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CLIENT ADVISORY

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NEW GUIDANCE FOR RESIDENTIAL BUILDINGS PLANNING TO REOPEN THEIR GYMS

When the coronavirus pandemic struck New York in March, and the population locked down as required by the Governor's Executive Orders, virtually all gyms and fitness centers were closed. For several months the State ordered that gyms remain closed, even during "Phase Four" of the Governor's reopening plan. However, the State's guidance appeared to focus primarily on commercial rather than residential gyms.

More recently, the State has issued an updated directive that now clearly applies to gyms offered as an amenity to residents of a residential building, as well as to commercial fitness facilities. The directive allows gyms to reopen, but subject to numerous detailed requirements. Among many other things:

- Occupancy must not exceed one third of the occupancy specified in the certificate of occupancy.
- The facility must be staffed to ensure compliance with the required safety procedures.
- Everyone (including both patrons and employees) must wear an acceptable face covering at all times (including while exercising, except when using a pool or shower).
- At least six feet of distance must be ensured between individuals, including while exercising. The number of workout stations must be reduced if necessary to ensure the required distance.
- Gyms must meet specific requirements for air-handling systems. This may require engaging a qualified professional (such as an HVAC technician or licensed engineer) to certify compliance.
- Gyms are subject to inspection by the Health Department, and must be registered on an online portal that the Health Department is opening in order to schedule the inspections.
- Buildings must also affirm on the State's online form that they are in compliance with all applicable requirements (most buildings will have already done this during the "Phase Two" reopening).

Cooperatives, condominiums, and landlords should also require each patron to sign an informed consent and liability waiver, containing specific language referring to COVID-19, before being allowed to use the facility. Counsel can provide guidance concerning the foregoing requirements and the contents of the waiver form.

FEDERAL GOVERNMENT PLACES MORATORIUM ON SOME RESIDENTIAL EVICTIONS

As readers of this *Client Advisory* are aware, the Executive Orders issued during the coronavirus emergency have placed restrictions on landlords' ability to pursue legal proceedings that would result in a tenant's eviction. The Executive Orders continue to evolve, as do the New York State court system's rules and procedures designed to implement them. Landlords, including cooperative boards, and other affected parties should continue to consult with their counsel concerning the impact of these restrictions.

In addition to these State-level measures, on August 31, 2020, the White House announced that the U.S. Department of Health and Human Services and the Centers for Disease Control and Prevention have issued an order temporarily halting certain residential evictions for the next four months. The order prohibits a landlord or other property owner from evicting any "covered person" from any residential property before December 31, 2020. An individual must satisfy several conditions to obtain "covered person" status. Among other things, the individual must certify that he or she expects to earn less than $99,000 in income this year (or

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$198,000 for a couple filing a joint return), and that in the event of eviction, he or she is at risk of either becoming homeless or having to move into a congregate or shared living setting.

This federal order does not suspend the tenant's underlying obligation to pay the rent, and the tenant is still supposed to make partial rent payments to the extent possible. The order does not affect the landlord's own continuing obligations to meet its own expenses including mortgages and property taxes. The order does not affect commercial leases, and does not apply to the foreclosure of mortgages on either residential or commercial premises. The stated intent of this order is to reduce the spread of COVID-19 by avoiding or postponing evictions that would cause the tenant to become homeless or have to move into a shelter or similar environment in which people live at close quarters and are at greater risk of contracting the virus. Landlord groups have brought litigation challenging the validity of the order.

MORE COOPS AND CONDOS ARE SCHEDULING VIRTUAL ANNUAL MEETINGS

With the realization that social distancing measures to mitigate coronavirus spread will need to continue for at least several more months, an increasing number of cooperatives and condominiums are scheduling their 2020 annual meetings and planning to hold them virtually using an electronic platform. This includes buildings whose annual meetings are typically held in the spring but were postponed this year, as well as buildings that typically hold their annual meetings in the fall or near the end of the year.

As previously discussed in this *Client Advisory*, New York State has passed legislation authorizing all-electronic annual meetings for cooperatives for 2020 and 2021. While this legislation technically does not apply to condominiums, many condominiums are also scheduling virtual annual meetings, since it would be inappropriate (and depending on the size of the building unlawful) to convene an in-person unit owner meeting at this time. Holding a virtual annual meeting requires careful planning. Boards intending to conduct electronic annual meetings should consult with counsel regarding the necessary arrangements.

COURT UPHOLDS PURCHASER'S TITLE AND ADDRESSES PROCEDURAL ISSUES IN SUIT AGAINST CONDOMINIUM

The By-Laws of a condominium provided that units could not be transferred unless any common charges liens were satisfied. The owner of several commercial units sold the units while liens on them were outstanding. The Board of Managers' right of first refusal did not apply to commercial units, and the Board was unaware of the sale at the time. Subsequently, the purchaser sued the Board of Managers alleging that defective conditions in the common elements were causing damage to the purchaser's units and demanding that the Board make repairs. The Board moved to dismiss the lawsuit, arguing that the sale of the units in violation of the By-Laws was void, so the purchaser lacked standing to sue. The court held that "a requirement in the By-Laws of the Condominium that liens for common charges be satisfied at closing does not render the deed void." The court held that the common charges remained a lien on the units, and that the condominium "can either sue on the lien or foreclose on the lien." However, "[t]his does not affect the purchaser's title."

The Board also argued that in general, a unit owner cannot sue the condominium for property damage claims. The court disagreed, but noted that in many cases, the Board may be protected by the Business Judgment Rule. Finally, the court found that it was procedurally improper to designate the Board of Managers as the defendant. Citing the New York General Associations Law, the court required the purchaser to amend its complaint to name the condominium's president or treasurer, in his or her representative capacity, as the defendant. This is not how actions involving condominiums are typically captioned and this holding may not be followed by other courts. In any event, the court held that this was not a jurisdictional issue and that the caption could be amended to cure the alleged defect. **Sagacious Minds, Inc. v. Board of Managers of the Brighton Tower II Condominium, 2020 N.Y. Slip Op. 32706(U) (Sup. Ct. Kings Co. Aug. 18, 2020)**.