

Coops, Condos and COVID-19

By Richard J. Sobelsohn



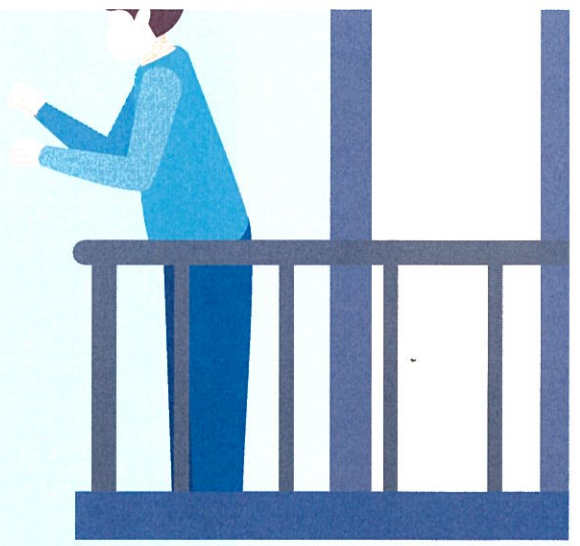
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For condominiums, cooperatives and homeowner's associations, the novel coronavirus has presented myriad legal issues. However, dealing with COVID-19 has provided one benefit. There is now an opportunity to develop a blueprint for condominiums and cooperatives to follow when, and if, the next similar crisis occurs. It is therefore incumbent upon practitioners to set forth for their clients plans for the future so that they are readily accessible when needed. To understand the basic foundation of what concerns many of these properties have, we should understand that, at a minimum, there is typically a statutory requirement to protect the health and welfare of residents.¹

COVID-19 ISSUES THAT NEED ATTENTION

1. How to Keep the Building Operating

- a. Employees who keep the building operating are considered "essential employees,"² and as such they are permitted to work in the condo/coop. However, what happens when one or more of them becomes ill (either with the coronavirus or



something else)? Should others on staff be required to work overtime to take up the slack? Should temporary workers be hired, and if they are, will the union (if the employees of the building work under a union contract) require those temporary workers to become hired as permanent employees if they are needed for more than the typical union maximum working days? All these are issues with which the condo/coop must grapple.

- b. How to deal with deliveries of food (either take-out meals or groceries). Some boards have required residents to pick up food deliveries in the lobby or immediately outside the building entrance to avoid having a delivery person possibly infect the building surfaces or residents/employees.³
- c. Package deliveries are also an issue. In some buildings, large packages, or a delivery of multiple large boxes, are now delivered directly to the resident's apartment soon after arriving at the building so as to keep the potentially infected boxes out of the common areas.⁴
- d. Wearing masks has also become a building entrance and common area requirement. Those residents not wearing a mask may be given a mask if they are not wearing one when entering the building, and furthermore, guests may be prohibited from entering the building at all if they refuse to wear a mask. Similarly, restrictions on elevator usage (no more than a maximum number of unrelated persons per elevator cab) are now the norm.⁵ New York State imposed a mandatory 14-day quarantine for those individuals entering the state from designated "hot spot" states and countries and even imposes fines for failure to satisfy this obligation.⁶ Those required to be quarantined may also need additional building services, such as having staff assist with trash collection and food delivery, and the condo or coop may have to plan for this.
- e. Employees of residents (whether full-time or part-time) also need to be accounted for. These workers could include housekeepers, dog walkers and nannies. Many state governors promulgated executive orders with minimum guidelines for buildings (both commercial and residential).⁷ Clearly condominiums and cooperatives have to comply with these directives, but most executive orders included (as they did in New York State) the proviso that building owners have the latitude to add to the orders as they see fit (of course, in a legal, non-discriminatory fashion). A questionnaire asking the employee or recently arrived resident about exposure to the novel coronavirus or a statement regarding recent travel is now typical, and

some buildings are even taking the temperature of workers and unknown individuals before permitting entrance to the property.

2. Social Distancing and Amenities

Due to the novel coronavirus, social distancing has become the norm to protect others from catching the virus. And relating this to a resident's use of the common areas and amenities of their buildings is something with which Boards have recently grappled. For example, the utilization of a health club, gym or pool must now be considered when formulating social distancing regulations. Children's playrooms, racquetball, squash and basketball courts are also part of the discussion. Even the use of elevators, common hallways, trash rooms, lobbies, laundry rooms and outside areas of the property are all in the mix. In many cases there are different rules for those who tested positive for COVID-19 versus those who did not get tested or after testing were found to be negative. Building concierges' health protection must also be addressed. In many buildings, plexiglass screens have been installed to provide a barrier between residents and employees, and many buildings have even installed tape on the floor delineating six feet for social distancing from concierge stations. Required mask and social distancing signage located on the building façade, elevator banks and lobbies have also become commonplace (even in the fanciest buildings). Additional expenditures on masks, hand sanitizers and disinfectants are also something for which boards must plan.

