
CLIENT ADVISORY

SEPTEMBER 2008

**MAINTENANCE PAYMENTS DUE TO COOPERATIVE ABATED
AS SHAREHOLDER'S APARTMENT IS FOUND UNINHABITABLE,
BUT CLAIMS AGAINST INDIVIDUAL BOARD MEMBERS DISMISSED**

Based on a finding that a cooperative apartment "cannot be safely inhabited in its present condition," an appellate court affirmed "a 100% abatement of plaintiffs' maintenance, as authorized by their proprietary lease." The court specifically rejected an argument that the tenant-shareholder should at least be required to pay the portion of maintenance attributable to the Cooperative's real estate taxes and mortgage payments. However, the court dismissed claims by plaintiffs against the Cooperative's individual board members. **Granirer v. The Bakery, Inc., 2008 WL 3288425, 2008 N.Y. Slip Op. 6582 (App. Div. 1st Dep't Aug. 12, 2008).**

In this case, although the parties disputed some of the reasons that required repairs had not yet been made, the court found sufficient evidence that in its present condition, plaintiffs' apartment could not be used for residential purposes. Accordingly, as authorized by the proprietary lease, plaintiffs' maintenance obligations were completely abated, *i.e.*, plaintiffs were relieved of their obligation to make maintenance payments until the necessary repairs were made. The appellate court reached this conclusion unanimously, but split 3 to 2 on the question of whether the abatement of maintenance also operated to relieve plaintiffs of their obligation to contribute to the Cooperative's real-estate tax and mortgage obligations. The majority found that "[t]he parties to this detailed and carefully crafted proprietary lease could have excluded these incidents of ownership from the abatement provision . . . had they chosen to do so." However, the court denied plaintiffs' further claim that the Cooperative should reimburse them for the expense of making alternate living arrangements during the period they could not live in their apartment.

While upholding many of plaintiffs' claims against the Cooperative, the court dismissed claims brought by plaintiffs against the individual Board members, on the ground that "the complaint does not allege any individual wrongdoing by the . . . members of the cooperative's board of directors, separate and apart from their collective actions taken on behalf of the cooperative." The court also dismissed a claim for breach of fiduciary duty against the Cooperative, holding it to be "merely duplicative of their cause of action for breach of the proprietary lease."

**NEW DEPARTMENT OF BUILDINGS DEPARTMENT REQUIREMENTS FOR
WORK PERMITS WILL IMPACT COOPERATIVE AND CONDOMINIUM BOARDS**

The New York City Department of Buildings (DOB) has revised certain of its forms and procedures relating to applications for work permits, including those affecting cooperative and condominium apartments. The revised documents include new forms "PW1" (the work application) and "PW3" (the affidavit of cost). Among other things, these forms call for a certification that the work to be performed will not require an amendment of the building's certificate of occupancy, and a

statement by the owner of the construction costs to be incurred, which is used by the DOB in calculating the permit application fees. In addition, an inspection report must be submitted when the work is completed, including a sign-off from an appropriate professional such as an architect or engineer. The person signing the forms as “owner” is responsible for the accuracy of all the information provided, and may be civilly or criminally liable if any of the information is incorrect.

The governing documents of most cooperatives and some condominiums require board approval before alterations are made to a unit. In the past, many boards have insisted that a board representative sign the DOB application forms as “owner” of the premises, so as to ensure that the board was consulted and its approval obtained. However, the DOB regulations do allow a tenant-shareholder or unit owner to sign the application as owner, with the consent of the board.

In light of the increased responsibility now imposed upon “owners” submitting the application forms, boards may wish to revise their forms of alteration agreement so that the tenant-shareholder or unit owner, rather than the Cooperative or Condominium itself, is required to sign the application forms and submit them to the DOB, following written approval and authorization by the Board of Directors or Board of Managers. Alternatively, boards may wish to broaden the indemnification provisions of their alteration agreements to specifically cover these new obligations.

PROPERTY OWNERS CAN PREVENT UNWANTED ADS FROM LITTERING PREMISES

New York City property owners can now legally prevent businesses from leaving unwanted advertisements, such as fliers and menus, strewn throughout their property, pursuant to amended **New York General Business Law § 397-a**, commonly known as the “Lawn Litter Law.” As applied to apartment buildings, including cooperatives and condominiums, a building may prohibit delivery of unsolicited advertisements to its property. To effectuate the prohibition, the building owner must post a sign at least five inches tall and seven inches wide with letters at least one inch in size, stating: **“DO NOT PLACE UNSOLICITED ADVERTISING MATERIALS ON THIS PROPERTY.”**

The law provides that if at least one occupant of a multiple-dwelling building consents to prohibit advertisements, but not all of the occupants consent, then the building may post a sign designating a particular location or receptacle where the fliers or menus may be left, in a reasonably accessible location. The sign may limit the number of advertisements that may be left in the location or receptacle, to an amount equal to the number of units whose owners or lessees have not consented to prohibit distribution of advertisements..

A sample sign suitable for posting, together with additional information concerning the Lawn Litter Law and its enforcement, can be found on the New York City Environmental Control Board’s website at http://home2.nyc.gov/html/dsny/html/contact/requests_lawnlitter.shtml

TAX ABATEMENT FOR “GREEN ROOFS” IN NEW YORK CITY

Certain properties in New York City, including cooperatives, condominiums, and rental apartment buildings, may now be eligible for a one-year real estate tax abatement if they install “green roofs.” A “green roof” is a rooftop which is at least half covered with vegetation, including a growth medium and a vegetation layer consisting of a hardy, drought-resistant plant species. The tax abatement is equal to \$4.50 per square foot of the green roof, not to exceed the lesser of the tax liability on the building or \$100,000. This tax abatement is in effect from 2009 until March 15, 2013.