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MHH Condo/Co-op Digest

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This newsletter explores the emerging legal topics and issues affecting the condominium and cooperative services industry. Thought-leading attorneys from Moritt Hock & Hamroff's Condominium and Cooperative Services Practice Group share their legal insight, experience and best practices on this rapidly evolving area of law.

About The Group

Moritt Hock & Hamroff's Condominium and Cooperative Services Practice Group represents clients in all aspects of condominium and cooperative law. We recently welcomed five attorneys to our New York City office,

significantly expanding our real estate practice and further illustrating the firm's continued growth. **Matthew J. Leeds**, **David S. Fitzhenry**, and **William D. McCracken** join as Partners, while **Matthew D. Healey** joins as Counsel and **Brett M. Stack** joins as an Associate. All were previously part of the real estate practice group at Ganfer Shore Leeds & Zauderer in New York City where Matthew Leeds served as Co-Chair of the team. To mark our expansion, the Condominium and Cooperative Services Practice Group will begin distributing periodic client advisories sharing recent and important legal developments affecting condominiums and cooperatives.

If you have any questions regarding the matters raised in this newsletter, please feel free to contact Bill McCracken of our New York City office at wmccracken@moritthock.com.

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DOB Issues Long-Awaited Rules Outlining "Good Faith Efforts" Needed To Reduce Or Eliminate Penalties Under Local Law 97

Local Law 97 is the centerpiece of New York City's efforts to reduce carbon emissions in its buildings sector by 40% by 2030 and 80% by 2050. Beginning next year in 2024, covered buildings must reduce their carbon emissions to within specified statutory limits or face potentially severe annual fines.

The threat of these annual fines has generated a lot of commentary – and even litigation – from building owners concerned that they will not be able to afford the retrofits and capital improvement work it may require to sufficiently reduce their carbon emissions. Although the statute says that penalties can be mitigated if owners make "good faith efforts" to comply, for the last four years no one has known what that would mean or what it would require. The uncertainty has led many building owners to openly contemplate "just paying the fine" rather than start down the road of decarbonizing their buildings.

With the publication of the new DOB rules, and following the comments received at the DOB's public hearing held on October 24, 2023, we now know better what “good faith efforts” will be required to reduce or eliminate building fines in the first 2024-2029 compliance period. Broadly speaking, the rules require a building seeking penalty mitigation to first take care of the low hanging fruit (namely, file Local Law 97 building emissions report for the previous calendar year, submit Local Law 84 benchmarking data for the previous calendar year, and complete Local Law 88 lighting and submetering upgrades), and then demonstrate one of several additional compliance options, including filing proof that the building has received approval from DOB to perform work that will bring it into compliance with its emissions limits, or that it has undertaken work to electrify its building systems.

The penalty mitigation option that has generated the most headlines is submitting a “decarbonization plan.” The new rule explains in detail what is required in such a plan, including: (1) an energy audit prepared by a qualified energy auditor; (2) a complete inventory of relevant building systems; (3) a description of any building work in the last ten years that reduced emissions by 10% or more; (4) a detailed list of planned changes that will result in net zero emissions by 2050; and (5) a showing that the work will bring the building into compliance with its 2024 limits by no later than 2026 and with its 2030 limits by no later than 2030. Finally, in a nod to a major controversy that had been brewing since DOB released its first set of rules last year, decarbonization plans cannot rely on the purchase of renewable energy credits to achieve compliance during the first period (meaning that any planned emissions reductions must come from actual retrofit work done at the building itself). Even for those buildings not facing immediate fines, this description of what a decarbonization plan should include provides a useful roadmap in preparing for emissions reductions work.

In order to qualify for penalty mitigation during the first 2024-2029 compliance period, buildings have to make all of these submissions to DOB by no later than May 1, 2025. This means that any buildings expected to face fines during this first five-year period have a little over 18 months either to bring their building into compliance or to develop evidence that they have engaged in “good faith efforts” to do so in accordance with the rule.