Before COVID-19, the package of amenities that enticed people to want to live in condominiums and cooperatives helped sell and rent the apartments located therein. Yet after the outbreak, condo and coop boards alike have had to weigh priorities and to determine whether protecting residents and employees of the building outweighs facilitation of sales and rentals. Therefore, new responsibilities for employees, such as doorpersons wiping down elevator buttons, front doors and keeping delivery people outside of the building, have been added to the scope of work, as well as having building staff deliver packages to residents instead of those residents coming to the lobby to retrieve them. Bringing in cleaning services for extra deep-cleaning/disinfecting is also common in many buildings. Balancing these added costs against resident and employee health has also become an issue. Furthermore, more vigilant HVAC filter changes and higher MERV rating filters⁸ have become the norm, which have the added benefit of preventing sick building syndrome⁹ and Legionnaires' disease.¹⁰

3. Disclosure of Infected Persons

Although not codified in statute or addressed specifically in case law, if a resident of a condo or coop is known to be infected with the coronavirus, disclosing that an indi-

vidual resides in the building has been generally accepted to be appropriate, provided, however, that that person's name and apartment number is not to be released.¹¹ But because the infected person(s) live near others and potentially share the property's common areas (including where the mailboxes are situated) and share the buildingwide HVAC¹² and water systems, condos and coops should have set protocols to deal with this. Due to the concern of the virus spreading and a healthy occupant of a building being infected by someone that has the virus, many condominiums and cooperatives have put the following measures in place:

- a. Notifying residents that there is someone in the building that has the coronavirus puts them on notice that they could be susceptible to catching the virus unless other actions are not taken (most of those actions, however, are already described in this article and below). The general consensus is that if a building has a known infected person, there may be additional individuals residing in the property who also have COVID-19 but are asymptomatic or unaware that they are sick. Of course, if the infected person gives consent to disclose their identity, that might be advantageous since at this point the state of the law is unclear.¹³
- b. With a COVID-19-identified resident, a condo and coop could arrange for the following to (1) permit that person to self-quarantine and (2) prevent that person from spreading the virus:
 - (i) Picking up and disposing the trash left outside the infected person's apartment;
 - (ii) Delivering the mail from the infected person's mailbox to outside their apartment;
 - (iii) If the infected person must leave the apartment to go to the doctor, managing the elevator operation so that the person is the only one in the elevator when using it, uses a mask, does not touch the floor buttons, and is escorted out from and back into the building.
 - (iv) Providing the infected person with names and numbers of grocery stores, laundry/dry cleaners and pharmacies that deliver, and when the items are delivered, facilitating the drop-off outside the apartment.
 - (v) Informing the local health department and the CDC that an infected person resides in the building.
 - (vi) Requiring all persons entering the building that have not recently resided in the building to complete a questionnaire stating from where they may have traveled, if they are infected or have been in contact with someone

infected, etc., and to prevent access if the questionnaire discloses a COVID-19 connection.

4. Monthly/Annual Board Meetings

Condominium and cooperative annual meetings and monthly board meetings are now being conducted virtually. However, what should the condo or coop board do if the bylaws do not speak to this? New York State law¹⁴ and new policies suggested by the Real Estate Finance Board and the New York State Department of Law help here by permitting a relaxing of bylaws to facilitate these types of virtual meetings.¹⁵ In planning for the future, a practitioner might want to suggest that condominium or cooperative bylaws be modified to permit these types of meetings on the occurrence of an event such as COVID-19.

