

CLIENT ADVISORY

MID-MONTH EDITION

MID-AUGUST 2020

NEW EXECUTIVE ORDER AFFECTS OFFERING PLAN REQUIREMENTS

On August 5, 2020, Governor Cuomo issued Executive Order 202.55, which recognizes that the coronavirus emergency has not concluded, and so extends many provisions of existing Executive Orders for another 30 days, until September 4, 2020. The Executive Order extends, among many other things, the prohibition against executing warrants of eviction that were issued before the pandemic began, the authorization for remote notarization of documents, and the tolling of most civil statutes of limitations.

In addition, the Executive Order affects certain provisions of the General Business Law, Real Property Law, and the Attorney General's Regulations dealing with offering plans, including:

- Ordinarily, a Sponsor must offer rescission to purchasers if the first closing of a unit does not occur within twelve months of the commencement date of the projected first year of condominium operation as set forth in the offering plan. Apparently, this period is extended for the duration of the Executive Order plus an additional 120 days, and such extensions shall not be deemed a material or adverse change under the terms of the offering plan.
- The requirements to update the projected budget for the first year of operations are also tolled for the duration of the Executive Order plus an additional 120 days. The Sponsor will not be required to offer rescission based on an increase in the first-year budget as long as it is less than 25%.
- Sponsors will be required to file an amendment to their offering plan updating the applicable deadlines and first-year budget within 45 days after the Executive Order expires.
- The two-year periods during which certain credits are available against mortgage recording taxes under RPL Section 339-ee for condominiums have also been extended.
- Ordinarily, an offering statement or prospectus for the conversion of a property in New York City from a rental property to a condominium or cooperative ownership must be declared effective within 15 months after the Department of Law has accepted it for filing. Although conversions are not common, for those that are pending, this 15-month period has been extended for the duration of the Executive Order plus, apparently on a current reading, an additional 120 days. The Sponsor will have to file an amendment to the offering plan, updating the date by which the offering plan must be declared effective, within 45 days after the Executive Order expires.

The above is just a partial summary of the Executive Order, whose complete text can be found at <https://www.governor.ny.gov/news/no-20255-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>. We also note that it is possible that in a given instance there may be arguments

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that the order is inapplicable, or there may be separate matters of contract that arguably might affect the operation of the in a particular instance. Sponsors, purchasers, and others who may be impacted by the changes should consult with their legal counsel for a full analysis of how the Executive Order may affect them.

PROPOSED LEGISLATION WOULD RESTRICT CO-OP/CONDO TAX ABATEMENT

The New York State Legislature is considering a bill that, if passed, would eliminate the New York City cooperative and condominium tax abatement on units with an assessed value of \$200,000 or more. The sponsors of the bill, numbered S5267A in the State Senate and A7092A in the Assembly, claim this would affect only the most expensive 10% of coop and condo units citywide, although in certain neighborhoods the percentage could be much greater. The legislation would reallocate the increased tax revenue for the benefit of the New York City Housing Authority. The tax abatement program would be continued for another year for other coop and condo owners, subject to the existing eligibility requirements. Boards, shareholders, and unit owners may wish to contact their state legislators and express their opinion of this proposal.

BOARDS MUST USE CAUTION IN REOPENING AMENITY SPACES

One of the first Executive Orders issued by Governor Cuomo in the early stages of the pandemic directed that fitness centers and similar businesses closed. Most cooperatives and condominiums closed the recreational amenity spaces in their buildings – such as gyms, rec rooms, pools, and similar spaces – citing a combination of public health concerns and legal requirements (which were not entirely clear). Now, as the pandemic enters its sixth month, many buildings are re-examining these decisions.

On August 17, the Governor authorized gyms to reopen, subject to detailed guidelines issued by the New York State Health Department, which clarify that they apply to residential as well as commercial facilities. These include a 33% capacity limitation, mandatory wearing of masks, sanitation and ventilation requirements, and having staff present to ensure compliance with the rules. The Governor also announced that gyms would be inspected by health authorities. The directive allowing gyms to partially reopen takes effect beginning on August 24. However, localities may delay its implementation until early September to allow time to conduct the inspections, and Mayor De Blasio has stated that New York City will do so.

Before residents are allowed to use a reopened gym, they should be required to acknowledge the new rules governing gym use and sign a liability waiver that specifically mentions COVID-19. As with other aspects of dealing with the pandemic, boards facing the issue of whether to reopen amenity spaces in their buildings should consult with counsel before exercising their business judgment.

CONDOMINIUM'S CLAIMS AGAINST SPONSOR DISMISSED AS UNTIMELY

A Condominium Board of Managers sued the Sponsor, the corporate members of the Sponsor, and their shareholders, based on alleged construction defects in the Condominium's building. Defendants moved to dismiss the complaint under the statute of limitations. The court reaffirmed that "a claim for damages arising from defective construction accrues on the date of completion of the work." Here, the certificate of occupancy was issued in 2007, reflecting that the construction work had been completed. The lawsuit was filed more than eight years later, after all the applicable statutes of limitations had expired. Although the Board asserted that defendants should be estopped from invoking the statute of limitations, the court found no evidence of misconduct or misrepresentation by defendants that would have prevented the Board from filing a timely lawsuit. **Board of Directors of 23-23 Condominium v. 210th Place Realty, LLC**, 2020 N.Y. App. Div. LEXIS 4237, 2020 NY Slip Op 04143 (2d Dep't July 22, 2020).