

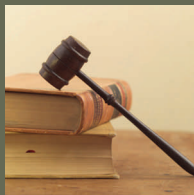
Veneruso, Curto, Schwartz & Curto, LLP

Co-op & Condo Newsletter

SPRING 2012

We are pleased to present to our valued clients and associated real estate professionals our Spring 2012 Newsletter. We welcome any comments or suggestions that you may have. We hope you find the information helpful. Thank you!

LEGISLATIVE NEWS



SPECIAL INTEREST ARTICLES:

• OBJECTIONABLE

CONDUCT

• EMERGENCY

ACTION PLANS

LEGISLATIVE UPDATE



While they may not grab the headlines in the way budget and tax matters do, there are many housing-related bills, which includes those specifically related to cooperatives and condominiums that have been introduced, and reintroduced, at the state and local levels. Of the over 200 or so housing related bills in Albany right now, there are about 65-70 that are cooperative or condominium specific and, out of these, maybe 2 or 3 are likely to be enacted into law. Some of the more prominent bills include AC2163 (would

require boards of directors of cooperatives to act on purchase applications within 45 days of receipt, failing to do so would result in automatic approval); A02195 (would extend the applicability of the property condition disclosure statement which currently applies to residential real property exclusive of cooperatives and condominiums); and A00797 (would create a special sub-part of the housing part within the civil court system to hear only cases involving cooperatives and condominiums). Another bill to watch is S00395 which would (i) establish the

Office of the Cooperative and Condominium Ombudsman; (ii) authorize the residential tax; and (iii) establish the Office of the Cooperative and Condominium Ombudsman fund. The purpose of this Office would be to educate shareholders and residents of cooperatives, and owners of condominiums, of their rights and responsibilities, mediate disputes and conduct hearings, and monitor board elections. This type of office already exists in other states, e.g. Florida, and there are those that believe one should be established in New York, especially given the large number of (continued on bottom of page 2)

Dealing with Objectionable Conduct: A Roadmap

From time to time Boards are faced with a shareholder who repeatedly or continuously violates the terms of the Proprietary Lease through their "objectionable conduct". These are often very difficult situations to deal with due to the nature of the conduct complained of and the fact that the parties involved are usually emotionally charged. That being said, there may be circumstances where the remedy is entirely appropriate and should be employed to deal with a particularly troublesome shareholder.

Due to the extreme nature of this remedy and the typically required supermajority

votes of the board members and shareholders of a cooperative, it can sometimes be very difficult, if not impossible, to successfully employ. For that reason, this remedy should be reserved for situations where, despite every effort, the shareholder will not cease and desist from the objectionable conduct. Once, however, a board chooses to pursue this remedy, the key is to make sure (i) that the board follows proper procedure; and (ii) that the board exercises proper business judgment. The seminal case on this issue is *40 West 67th Street v. Pullman* where the Court of Appeals ruled that courts must apply the business judgment rule and

defer to a board's determination that shareholder conduct is objectionable under the circumstances unless the shareholder can establish that the "board acted (1) outside the scope of its authority; (2) in a way that did not legitimately further the corporate purpose; or (3) in bad faith."

Almost all proprietary leases provide that a shareholder lease may be terminated by a vote of the board, a vote of the shareholders, or both, if the behavior rises to a level deemed objectionable and the offending shareholder fails to cure the conduct complained of after receipt of notice from the cooperative.

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EMERGENCY ACTION PLANS

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The main objective is to give directions and effectively and efficiently evacuate the building to safety.

While we may not hear about them during our everyday lives, the legislators are busy preparing bills that if enacted into law would have a direct impact on cooperatives and condominiums.

If you are a resident of Westchester County then you are no stranger to the recent flooding problems from overflowing waterways that threaten (and in some cases destroyed) cooperative and condominium property, as well as personal property belonging to shareholders and unit owners. Worse yet is the potential for serious bodily injury resulting from emergency situations that can occur suddenly and without warning. Floods, however, are not the only threats to cooperatives and condominiums. Owners should be aware of other common situations involving fire, smoke, winter storms, natural gas leaks, elevator emergencies, criminal activity, hurricanes, power outages, etc. In response, many cooperatives and condominiums have designed specialized emergency action plans ("Plan") that are suited to their building and occupancy conditions. Our office supports the creation of a Plan. Should a board wish to establish a Plan the first step is for the board to place the matter on its meeting agenda, and keeping it there, so that board members, together with the management company, if any, can begin the process and see it through to completion. Some key elements to consider include, but

are not necessarily limited to:

- ▶ What will constitute an emergency
- ▶ What preventative measure are currently in place or that can be implemented
- ▶ Compliance with any applicable laws
- ▶ Equipment needs
- ▶ Personnel assignments
- ▶ Property and occupancy data
- ▶ Communication in the event of an emergency with the emergency management team, building occupants and first responders (police, fire, etc.)
- ▶ Other building or property-specific considerations.

The main objective is to give directions and effectively and efficiently evacuate the building to safety, however, once that happens and police, fire, etc. arrive they will take over and directions from them must be given first priority.

Cooperatives and condominiums should know that there exists a number of outside resources that can assist with the development and implementation of a plan, including local police and fire organizations, the Red Cross, real estate management companies, as well as other trade and business groups. Remember: what will work for a 30 unit two story garden style building will not work for a 100 unit fifteen story high

-rise. Whatever the Plan, it must be tailored to the specifics of an individual property.

