

CLIENT ADVISORY

JANUARY 2008

GANFER & SHORE, LLP WELCOMES MATTHEW J. LEEDS

Ganfer & Shore, LLP is pleased to announce that Matthew J. Leeds, formerly of Bryan Cave, LLP, has joined Ganfer & Shore as a partner.

Matthew Leeds' diverse real estate practice includes representation of owners, developers, sponsors, condominium and cooperative boards, investors and institutional real estate lenders. He has particular expertise in the burgeoning area of commercial condominiums as they relate to development, financing, and leasing transactions.

Mr. Leeds is an adjunct professor of law at Fordham University School of Law as well as the co-author of the reference book *New York Practice Guide: Real Estate: Cooperatives and Condominiums*, published by Matthew Bender. A frequent lecturer and writer, he is a former chair of the New York State Bar Association's Real Property Section as well as of that organization's Condominiums and Cooperatives Committee. In 1999, Leeds was elected to the American College of Real Estate Lawyers. He has been listed among the *Best Lawyers in America* and *New York Super Lawyers*.

Mr. Leeds has 30 years of experience as a real estate lawyer. He began his law career as a Special Deputy Attorney General in the New York State Department of Law's Real Estate Financing Bureau. In 1984, he joined the firm of Robinson Silverman Pearce Aronsohn & Berman LLP, which merged with the national law firm Bryan Cave, LLP in 2002. We are pleased to welcome Mr. Leeds and his clients to Ganfer & Shore, LLP.

NEW STATUTE EASES BURDEN OF "80/20 RULE" ON COOPERATIVES

On December 20, 2007, President Bush signed into law **Public Law 110-142**, known as the Mortgage Forgiveness Debt Relief Act of 2007. Among other things, this new federal statute provides significant relief for many cooperatives from the effects of the so-called "80/20 rule" under the Internal Revenue Code.

The former 80/20 rule provided that certain tax benefits to tenant-shareholders in cooperative housing corporations, such as the ability of a shareholder to deduct his or her proportionate share of the cooperative's property taxes and mortgage interest, were only available if at least 80 percent of the cooperative's total income was derived from income from tenant-shareholders, rather than from leases on commercial space or other "non-qualified" sources. If the cooperative's non-qualified income exceeded 20 percent, the shareholders' tax benefits would be lost. This rule sometimes

prevented cooperatives with sizable commercial space from maximizing their commercial rents and thereby reducing the maintenance burden on their shareholders.

Under the newly enacted legislation, the definition of a qualifying cooperative housing corporation has been revised to include buildings passing any one of three alternative tests. Tenant-shareholders will continue to enjoy the tax benefits of cooperative ownership if during any tax year, (1) 80% or more of the cooperative's gross income for the tax year is derived from tenant-shareholders (the same as the prior law); *or* (2) throughout the year, 80% or more of the cooperative's square footage is used or available for use by tenant-shareholders for residential purposes or for purposes ancillary to residential use; *or* (3) 90% or more of the corporation's expenditures paid or incurred during the tax year are paid or incurred for the acquisition, construction, management, maintenance, or care of the cooperative's property for the benefit of tenant-shareholders.

The new legislation provides that it "shall apply to taxable years ending after the date of enactment of this Act." Cooperative board members, shareholders, and managing agents with questions about the effects of the new statute should consult with their counsel or tax advisors.

**WAIVER OF RIGHT TO SUBLET BY HOLDER OF UNSOLD SHARES
DOES NOT AUTOMATICALLY WAIVE HOLDER'S OTHER RIGHTS**

An investor who acquires a cooperative unit as a "holder of unsold shares" typically enjoys certain rights not possessed by other tenant-shareholders, such as the right to sublet or sell the unit without obtaining board approval and without paying fees such as subletting fees or "flip taxes." Although a holder of unsold shares can waive these rights, such a holder's waiver of the right to sublet without board approval does not necessarily waive the holder's other rights, according to the Appellate Division decision in **L J Kings, LLC v. Woodstock Owners Corp., 2007 WL 4336227, 2007 N.Y. Slip Op. 9884 (App. Div. 1st Dep't Dec. 13, 2007).**

In this case, a shareholder acquired cooperative shares from a designated holder of unsold shares, not for purposes of the investor's own occupancy, and no one affiliated with the shareholder ever resided in the apartment. Based on these undisputed fact, the court held that the shareholder enjoyed "holder of unsold shares" status. (For a discussion of the circumstances under which a cooperative shareholder will be deemed a holder of unsold shares, please see the July 2005 and November 2005 issues of this *Client Advisory*.)

Despite the shareholder's status as a holder of unsold shares, at the closing of the purchase, the shareholder signed a document acknowledging that it could not sublet the apartment without the board's consent. The apartment was occupied at the time of the purchase, and the purchaser subsequently renewed the sublease without seeking or obtaining board approval. The purchaser also failed to pay sublet fees to the Cooperative. The shareholder brought an action for injunctive and declaratory relief to prevent the Cooperative from terminating its tenancy as a result of these actions.

The court sided with the shareholder and granted a preliminary injunction against termination of the shareholder's proprietary lease. Even assuming that the shareholder had validly waived its right to sublet without board approval, this would not automatically mean that it had waived its other rights, such as the exemption from sublet fees. Under the circumstances, the court found substantial questions as to the scope of the shareholder's waiver of its rights and whether the shareholder's violation of the proprietary lease, if any, was sufficiently severe as to warrant forfeiture of the lease.