

CLIENT ADVISORY

JULY 2020

BOARDS CONTINUE TO CONFRONT THE CHALLENGES OF 2020

It is now more than three months since daily life in New York was transformed by the coronavirus emergency and the Governor's "New York on PAUSE" orders. Millions of New Yorkers made the sacrifices needed to slow the spread of the virus, and a dramatic decrease in new infections, hospitalizations, and deaths followed. It remains to be seen what the future holds, especially since infection rates have significantly increased in other regions even as they have declined in New York, and the virus continues to be a serious threat to public health. However, some aspects of a more ordinary daily life for New Yorkers are resuming.

At this writing, New York City is in "Phase Two" of the Governor's four-phase reopening plan. The rest of the State is now in Phase Three, and it is hoped that New York City can enter Phase Three during July if the local health metrics continue their positive trend. Phase Two permitted the reopening of offices, barber shops and hair salons, playgrounds, and some outdoor dining at restaurants. Businesses were required to adopt a coronavirus safety plan before reopening, recognizing the ongoing need for measures such as social distancing, protective face coverings, and capacity limitations. When officials determine it is safe, Phase Three will permit indoor dining at restaurants to resume with restricted seating capacity. Amenities such as Broadway shows, movie theaters, and professional sports with spectators are still months away.

Cooperative and condominium boards remain on the front lines of making decisions that balance health and safety with the desire to resume normal life and commerce. By now, most boards will have addressed at least some of these issues. Among other things, coops and condos should have adopted modified forms of alteration agreements, requiring that in addition to the other usual requirements, health and safety measures be put in place to mitigate the risk of spreading the virus. Similar precautions should also be in place with respect to move-ins and move-outs and potentially for other situations in which non-residents are again being allowed access to the premises. Legal counsel can help tailor the right policies for a specific building's circumstances. As always, it is important to document the board's decision-making in the board minutes.

Buildings must have safety measures in effect to protect the health of building staff as well as residents. The Real Estate Board of New York, Local 32B-J, and the Realty Advisory Board have updated their joint guidelines for boards and landlords. Failure to take reasonable steps to protect employees from the virus may constitute unsafe working conditions in violation of federal, state, or local laws. In at least two cases outside New York, labor unions went to court and obtained injunctions against owners who were operating workplaces without acceptable safety precautions. In addition, a coop or condo that fails to document and follow proper precautions could face litigation if someone there contracts the virus. With the guidelines, sample forms, and professional advice available in New York, there is no reason to run these risks.

Sales of cooperative and condominium units, which virtually halted for several weeks near the start of the emergency, have resumed. Brokers have developed the art of the virtual apartment showing, although some buildings are now allowing in-person showings to limited numbers of people. Many coop boards are now interviewing applicants remotely, and more transactions are closing remotely as well. Two of our real estate attorneys, Margery N. Weinstein and Jeffrey Lederman, recently published an article in the *New York State Bar Association Journal* providing guidance on remote closings. A copy of this article can be found at https://nysba.org/app/uploads/2020/05/JuneJuly_Journal_web.pdf

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The court system is also moving closer to normal operations, but various executive orders and court system directives limit the ability to prosecute cases whose outcome could result in an eviction or foreclosure, especially where the tenant or owner has been adversely affected by the coronavirus pandemic. A recently announced exception to the limitations on foreclosure filings may apply in some circumstances where the premises are vacant and abandoned. Anyone with a case that may be affected by these limitations should discuss not just the merits of the case but also the associated timing issues with counsel.

Another recent executive order provides that persons coming into New York from states with the highest coronavirus infection rates must self-quarantine for two weeks upon arrival. The list of affected states has been announced but is subject to change. The quarantine requirement applies to non-New York residents visiting from these states, as well as New Yorkers returning from a trip, with special rules for essential workers. No guidance has been provided to boards or landlords regarding this executive order. Employers will need to address the applicability of the COVID-19 sick leave regulations on employees subject to this quarantine.

ANOTHER CHALLENGE: CONDUCTING THE 2020 ANNUAL MEETING

Cooperatives and condominiums whose By-Laws schedule their annual meetings in April, May, or June were placed in a difficult position this spring. The public health situation and executive orders precluded gathering shareholders or unit owners to hold an annual meeting. Other activities traditionally associated with some annual meetings, such as visiting neighbors to gather proxies, would also have been inappropriate.

In March, the Governor issued an executive order suspending the requirement that shareholder meetings take place in a physical location, thus allowing the meeting to be held remotely. This executive order is currently in effect through July 6 but is expected to be extended. Separately, Section 602 of the Business Corporation Law was amended last year to facilitate remote participation in shareholder meetings. Under that model, the chairperson and any others who wished would attend the meeting in person, but others could participate and vote by video or audio hookup.

For practical reasons, most coops and condos have been reluctant to embrace the concept of an electronic annual meeting. Holding an electronic meeting presents an especially daunting challenge for larger buildings whose annual meetings are attended each year by scores if not hundreds of people, including some who may lack access to computer equipment, may lack experience in using the equipment to attend virtual meetings, or may have disabilities making it difficult or impossible for them to participate in this fashion.

Nonetheless, as it is becoming increasingly likely that large in-person gatherings will remain impossible or impracticable well into the fall, and as many people are now familiar with Zoom or other online meeting platforms from work or their other interests, more coops and condos will be exploring the electronic-meeting option. Even buildings whose annual meetings are held later in the year should anticipate this issue and begin discussing how to address it. Counsel can provide advice on the legal requirements for the annual meeting, as well as best practices for conducting a meeting virtually if circumstances call for it.

... AND BOARDS ALSO MUST NOT FORGET THEIR MANY OTHER OBLIGATIONS

While dealing with all these issues triggered by the coronavirus situation may seem like a full-time job for volunteer board members, the board must not overlook its other responsibilities. For example, boards are still required to keep records of any transactions involving conflicts of interest for inclusion in the annual disclosure report, and most boards are required to circulate the building's annual financial statements. Perhaps most important, it appears that the COVID-19 crisis will not result in any extension of the timetable for meeting climate change/energy efficiency requirements under Local Law 97. For boards that may have put these and other non-virus-related matters to one side while dealing with the emergency, it is time to focus on them again.