In connection with the creation and implementation of building-specific plan there are a few key elements to also keep in mind. First, make sure the plan is in writing and communicated to the building occupants in an effective and acceptable manner. Town hall type meetings and updates in newsletters, etc. are also key components to both informing occupants of the plan's existence, what it covers, and how it will work, as well as any subsequent changes, etc. Second, special consideration must be given to certain types of populations and special needs occupants, including the elderly, those with disabilities, occupants with young children, and those who may experience language barriers, to name the most common. The location and contact information for the foregoing should be known to building management, plan personnel and first responders. Third, as part of the Plan the building should carry out periodic drills covering the most likely types of emergency situations. In conclusion keep in mind that the Plan must be suited to the unique needs of the building and property and that communication and practice are key! ◀

Legislative Update (cont'd)



cooperatives and condominiums located within the State.

In addition to the bills at the state level, there are also bills at the local level which are responsive to trends or concerns prevalent at the time with respect to a given geographic area. For example, in an effort to promote going "green", New York City has a number of bills pending that deal with the implementation of green initiatives in a building (e.g., light sensors, "green" roofing, the recognition of environmental concerns as a "guiding principal" of building, mechanical and other codes, etc.). As

cooperatives and condominiums located in New Rochelle are already aware, the city recently passed an increase in its garbage tax which will substantially increase the amount of money individual unit owners will have to pay to the City for these services. The increase is the subject of a lawsuit by a New Rochelle resident in the form of an Article 78 proceeding, that seeks to have the fee increase rescinded.

As the above illustrates, while we may not hear about them

during our everyday lives, the legislators are busy preparing bills that if enacted into law would have a direct impact on cooperatives and condominiums. As we have in the past, we will continue to monitor the status of the bills mentioned as well as others that may be proposed and take (as well as recommend that you take) responsive action (which may include contacting legislators directly) as is necessary and advisable in order to protect the best interests of our cooperative and condominium clients. ◀

Dealing with Objectionable Conduct: A Roadmap (continued from first page)

The written notice to the shareholder must outline the conduct deemed objectionable and advise the shareholder of the consequences that will occur if the behavior continues. Typically the vote that is required, whether by the board, the shareholders, or both is a super majority in favor of terminating the lease.

As we all know, the term “objectionable” is subjective and the range of behavior that can be deemed “objectionable” is broad. Anything from noise, to cooking odors, to parking improperly, to constant arguing with board members and other shareholders, etc., and behavior that otherwise negatively impacts the quality of life in a building can, if severe and/or often enough, be deemed objectionable. Of course, behavior along these lines can sometimes be difficult to characterize as objectionable, while behavior like physically assaulting or verbally threatening someone, dealing drugs or otherwise engaging in illegal activity are much easier to characterize.

Since evicting a shareholder is a drastic remedy, and the required vote in favor sometimes difficult to obtain, every effort should be made to resolve the matter short of terminating a shareholder’s lease. These efforts vary depending upon the circumstances and one or more of the following: sending out notices, meeting with the offending shareholder separately as well as with the affected shareholder(s), seeking the assistance of a third party to help mediate, foster direct communication between the offending and complaining shareholder(s), etc. It goes without saying that a cooperative should maintain very detailed records and create a file that contains all documentation in connection with the shareholder behavior and the complaints in response to same. There may come a time where, despite every effort at resolving a matter, the conduct is so egregious, the problem so persistent or the offending shareholder so unreasonable that a board is left with no other choice – it is under these circumstances where the remedy is usually successfully

employed. An interesting case on a successful approach to dealing with this type of shareholder employed by a cooperative involved the board meeting with the offending shareholder, presenting him with the overwhelming evidence to be presented to the shareholder community, and offering him the opportunity, in order to avoid the presentation of the facts to the shareholder community and the resulting and impending termination, to voluntarily sell his unit within a time specified and vacate in connection with said sale.

Once the decision to proceed is made it is important that a board follow proper procedure as set forth in the proprietary lease. Where the proprietary lease requires that the shareholders vote by supermajority to evict the offending shareholder, the board must then educate the other shareholders as to why their votes are required and then garner sufficient support, in person or by proxy, to obtain the requisite percentage vote in favor. It is advisable to prepare a detailed statement advising and outlining the conduct complained of, its effect on others and the efforts attempted to resolve the problem. The statement is provided to all shareholders (including the offending shareholder) and a special meeting is

held. The offending shareholder has the right to attend the meeting and make a statement in his/her defense (and in some cases even bring their lawyer with them). At that point a vote is held, and, assuming the required votes are obtained, a notice is then issued to the shareholder terminating his/her lease. As is often the case, the shareholder will refuse to vacate their apartment and a formal legal proceeding for ejection will be required. Once a judgment awarding possession is obtained, the shareholder can then be removed from possession.

The typical case does not reach this point; however, more and more complaints about shareholder behavior have been received and it is important for boards to know that if and when this type of situation presents itself, there is a powerful remedy available. So long as the board follows proper procedure as outlined in the proprietary lease and exercises proper business judgment, its actions will be upheld as valid and enforceable if challenged in court by the offending shareholder. ◀

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Wise Words

The application of parliamentary law is the best method yet devised to enable assemblies of any size, with due regard for every member's opinion, to arrive at the general will on the maximum number of questions of varying complexity in a minimum amount of time and under all kinds of internal climate ranging from total harmony to hardened or impassioned division of opinion. —Robert Rules of Order Newly Revised, 10th edition, p. XLVIII

The contents of this newsletter are intended solely for general informational purposes only. It does not constitute advice, and it should not be relied on as legal advice without a discussion of your specific situation with an attorney.