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CLIENT ADVISORY

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CO-OPS AND CONDOS ADDRESS THE CLIMATE MOBILIZATION ACT

We are approaching the second anniversary of New York City's passage of the Climate Mobilization Act (CMA). Co-op and condo boards are beginning to understand the challenges they will face in complying with this law. The main goal of the CMA is to reduce overall carbon emissions in New York City by 40% by 2030, and 80% by 2050. In order to meet these emissions targets, some buildings covered by the new law will have to begin demonstrating emissions reductions by 2024, and most buildings by no later than 2030. An interactive map is available online at https://energy.cusp.nyu.edu/#/ showing how a building's current emissions compare to its anticipated 2024 and 2030 emissions limits. Another requirement under the CMA was the requirement to post energy efficiency "letter grades" beginning in October 2020.

Determining what emissions limits apply to a given building is not always straightforward. At least for the present, buildings smaller than 25,000 square feet do not have to meet the emissions targets. City-owned buildings, houses of worship, and certain public housing developments are also exempted. When the CMA was passed, all buildings containing any rent-regulated units were also exempted, but this excluded many large co-op buildings with a handful of rental units remaining from their conversions. Last year, the City Council mostly closed this loophole by narrowing the exemption to buildings with more than 35% rent-regulated units. For those buildings newly subject to emissions limits as a result of this change, the start of the compliance period was delayed from 2024 to 2026. Other buildings that can demonstrate that they are legally incapable of complying with the limits, such as landmarked buildings or certain high-energy or high-density buildings, may apply for an adjustment to their compliance requirements.

The CMA was to be accompanied by a new financing program to assist in funding energy efficiency projects. The development of this program was delayed by the pandemic, but it is anticipated that it will become available shortly. The pandemic has also delayed the issuance of a study of a potential carbon-trading program that was supposed to have been released by January 2021. Such a program would provide another avenue of compliance for buildings that are unable to sufficiently reduce their emissions through capital improvement projects. We will report on this study and other aspects of the CMA in future issues of the *Client Advisory*.

Finally, boards and other property owners should be aware that in his state budget proposal submitted in February, Governor Cuomo proposed language that would allow building owners to meet their emissions targets by buying credits for renewable energy produced elsewhere in New York State. Critics of this proposal, including state legislative leaders, have asserted that this proposal, if enacted, would substantially undermine the goals of the CMA. Whether any such legislation will be adopted is not known at this time.

COOPERATIVE BOARD REQUIRED TO APPROVE TRANSFER TO FAMILY MEMBER

Cooperative boards generally have the right to approve or disapprove the transfer of a cooperative unit for any reason or for no reason (but not for an impermissibly discriminatory reason). Such board decisions are ordinarily subject only to limited judicial review under the Business Judgment Rule. However, when a proprietary lease provides that a cooperative board's consent to the transfer of a unit under specific

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circumstances "will not be unreasonably withheld," the board's decision to disapprove a transfer is subject to more searching judicial review than would ordinarily be available.

In **Matter of Kotler v 979 Corp., 2021 N.Y. App. Div. LEXIS 802, 2021 N.Y. Slip Op 00801 (1st Dep't Feb. 9, 2021)**, the proprietary lease provided that if the lessee (tenant-shareholder) should die, then the Board's "consent shall not be unreasonably withheld to any assignment or transfer of this lease and the appurtenant stock by bequest or by assignment ..., provided that such legatee or assignee shall be a financially responsible member of the Lessee's family." The court held that this language "triggered application of a 'heightened standard of reasonableness' to be applied in lieu of the usual business judgment rule." As a result, in an action challenging the Board's disapproval of a transfer to the deceased tenant-shareholder's daughter, the Board had the burden of showing that the daughter was not "financially responsible."

The court held that the Board did not meet this burden, where "[t]he daughter produced financial statements and other documents showing assets of magnitude greater than the annual maintenance and other costs associated with the apartment, as well as annual income more than double those costs." The court annulled the board's decision and directed it to allow the transfer. The court also held that the Board could not impose a transfer fee, since none was provided for in the By-Laws or in the proprietary lease. Further, the court required the Board to pay the plaintiff damages for breaching the proprietary lease, measured by "the amounts paid after [the Board] unreasonably withheld its consent to the assignment," as well as the plaintiff's reasonable attorneys' fees.

COURT OF APPEALS ADDRESSES LOAN ACCELERATION ISSUE

Residential mortgage loan documents typically provide that if the borrower goes into default, the lender may accelerate the loan, meaning that the entire loan balance is due and payable immediately. This frequently occurs, for example, when the lender commences a foreclosure action. Sometimes, however, the lender does not proceed with the foreclosure action and the action is withdrawn. Several court decisions had held that the lender's discontinuance of the foreclosure action did not reverse the acceleration of the loan. This created a trap for unwary lenders, because on the date of acceleration, the six-year statute of limitations began to run on the entire balance due – meaning that if the lender sought to bring a new action more than six years later, the entire action could be dismissed as time-barred, leaving the lender unpaid and unable to foreclose.

New York's highest court, the Court of Appeals, has now addressed this issue in **Freedom Mortgage Corp v. Engel, 2021 N.Y. LEXIS 103, 2021 NY Slip Op 01090 (Feb. 18, 2021).** The Court stated that "[a]dopting a clear rule that will be easily understood by the parties and can be consistently applied by the courts, we hold that where the maturity of the debt has been validly accelerated by commencement of a foreclosure action, the noteholder's voluntary withdrawal of that action revokes the election to accelerate, absent the noteholder's contemporaneous statement to the contrary."

Even with the benefit of this holding, lenders must remain careful. For example, the Court's holding may not apply when the lender has accelerated the loan in communications other than the pleadings in the foreclosure action itself, or if the dismissal of the foreclosure action is other than voluntary. It is also not clear whether the ruling will apply to commercial foreclosures. The safest course, where a lender wishes to reverse an acceleration, is to provide the borrower with clear notice that the lender is doing so. For example, in **Carter v. U.S. Bank Trust, N.A., 2021 N.Y. Misc. LEXIS 335, 2021 N.Y. Slip Op. 30258(U) (Sup. Ct. Kings Co. Jan. 27, 2021)**, a lower court held that a lender had validly decelerated the loan, thus avoiding the bar of the statute of limitations, where it advised the borrower of the deceleration in a written notice sent to the borrower before the statute of limitations would have expired. In addition, lenders and other parties must always be attentive to the specific terms of the loan documents in any given transaction, and be certain to comply with any requirements imposed by their terms.