It bears emphasis that the vast majority of buildings subject to the emissions limits in Local Law 97 are already in compliance with the 2024-2029 standards, and thus these new rules only directly affect a relative handful of buildings. To the much larger set of buildings first facing fines in 2030, however, the DOB’s commentary on the new rule includes a warning that the relatively lenient mitigation criteria now being proposed may not be available in future compliance periods: “In general, compliance with Local Law 97 requires multiple years of planning and implementation, which means that any good faith effort to comply with the 2030-2034 emissions limits will require owners to take steps to comply with such limit well in advance of 2030.” In other words, buildings should not expect to avoid fines in 2030 with a mere plan for future action, no matter how detailed.

Separate and apart from the mitigation criteria set forth above, the new rules also establish an intriguing mechanism of entering into a “mediated resolution” with the DOB, seemingly allowing buildings to negotiate bespoke

compliance plans with DOB in lieu of immediate compliance. The new rules also lay out a new "beneficial electrification" credit to reward buildings that undertake decarbonization efforts ahead of schedule, as well as technical updates on the first set of DOB rules.

To those buildings still contemplating "just paying the fine" rather than attempting to comply with Local Law 97, the new rules offer food for thought. Not only do the new rules offer a pathway to penalty mitigation that does not necessarily require immediate substantial capital outlays, the rules also lay out exactly how to develop a bona fide decarbonization plan. The preparation of a decarbonization plan will undoubtedly require significant time and expense, but that one-time expense is likely to be much less than the costs of annual (and recurring) fines.

With these new rules, the DOB seems to be betting that once buildings take the first steps down the road of decarbonization, compliance with Local Law 97 will become more achievable than what some critics have argued.

Court Confirms That Non-Waiver Provisions Can Themselves Be Waived By The Parties' Course Of Conduct

A dispute over a doctor's office led a court to a re-affirm the principle that non-waiver contractual provisions can themselves be waived. Non-waiver provisions, which typically state that parties may not change or modify their agreement unless both parties agree to the proposed change or modification in writing, are designed to prevent parties from inadvertently waiving rights through their actions or omissions. They are a standard part of a contract's boilerplate. Ironically, however, if the parties' course of conduct sufficiently evidences an intent to modify their agreement, the courts will disregard the non-waiver provision and not require a writing documenting the change.

In **Buchman v. 117 East 72nd Street Corp., No. 656460/2021 (Sup. Ct. N.Y. Co. 2023)**, the court found that a tenant-shareholder's decades-long use of an apartment as a doctor's office was sufficient to allege a waiver of enforcement of the proprietary lease's prohibition against use as a medical office. Plaintiff's husband had used the first-floor suite as a medical office for

over 50 years, and a neighboring space had been used as a dermatologist's office. When the latter space was sold in 2015, the new owner converted it to residential use. As part of the conversion, the cooperative (either inadvertently or deliberately) signed an application to convert **all** of the professional suites on the first floor (including plaintiff's) to residential apartments.

When plaintiff went to sell the medical office in 2017, she discovered that the building's certificate of occupancy had been changed so that it could not be conveyed as a medical office, which would have severely depressed the value of the space. Plaintiff sued, and the co-op moved to dismiss, citing a provision of the proprietary lease that said the plaintiff's premises were to be used as a "private dwelling apartment" that may be used as a medical office only if the practitioner also lives there, and there was no dispute that the space was not, and never had been, used as a private residence. The plaintiff argued, however, that the parties' course of conduct modified the proprietary lease. The court agreed: "Since the cooperative was aware that plaintiff's husband had used the premises as a medical office since 1965 and that prior tenants had used the premises as a medical office since 1928, the cooperative lifted the restriction despite the proprietary lease's requirement that a waiver of the lease's terms be in writing." Thus the lease's non-waiver provision was itself waived.

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