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CLIENT ADVISORY

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BOARDS CONTINUE TO ADDRESS CORONAVIRUS-RELATED ISSUES

As the COVID-19 emergency continues, most cooperative and condominium boards have updated building policies and procedures to address the challenges that the emergency has created. Coops and condos have adopted safety plans, modified their alteration agreements and move-in/move-out procedures, decided which amenity areas can be reopened with social distancing and which must remain closed, and adapted to holding board meetings electronically or telephonically. Boards should continue to consult with their counsel to ensure that their policies are properly documented and comply with the latest requirements.

COURT DECISION ADDS TO UNCERTAINTY REGARDING UNSOLD SHARES

In the May 2019 issue of this *Client Advisory*, we reported on the decision in Pastena v 61 W. 62 Owners Corp., 169 A.D.3d 600 (1st Dep't 2019). In this decision, the appellate court whose jurisdiction includes Manhattan and the Bronx appeared to invalidate certain proprietary lease provisions under which holders of unsold cooperative shares are exempted from flip taxes and sublet fees. However, as we discussed at the time, a closer look at the arguments presented in the case suggested that the decision could also be subject to a much narrower reading. We anticipated that this issue would come up again in future cases.

In **Matter of Ross v. Wakefield Owners Corp., Index No. 5572/2019 (Sup. Ct. Queens Co. June 18, 2020)**, a lower court followed the broader interpretation of Pastena. In this case, the owner of two coop units challenged the board's decision to impose sublet fees on leases of the units. The court found that it was not clear whether the owners were, in fact, holders of unsold shares. However, citing Pastena, the court held that even if the owners were holders of unsold shares, "the provisions of the Operating Documents, which purportedly exempt holders of unsold shares from certain expenses and fees assessed by the landlord, are void as a matter of law."

If other courts follow this interpretation, it will effectuate a major change in the common understanding of the rights that holders of unsold shares enjoy. However, the grounds for questioning this interpretation continue to exist, and we can certainly anticipate further litigation on this issue.

REMINDER: CLIMATE MOBILIZATION ACT DEADLINES DRAW NEARER

When New York City's Climate Mobilization Act (CMA) was enacted in 2019, it was seen as some consolation that many of the more challenging deadlines were several years away. A year later is a year closer to those deadlines, and buildings are starting to have to take steps to comply.

One component of the CMA is a "letter grade" program, modeled on the letter grade system for restaurants, and is intended to bring visibility to buildings' energy and water usage and incentivize building owners to improve their "ENERGY STAR" metrics. The letter grade program is derived from benchmarking data that most large buildings have been required to compile for the last several years. This year, the benchmarking data was due to be submitted to the Department of Buildings by May 1, 2020, which was extended to August 1, 2020 due to the coronavirus emergency. If your building is required to submit this data but has not yet done so, you should contact counsel immediately.

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Like so many things, the rollout of the CMA has been disrupted by the ongoing pandemic. Not only has the letter grade deadline been extended, but with so many people working from home this year (and not working from Manhattan office buildings), this year's energy usage data will be seriously skewed. As a result, a building's letter grade next year may not accurately reflect its usual energy performance.

The CMA contemplated a specialized lending program for energy improvements, but the program guidelines that were to be unveiled this past spring have been delayed indefinitely. The CMA also requires the City to publish a study on a potential carbon trading program by January 1, 2021, but it is unclear whether that deadline will be met. This is of concern because a workable carbon trading program will be the only way for many large buildings to achieve compliance with the CMA's emissions limits in future years.

PROPOSED STATE LAW WOULD REGULATE COOP APPLICATION PROCESS

Once again, the New York State Legislature is considering legislation (Bill A1267D/S6408B) that, if passed, would impose time limitations on cooperative boards' consideration of purchase applications and require them to provide reasons for rejecting an applicant. More specifically, the proposed legislation would require coop boards to:

(1) have a written, uniform application process for considering applications and provide a copy to prospective purchasers, sellers, and agents on request;
(2) advise applicants whether their application is complete or what additional information is necessary within 21 days of receipt;
(3) advise applicants in writing when the board will complete its review once the complete application is submitted;
(4) complete their review and advise the applicant whether the application has been approved or denied within 90 days; and
(5) if the application is denied, provide the reason for the denial. If no written notice of approval or denial is provided within 90 days, the application would be deemed approved.

In the past, cooperatives have strongly opposed similar proposals because of the additional burdens these requirements would create and the potential for litigation that could arise from providing reasons for rejecting applicants. Board members and others may wish to contact their state legislators and express their views on the proposed legislation.

COURT CONFIRMS THAT MORTGAGE CAN BE PAID FROM PROCEEDS AT CLOSING

When real property encumbered by a mortgage is sold, arrangements are often made to pay off the mortgage from the sale proceeds at the closing. Real estate attorneys, lenders, and title insurers have established procedures to allow the transaction to close while ensuring that the payoff takes place and a satisfaction or assignment of the mortgage is documented and recorded.

The court's decision in **Prendergast v. Swiencicky, 183 A.D.3d 945 (3d Dep't May 7, 2020)**, upholds this common practice. In this case, the contract purchaser under the standard form of purchase contract used in upstate New York refused to close because, at the time of the closing, there were two bank mortgages on the property, even though everything was set to pay off the mortgages immediately from the sale proceeds. The court held that the purchaser had defaulted because paying off an institutional mortgage from the proceeds is a customary practice. A dissenting judge argued that however common this procedure might be, the contract did not authorize it and the purchaser was within her rights not to close. Even though the court decision upholds the practice of paying off mortgages at closing, parties and attorneys may wish to avoid any question by including language in the purchase contract reflecting that this is what will actually occur.