depreciation schedule and file amended returns for prior years. Owners should consult with their tax advisors to determine whether they can benefit from the new legislation, including by filing amended returns.

CONGRESS IMPOSES NEW DISCLOSURE REQUIREMENTS FOR BENEFICIAL OWNERSHIP OF CORPORATIONS AND LLCs

Another new federal law, the Corporate Transparency Act, will require most small corporations and limited liability companies to disclose to the federal government information on the beneficial ownership of the entity – that is, the actual persons who own and control the entity. The government will be allowed to disclose this information for authorized law enforcement investigations, but it will not become public.

This new requirement will directly affect many cooperative and condominium owners, because it is increasingly common for apartments to be purchased and owned by single-purpose entities for tax and privacy reasons. Most of these entities will be required to disclose beneficial ownership information to the Financial Crimes Enforcement Network upon formation. Existing entities will also have to file this information within two years after final federal regulations implementing the new law are issued. Willfully providing false information in these reports will be a federal crime, punishable with fines of up to $10,000 and/or prison terms of up to two years. We will report in this *Client Advisory* when the regulations are issued later this year.

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APPEALS COURT DISCUSSES RIGHTS OF HOLDERS OF UNSOLD SHARES

Most proprietary leases accord special rights to "holders of unsold shares," including the right to sell or sublease units without obtaining board approval or paying fees. Disputes sometimes arise as to whether a shareholder is a holder of unsold shares, as occurred in **Bellstell 7 Park Ave., LLC v. Seven Park Ave. Corp., 2021 N.Y. App. Div. LEXIS 508, 2021 N.Y. Slip Op. 00487 (1st Dep't Jan. 28, 2021).**

Paragraph 38 of the standard form of proprietary lease provides that a holder of unsold shares loses that status, as to a given unit in the cooperative, if the holder or a family member of the holder resides in the unit. But if the unit is owned by an entity such as a limited liability company, rather than an individual, who is a member of the holder's "family"? In most proprietary leases, the lease does not explicitly discuss ownership by entities or the individuals in residence when an apartment is owned by an entity.

The cooperative in Bellstell asserted that shares corresponding to an apartment owned by an LLC were no longer unsold shares because an individual affiliated with the LLC had occupied the apartment. The cooperative argued that "'any individual who is identified as a principal of the entity in the related regulatory filings with the Attorney General' should be deemed 'family' for the purposes of paragraph 38." The court disagreed, stating that "nothing in the proprietary lease suggests this interpretation," and that in any event, the individual who occupied the apartment was not listed as a principal in the last amendment to the offering plan.

The court noted that at the time this proprietary lease was drafted in 1982, federal tax regulations precluded entities from owning cooperative shares. That rule was changed by the Tax Reform Act of 1986, but the proprietary lease was never amended to address this development. The court stated that "if the cooperative wanted to define who constituted a 'family member' of an entity, or to require an entity to designate a natural person for the purposes of paragraph 38 ... the proprietary lease could be amended by a vote of 75% of the shares, and [the cooperative] is still free to put such a proposal to a vote of the shareholders."

The appellate court also used this opportunity to clarify its prior decision in Pastena v. 61 W. 62 Owners Corp., 169 A.D.3d 600 (1st Dep't 2019). That decision had created some uncertainty concerning the legal status of holders of unsold shares, by suggesting that the special rights accorded to holders of unsold shares under paragraph 38 might violate the Business Corporation Law. In Bellstell, the court clarifies that a cooperative may not accord special rights to original purchasers *from* holders of unsold shares, but that the holders of unsold shares themselves may continue to enjoy such rights. It appears that this clarification was likely intended to return the law governing unsold shares to its status prior to Pastena.

COURT GRANTS CONDOMINIUM ACCESS TO UNIT TO PERFORM REPAIRS

Cooperatives' and condominiums' governing documents typically authorize the Board and its agents to obtain access to units for maintenance and repairs. Most shareholders and unit owners will cooperate and provide access when required, but sometimes the Board may need to bring a lawsuit to gain access.

In **Board of Managers of Carriage House Condominium v. Healy, 2021 N.Y. App. Div. LEXIS 249, 2021 N.Y. Slip Op. 00249 (1st Dep't Jan 19, 2021)**, the condominium board sued a unit owner to enforce its right to access the owner's unit in order "to make repairs to AC condensers located in [the owner's] unit that service other units in the condominium." The condominium moved for a preliminary injunction granting immediate access and the court "ordered that, upon one day's notice, [the owner] allow HVAC workers performing repairs or services into [the unit] to perform necessary HVAC maintenance and repairs." The court directed that "any such HVAC workers be accompanied by an individual associated with the managing agent for the condominium." On an appeal by the unit owner, the appellate court upheld this order, while directing that the condominium post an injunction bond in the nominal amount of $1,000.