5. Payment of Common Charges/Maintenance

Condominiums and cooperatives are dealing with not only additional COVID-19-related costs, but the failure of some unit owners in paying their monthly common charges/maintenance. Here the boards have to figure out how to respond to those owners who state that they do not have the funds to pay what is due. This is a much easier issue with which to deal when there are a limited number of issues, but with the current pandemic it is different. The funds to pay for regular operating expenses (real estate taxes for cooperatives) and coronavirus-added costs have to come from someplace. Although there are various groups suggesting that enforcement of payment obligations should be relaxed¹⁶ and that there be a waiver of late fees, penalties and foreclosures for an owner's failure to satisfy their monetary obligations, a board's fiduciary duty remains constant, i.e., to insure that the best interests of the condo/coop are paramount. This is not an easy issue, and the boards must use a formula that is applied equally and fairly to all unit owners. One question that arises is: Should there be different rules for owner-occupied units as opposed to those that are merely owned as investment properties? Since it is not unusual nowadays to see rentals vacated and the owners of those apartments unable to pay their monthly maintenance/common charges, a condo or coop's board will need to have in place certain protocols to deal with such a situation.

6. Sales and Rentals

Cooperatives and condominiums are also faced with the issue of how to deal with shareholders/owners wishing to market their apartments for sale or rental.¹⁷ No longer are in-person open houses the norm. With COVID-19, due to market jitters, local or state prohibitions¹⁸ and condo/coop COVID-19-related rules, "virtual viewings" abound. This alleviates the concerns that too many "strangers" would enter a building to see an apartment and possibly transmit the virus if they have it. Another modification in the selling/leasing process has been adopted.

For a coop sale, it is typical for the purchaser to submit an application to the board of directors and to take part in an interview by the board or a committee of the board. During the pandemic, live face-to-face interviews are not happening, and instead they are now taking place online with Zoom, Skype or another online medium.

7. New York State Relaxes Requirements for Sponsors

New York State requires sponsors of condominiums and cooperative to file amendments to offering plans when there are financial updates and price changes for the sale of apartments.¹⁹ Due to COVID-19, the New York State Real Estate Finance Bureau (REF) has stated that during the relief period, REF does not intend to pursue enforcement actions against sponsors or principals based solely upon the marketing or sale of units/apartments/homes pursuant to an expired or “stale” offering plan. . . . Therefore, until further notice, sponsors do not need to submit amendments to REF that principally serve to extend the term of the offering plan (i.e., financial update amendments).²⁰

However, the suspension of the requirement to file is dependent upon there being no adverse and material changes to the offering plan. Furthermore, Governor Cuomo’s Executive Order 202.55 provides for (x) a tolling of (i) the 15-month statutory residential coop/condo conversion deadline; (ii) the required date for the first closing of shares of a cooperative or a condominium unit and rescission rights; and (iii) the updated budget requirements; and (y) extending sponsor’s time to recover from purchasers the mortgage recording tax it paid allocated to the apartment/unit purchased.²¹

8. Construction Issues

Depending upon the jurisdiction, but generally seen throughout the country, most “non-essential” construction work was halted by executive or agency order due to the pandemic. Unless a project was “necessary to protect health and safety of the occupants, or to continue a project if it be unsafe to allow to remain undone” (i.e., “essential construction”), the construction was not permitted.²² The problem for a condominium or cooperative is that if a construction job was commenced prior to the outbreak of COVID-19, the delay in completing the job affects not only the current residents but also any sales and rentals in the building. Exceptions, however, are available in some cases and some jurisdictions. For example, in New York, essential construction also includes affordable housing construction, public housing work and essential business construction.²³

- a. **Building-Wide.** The projects under this scheme are generally for the benefit of all residents of the building. These could include renovations to lobbies, hallways, elevator cabs, etc. Normally, during the performance of construction, condominium

and cooperative owners understood that there would be a temporary period of time in which their building would not look pristine and the services usually afforded to those living in the building might be curtailed. However, with the current situation, those projects that began before the pandemic and the many executive orders have been delayed (in many cases, for months). Furthermore, once the “stop-work” directive is removed, challenges will also abound, as there will probably be an overwhelming number of construction jobs that need to be completed or started. It is possible that the original contractors may no longer be in business, much less have the resources to handle all of the work in the market. But the work, nevertheless, needs to go on.

- b. **Unit/Apartment Specific.** The individual apartment construction job that either was to begin at the time of the pandemic or was commenced prior thereto presents additional issues for condominiums and cooperatives. Not only do boards have to deal with their own building-wide construction jobs, they also need to manage unit owner construction jobs. Although the same restrictions on building-wide work applies to apartment construction, the staging of work for when the restrictions are lifted presents its own set of issues. What work has priority other than the condominium/cooperative building-wide work? Should a board permit resumption of construction in an apartment based on when the original job began or the scope of the work itself? In other words, if the job was a complete “gut” renovation, should that have priority over a kitchen cabinet replacement? Furthermore, in making a decision regarding permitted work resumption, a board would be well-advised to confirm with counsel if there might be any legal issues relating to deciding which jobs can start first. Clearly, any unit-specific work would be second in priority to the building-wide construction work. Pursuant to the governor’s executive order, boards can impose stricter rules as they deem necessary.²⁴ Additional issues presented are how to screen construction workers for COVID-19 infection, making sure that common areas are kept clean and possibly imposing additional cleaning fees on unit owners/shareholders having construction performed for them, and fining shareholders/unit owners or even stopping the construction work altogether if those owners do not abide by the rules.

