**GANFER SHORE LEEDS & ZAUDERER LLP**

# CLIENT ADVISORY

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## COOPERATIVES MAY HOLD VIRTUAL ANNUAL MEETINGS IN FALL 2021

As we enter the fall season in which many cooperatives and condominiums hold their annual meetings, the question arises as to whether this year's meetings should be held in person or virtually. At this time, the previous executive orders that restricted the number of people allowed to assemble in one place have expired. Thus, boards that wish to hold their building's annual meetings in person are free to do so.

However, based on continued concerns about COVID-19 and the delta variant, some buildings may prefer to hold their annual meetings virtually this year. Temporary legislation allowing New York corporations to hold shareholder meetings in an all-virtual format remains in effect through December 31, 2021. This legislation applies directly to cooperatives, and many condominiums have relied on it to hold virtual unit owner meetings as well.

It is not yet known whether the legislative authorization for all-virtual meetings will continue beyond the end of this year. However, even if that authorization expires, before the pandemic the Legislature adopted a separate amendment to the Business Corporation Law authorizing *partially* virtual shareholder meetings. Under this procedure, the shareholder meeting is convened in a physical location, where shareholders are able to attend in person, but other shareholders are afforded the ability to participate by video or telephone.

Although everyone is far more experienced with online events today as compared to before the pandemic, both all-virtual and partially virtual meetings require careful advance planning, especially when there is a contested election for the Board of Directors or Board of Managers. Boards planning for such meetings should discuss any concerns about the meeting with their advisors, including legal counsel.

## COOPERATIVES' TERMINATIONS OF TENANCY FOR SHAREHOLDERS' OBJECTIONABLE CONDUCT ARE UPHELD

The proprietary leases of most cooperatives provide that a tenant-shareholder's proprietary lease may be terminated for "objectionable conduct." Some proprietary leases give the board of directors the authority to terminate the lease, while others reserve such authority to the shareholders. The tenant-shareholder may seek to challenge the termination, but the Court of Appeals has held that these decisions will generally be reviewed under the deferential standard of the Business Judgment Rule. If the tenant-shareholder does not challenge the termination in court, but also does not move out of the building, the cooperative's next step is to bring a court proceeding to compel him or her to vacate. Often this is in the form of a holdover proceeding in the Housing Part of Civil Court, on the theory that the tenant-shareholder is subject to eviction because his or her lease for the premises has been terminated.

This procedure was followed in two recent cases decided by the Appellate Term of New York State Supreme Court, which hears appeals from Civil Court decisions. In **800 Grand Concourse Owners v. Thompson, 2021 N.Y. Misc. LEXIS 3721, 2021 N.Y. Slip Op. 50602(U) (App. Term 1st Dep't June 25, 2021)**, the board of directors voted to terminate a tenancy on grounds of objectionable conduct. The court found that the cooperative had followed the procedure set forth in the proprietary lease. The record reflected

360 Lexington Avenue, New York, New York 10017 Tel: (212) 922-9250 Fax: (212) 922-9335 http://www.ganfershore.com

that the tenant-shareholder and her husband had engaged in "vexatious litigation against the cooperative and its members, as found by several courts, consisting of multiple frivolous and duplicative suits, which caused the cooperative considerable expense and resulted in the loss of insurance coverage." The courts have held that "evicting tenants who consciously and unabashedly … inflict thousands of dollars in unnecessary legal fees is in furtherance of the cooperative's legitimate interests."

The court further noted that the tenant-shareholder was "provided with multiple opportunities to be heard, to defend and to abate the objectionable conduct," yet the conduct continued. Under these circumstances, the board's decision to terminate the tenancy was protected by the Business Judgment Rule.

In **111-15 75th Avenue Owners Corp. v. Min Fan**, **2021 N.Y Misc. LEXIS 4390, 2021 N.Y. Slip Op. 50775 (App. Term 2d Dep't July 30, 2021)**, another cooperative board also voted to terminate a tenant-shareholder couple's proprietary lease for objectionable conduct. (The decision does not disclose the nature of the objectionable conduct.) When the cooperative brought a holdover proceeding and moved for summary judgment, the Civil Court ruled for the tenant-shareholders, finding that the board "did not act in good faith," so its decision was not protected by the Business Judgment Rule.

The cooperative appealed and the Appellate Term reversed. The court observed that "when scrutinizing a cooperative's conduct in terminating a tenancy, the courts will … examine … whether the cooperative acted in good faith and in the corporate interest to terminate the tenancy for the reasons alleged." The record reflected that the board acted "for the purposes of the cooperative, within the scope of its authority and in good faith," and the board had provided sufficient evidence of objectionable conduct. Rejecting the lower court's finding of bad faith, the Appellate Term observed that "[t]he board sent tenants three notices and held a special meeting, at which neighboring tenants provided their accounts of the objectionable conduct, before terminating the lease." In addition, "there is no requirement that cooperative boards provide complaining tenants with written or oral responses to their alleged defenses or deliberate on the record."

These two decisions reaffirm the usefulness of the "objectionable conduct" provision in a proprietary lease, but also emphasize the importance of the board's complying with the procedures contained in the lease and creating a proper record. When a tenant-shareholder engages in objectionable conduct, the board should consult with legal counsel and develop a strategy for documenting that conduct, confronting the shareholder, and if the conduct continues, pursuing the possibility of termination.

## PURCHASER ALLOWED TO TERMINATE CONTRACT BECAUSE SELLER FAILED TO PURSUE REZONING APPLICATION AS AGREED

A contract purchaser of real property was allowed to terminate the purchase contract and recover its down payment, because the contract seller failed to pursue a rezoning application as required. **ZL Elmhurst, LLC v. Sunshine Elmhurst Real Estate LLC, Index No. 650163/2021 (Sup. Ct. N.Y. Co. July 9, 2021).**

The purchase contract required that as a condition of the purchaser's obligation to close, the seller had to successfully apply to have the premises rezoned as "residential with a commercial overlay." Under this zoning classification, a structure's upper floors are reserved for residential use, but commercial use (such as retail stores) is permitted on the ground floor and basement. The seller submitted a rezoning application, but subsequently withdraw the application for the commercial overlay. The court concluded that the purchaser was "entitled to summary judgment ... as a condition precedent to [its] closing on the Property has not been met." The court declared that the purchase contract was terminated and the purchaser had the right to recover its down payment. Ganfer Shore Leeds & Zauderer LLP represented the successful purchaser in this case.