

CLIENT ADVISORY

JUNE 2020

PLANNING AHEAD FOR THE REOPENING PROCESS

The current state of the coronavirus pandemic, and planning for the reopening process, remain uppermost in everyone's mind. Governor Cuomo has announced a four-phase process for reopening, which is being implemented in the various regions of New York State based on local coronavirus conditions. As of May 27, 2020, all of New York State except for the five boroughs of New York City has entered "Phase One" of the reopening. In Phase One, activities such as construction, manufacturing, and non-essential retail are allowed to resume, on a limited basis and subject to social distancing restrictions.

The date when New York City will enter Phase One has not yet been announced, but Mayor De Blasio anticipates that it will be sometime during the first half of June. Each region will advance through subsequent phases, during which additional types of activity may resume, as milestones for controlling the spread of the virus are achieved. However, throughout this process, the virus will remain a long-term threat to public health, and setbacks along the way to full reopening are quite possible. Precautions such as wearing masks in public places, social distancing, and sanitizing exposed surfaces will remain part of our life for the foreseeable future.

Cooperatives and condominiums continue to be among the many parts of society that are dealing with this new reality. As the initial weeks of shutdown become months of at best limited activity, boards will be reevaluating decisions concerning such matters as non-residents' access to the building and the closure of amenity spaces. For example, in March many boards adopted policies prohibiting service workers such as housekeepers and nannies from entering the building. Shareholders and unit owners typically understood the need for such restrictions in the short term, but some are questioning the continued need for these restrictions now. If boards wish to resume allowing such personnel into the building, they may wish to require them to certify that they do not have any symptoms of, or known exposure to, COVID-19 illness. Boards should consult with counsel regarding such policies and the drafting of certification forms.

Similarly, buildings that had suspended move-ins and move-outs may not wish or be able to continue this restriction indefinitely, but will seek to adopt procedures under which any move-ins or move-outs will be conducted using best practices to minimize risk. As another example, if a building decides to reopen its gym or fitness center, the board should require that all users sign appropriate disclosure and waiver documents confirming that they understand the risks, including the additional risks created by COVID-19. As there are legal considerations involved in drafting these procedures and forms, boards should again consult with counsel. It will also be prudent to consult with insurance professionals regarding risk management concerns. We anticipate that the State will provide additional guidance regarding reopening in the near future.

As discussed in prior issues of this *Client Advisory*, the By-Laws of many cooperatives and condominiums provide for the annual meeting to occur in May or June of each year. This year, holding ordinary annual meetings was not possible, and many buildings postponed them until the fall. However, we still do not yet know when it will be legal and safe to schedule meetings that may involve dozens or hundreds of people gathering in a confined area. Although shareholder or unit owner meetings must generally be held in person, an Executive Order has temporarily suspended this requirement, thus allowing meetings to be held on an electronic platform. This Executive Order is currently in effect through June 7, 2020 and is likely to be extended further. Holding an annual meeting electronically has the advantage of avoiding a face-to-face

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meeting, but poses substantial logistical challenges. This is especially true for larger cooperatives and condominiums that may have hundreds of shareholders or unit owners, not all of whom are able to participate in an electronic gathering. Affected boards should discuss this subject with their counsel as well.

The real estate industry continues to gain experience with the process of conducting real estate closings remotely. The possibility of buying and selling a house or apartment without anyone meeting face-to-face to conduct the closing, which may have seemed implausible just a few months ago, is now something that takes place every day. However, participants should remember that remote closings generally require advance planning by everyone involved as well as extra lead time in order to proceed smoothly.

The New York State court system has resumed accepting new case filings, which were suspended (except for emergencies) for more than two months. However, in New York City and its suburbs the courts are not allowing in-person court appearances and are still operating remotely. Many eviction and foreclosure cases continue to be under a moratorium until August 2020, although the constitutionality of some aspects of the moratorium has been challenged.

The prohibition against all non-essential gatherings has been relaxed statewide to permit gatherings of up to ten people, with social distancing being observed. Non-essential gatherings of more than ten people are still prohibited. Employees of most non-essential businesses must still work from home to the extent possible.

Funding continues to be available under the Paycheck Protection Program established by the federal CARES Act. Senator Schumer has asked the Small Business Administration to confirm that residential housing cooperatives are eligible for PPP loans, but there has been no action on his request at this writing. At the time the PPP was created, many cooperatives had not suffered economic losses that would justify their applying under this program. If a cooperative's economic situation has worsened since that time – for example, a cooperative with many commercial tenants who have been unable to pay their rent – it may wish to reevaluate whether to try to submit an application.

As if all this were not enough, some commentators are warning of possible power outages this summer. Weather forecasters are predicting that New York will have a hotter summer than usual in 2020, and far more people than usual will be working from home and using their air conditioners during the day. Boards and other building owners should plan ahead, to the extent possible, for the likelihood of unusually high electricity demand and even for the possibility of blackouts or brownouts.

NEW LAW SUSPENDS SOME PERSONAL GUARANTEES OF COMMERCIAL RENTS

New York City has adopted legislation intended to temporarily bar commercial landlords from enforcing personal guarantees of certain commercial leases. The law applies to defaults in payment of rent, utilities, or taxes due for the period from March 7 through September 30, 2020, under commercial leases of premises where the tenant was required to cease in-person service of food or beverages, limit retail operations, or close to the public as the result of the Executive Orders promulgated during the coronavirus pandemic. Where it applies, the law prohibits the landlord from enforcing any lease or rental agreement provision providing for a guarantee by any natural person who is not the tenant, and defines any attempt to enforce such a provision as a type of unlawful “commercial tenant harassment.”

This local law has a narrower scope than other proposed legislation that, in some versions, would have granted relief to any tenant or guarantor “affected” by the virus pandemic. However, it remains possible that additional legislation will be adopted in the future. There are technical issues surrounding the drafting of the new law that may lead to disputes about its scope, and its constitutionality is sure to be challenged in court. Landlords, tenants, and guarantors who may be affected should discuss the new law with their counsel.