9. Budgets

The many issues relating to COVID-19 have now forced coop and condo boards to modify previously well-

thought-out budgets. There are myriad increased costs with which buildings have thus far not had to deal, and the money to pay for them has to come from somewhere. The good thing (if one can call it a good thing) is that the unforeseen costs relating to COVID-19 are no different than any other unforeseen costs that a board must face. For example, when an emergency repair or replacement is required in a building and for which the board did not provide in its budget, assessments to unit owners or increases in common charges/maintenance is a typical new imposition. For coops and some condos, borrowing funds from a lender is another route that could be taken. In either situation, the added expenses are real, and a board's fiscal duty to its shareholders/unit owners is paramount and must be addressed.²⁵

10. Protection for the Boards

Followed in most jurisdictions, the Business Judgment Rule²⁶ protects a condo or coop board's actions as they will be presumed to be valid, absent fraud, self-dealing and illegality, and courts will be highly deferential to those actions. Case law typically shows that as long as a board acted in good faith, for a legitimate purpose and in the best interests of the shareholder/unit owners, it will not be reviewed by the court. This is true even when a board makes mistakes that cause the condo or coop to expend additional monies for a project that their shareholders/unit owners thought was extravagant or in excess of the benefit from such spending. As long as a board exercises "honest business judgment," their decisions are not second-guessed.²⁷ When a condominium's board of managers or a cooperative's board of directors decides to implement new rules to deal with COVID-19, they will probably go unquestioned by the court.

11. Summary

So where are we left in advising our condominium and cooperative board clients? The first suggestion may be to develop a blueprint for them to follow upon the occurrence of the next coronavirus-like event. Unlike dealing with the aftermath of a situation like Superstorm Sandy and even the events following 9/11, the ramifications of the novel coronavirus pandemic may prove to last much longer. It is therefore incumbent upon the practitioner to foresee some of the legal pitfalls with which our clients must deal to help them navigate successful outcomes. With proper planning, we can prepare for the known "unknown."

1. See New York State Multiple Dwelling Law, Article 1, Section 2, <https://www1.nyc.gov/assets/buildings/pdf/MultipleDwellingLaw.pdf>. See also *Majestic Hotel v. Eyre*, 53 A.D. 273, (1st Dep't 1900).

2. Essential employees work for "Essential Businesses," more fully defined in Executive Order 202.6, at <https://esd.ny.gov/guidance-executive-order-2026>.

3. See *Best Practices for Residential Property Managers*, Real Estate Board of New York, at https://rebny.com/content/dam/rebny/Documents/PDF/Resources/CoronavirusResources/Best%20Practices_ResidentialPropertyManagers.pdf.

4. See *COVID-19: FAQ for Residential Buildings*, NYC Health Department, <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/covid-19-residential-buildings-faq.pdf>.

5. See *COVID-19 Guidance for Shared or Congregate Housing*, CDC, Updated April 24, 2020 at <https://www.cdc.gov/coronavirus/2019-ncov/community/shared-congregate-house/guidance-shared-congregate-housing.html>.

6. See "COVID-19 Travel Advisory," NYS Dep't of Health, <https://coronavirus.health.ny.gov/covid-19-travel-advisory>.

7. See Karen Schwartz, "Thinking of Traveling in the U.S.? These States Have Travel Restrictions," N.Y. Times, July 10, 2020, <https://www.nytimes.com/2020/07/10/travel/state-travel-restrictions.html>.

8. See "Filtration/Disinfection," ASHRAE, <https://www.ashrae.org/technical-resources/filtration-disinfection>, showing why a higher MERV rating fights the spread of COVID-19.

9. See "Air Filters," Second Nature, <https://www.secondnature.com/science/air-filters>.

10. See "Quick Facts: How to take care of HVAC systems and prevent disease," Bluestone & Hockley, <https://www.bluestonehockley.com/quickfacts-how-to-take-care-of-hvac-systems-and-prevent-disease/>.

