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CLIENT ADVISORY

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BOARDS FACE DECISIONS AS NEW YORK CONTINUES TO REOPEN

Last year, as New York faced the unexpected and devastating onset of the COVID-19 pandemic, cooperative and condominium boards had to take painful steps to mitigate the public health emergency and to comply with a complex body of state and city emergency orders. More than one year later, although the pandemic is by no means over, the development and distribution of effective vaccines have allowed New Yorkers to return more closely to normal life. Within recent weeks, restaurants have been allowed to operate at full capacity, fans have resumed attending professional sporting events, and Broadway shows have announced they will reopen beginning in the fall.

Co-ops and condos have also been impacted. Based on the latest guidance from the Centers for Disease Control and updates to the Governor's executive orders, mask-wearing mandates have been eased. These reflect that it is no longer considered necessary for fully vaccinated individuals to wear a mask outdoors or even in many indoor settings, with certain exceptions including medical facilities, hospitals, and schools. Based on this guidance, some boards have also considered relaxing mask requirements for residents and visitors in common areas of their buildings. However, there is no requirement that boards must ease mask requirements for residents, and a board may wish to retain them at this stage, at least in areas such as elevators and hallways. No matter what the written policy may be, a building has no way of distinguishing between vaccinated and unvaccinated people, so removing the mask requirement for vaccinated residents could have the practical effect of removing it for all. In addition, many buildings are continuing to require that employees continue to wear masks, especially when some of the employees have thus far declined to be vaccinated.

By this time, most boards have lifted some of the restrictions that were imposed last year on visitors, including by allowing in-person showings of apartments, and on renovations or alterations in units, typically subject to compliance with an approved safety plan. Some buildings have also started allowing food and other delivery persons to resume making deliveries directly to apartments, while others still require residents to go down to the lobby to pick up their deliveries. Almost all annual meetings in 2021 have continued to be held virtually, although it remains to be seen whether the legislation authorizing this practice will be extended beyond the end of this year. Gyms and fitness centers can now operate at 100% capacity, but management should ensure that these spaces are sufficiently well-ventilated for the capacity permitted, and a six-foot social distance between machines or stations should still be maintained. Boards and managing agents with questions about their rights and responsibilities as conditions continue to evolve should consult with their attorneys.

BOARDS AND BUILDING OWNERS MUST FOCUS ON UPCOMING CMA DEADLINES

The first significant deadlines under the New York City Climate Mobilization Act ("CMA") are approaching. Under Local Law 97, which is part of the CMA, covered buildings have a yearly carbon emissions budget, or limitation, starting in 2024, and buildings that do not comply with this budget can be subject to heavy annual fines. The law recognizes four categories of buildings that may have particular difficulty complying with the 2024 limits, including (1) high-energy-use buildings facing "special circumstances" (including that the building's emissions in 2018 exceeded its 2024 budget by more than 40%), (b) non-profit hospitals, (c) buildings with physical and legal constraints (such as NYC landmarked buildings), and (d) buildings with "financial hardships," which is defined narrowly in the law to apply only to buildings

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that have been certified as having negative revenue for the prior two years or that have been placed on the city's tax lien sale list. Buildings qualifying under one of these exceptions may seek an adjustment from the Department of Buildings (DOB) to temporarily raise the building's emissions limits.

Buildings in the first category, high-energy-use buildings, must apply for an adjustment by June 30, 2021. The application process for buildings seeking an adjustment is extremely detailed and demanding. The DOB requires, among other things, that the building submit an "Emission Reduction Plan Report" with a schedule of specific alterations to the building's physical structure or changes to building operations sufficient to ensure that the building will be in compliance with its emissions budget for the years 2030 through 2034, which must be signed off by a registered design professional. The level of detail that the DOB is seeking in these reports is exacting, and would likely take several months for an engineer or consultant to prepare. The catch is that the DOB only released its guidance for these adjustment applications in April 2021, meaning that many potentially eligible buildings may simply run out of time before the deadline passes.

Few co-op and condo buildings are likely to qualify as "high energy use" buildings, so this particular upcoming deadline may not affect them. However, the stringency of the DOB guidance for this category of buildings may portend similarly rigorous treatment for buildings that seek an adjustment on the other listed grounds. Co-ops and condos in landmarked buildings should not necessarily expect the DOB to rubber stamp a favorable adjustment to their carbon emissions budget. Boards or owners who believe their buildings may qualify for an adjustment need to start working now with a design professional and legal counsel.

COURT IMPOSES REMEDIES AFTER FINDING SPONSOR-DOMINATED BOARD VIOLATED ELECTION PROCEDURES AND HAD CONFLICTS OF INTEREST

Several unit owners of a Condominium filed a derivative action on the Condominium's behalf against the Sponsor and three individual principals of the Sponsor. Plaintiffs contended that these individuals were "using their influence to maintain control of the Board" and engaged in self-dealing by causing the Company to retain their wholly owned management company. In an earlier stage of the protracted litigation, the court concluded that one of the individuals had breached the Offering Plan by failing to disclose that she had decided to retain, rather than sell, several units and by continuing to vote for a majority of Board seats although the By-Laws precluded her from doing so.

The court conducted a three-day trial on Plaintiffs' remaining allegations. In a 25-page decision after trial, the court concluded that the Board, dominated by the principals of the Sponsor, breached the Offering Plan and the By-Laws by disregarding various provisions governing election of the Board of Managers in order to retain control of the Board, and by failing to recuse themselves from the Board's decisions to retain and renew their affiliated management company. As a remedy for the election-related violations, the court directed that a new election for the Board of Managers must be held within 90 days, with no more than two of the individual defendants permitted to serve on the six-member Board.

With regard to the managing agent, the court held that the Board's selection was not protected by the Business Judgment Rule because of the conflicts of interest involved. Nonetheless, the plaintiffs had failed to show that that the Board's retention of the affiliated managing agent had caused any financial harm to the Condominium, so no damages were awarded. As a remedy, the court ordered that after the new Board of Managers is installed, it must reconsider the selection of managing agent, and that if the incumbent managing agent wishes to retain the position, the decision must be made by a committee of independent directors. The court also held that under the Business Corporation Law provisions governing derivative actions, the plaintiffs were the successful parties and were entitled to recover their legal fees for the trial and related briefing. **Tsai v. Chou, 2021 N.Y. Misc. LEXIS 1727, 2021 N.Y. Slip Op. 32112(U) (Sup. Ct. N.Y. Co. Apr. 9, 2021)**.