11. The question arises if a resident of the building lives in close proximity to the infected person, if there is a duty to disclose the apartment number. See Adam Leitman Bailey and John M. Desiderio "Residential Building Laws of the COVID-19 Pandemic," N.Y. Law J., June 9, 2020, <https://www.law.com/newyorklawjournal/2020/06/09/residential-building-laws-of-the-covid-19-pandemic/>.

12. Heating, Ventilation and Air Conditioning systems. The EPA states that because it is possible that the coronavirus can be transmitted via airborne particles traveling through a HVAC system, the following can reduce COVID-19 spreading from one individual to another: "increasing ventilation with outdoor air and air filtration as part of a larger strategy." See "Indoor Air and Coronavirus (COVID-19)," EPA, <https://www.epa.gov/coronavirus/indoor-air-and-coronavirus-covid-19>.

13. See Adam Leitman Bailey and John M. Desiderio "Residential Building Laws of the COVID-19 Pandemic," N.Y. Law J., June 9, 2020, <https://www.law.com/newyorklawjournal/2020/06/09/residential-building-laws-of-the-covid-19-pandemic>.

14. See M. Blankenship, J. Eric Johnson and Sey-Hyo Lee, "Temporary Relief for NY Corporations to Hold Virtual-Only Shareholders' Meetings," Winston & Strawn, LLP, <https://www.lexology.com/library/detail.aspx?g=6203d4fe-d58a-4ec3-94cf-46f82d4a0d74>, which states "New York governor's executive order issued March 20, 2020, suspending the application of certain statutory provisions in light of the coronavirus (COVID-19) pandemic temporarily permits corporations incorporated in New York to hold virtual-only shareholders' meetings. Specifically, the executive order suspends the provisions of Sections 602(a), 605(a) and 605(b) of the New York Business Corporation Law (NYBCL) with respect to the location and notice requirements for shareholders' meetings "to the extent that they require meetings of shareholders to be noticed and held at a physical location" initially until April 19, 2020."

15. Leslie R. Byrd, Joy Baskin and Ross F. Moskowitz, *NY Issues Condo and Co-op Plan Guidance Amid COVID-19 Pandemic*, Stroock, March 31, 2020, <https://www.stroock.com/publication/ny-issues-condo-and-co-op-plan-guidance-amid-covid-19-pandemic>.

16. See *COVID-19 & Community Associations Statement of Foreclosure Actions Moratorium*, Community Associations Institute, <https://www.caionline.org/Pages/covid-19foreclosures.aspx>.

17. The Real Estate Board of New York has an informative brochure providing guidance to real estate professional during the pandemic entitled *Best Practices for Conducting Residential Real Estate Rental Transactions During the Coronavirus (COVID-19) Crisis*, June 25, 2020, <https://rebny.com/content/dam/rebny/Documents/PDF/Resources/ConductingResidentialRentalTransactions.pdf>.

18. See NYS Executive Order 202.6, which was later lifted as real estate showings were redefined as "essential work."

19. See 13 N.Y.C.R.R. § 25.5.

20. See "Temporary Suspension and Review Policies and Procedures Due to COVID-19 State of Emergency," Real Estate Finance Bureau Memorandum, May 1, 2020, https://ag.ny.gov/sites/default/files/temporary_submission_and_review_policies_and_procedures_due_to_covid-19_state_of_emergency_5-1-2020.pdf.

21. See <https://www.governor.ny.gov/news/no-20255-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

22. See <https://esd.ny.gov/guidance-executive-order-2026>, Section 9.

23. *Id.*

24. See Rhonda Kaysen *My Co-op Is Letting Workers in Again. How Do I Know They're Doing It Safely?* N.Y. Times, July 25, 2020, <https://www.nytimes.com/2020/07/25/real-estate/coronavirus-reopening-workers-in-buildings-rules.html>.

25. NYS Article 9-B, New York Consolidated Real Property Laws, subsection 339 permits condominiums to raise common charges if the board chooses to do so. Cooperatives have this right as well, providing their bylaws permit it.

26. See *Ritter & Ritter, Inc. Pension & Profit Plan v. Churchill Condominium Ass'n*, 166 Cal. App. 4th 103, 123 (2008); *Harben v. Brown*, 431 Mass. 838, 845 (2000); *Otis & Co. v. Pennsylvania R. Co.*, 61 F. Supp. 905 (D.C. Pa. 1945).

27. *Otis & Co. v. Pennsylvania R. Co.*, 61 F. Supp. 905 (D.C. Pa. 1945).