

Legislative Update

Issues to Watch in 2018...and Beyond

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LAW & LEGISLATION



Whether it's pending Airbnb legislation in various markets, proposed legislation on New York State co-op applications, or homeowners winning the ability to sue condominium developers for faulty practices, co-ops, condos and HOAs are often at the mercy of legislators and the legal system. As constituents, they have a voice, but the question remains: are the interests of this niche collective fairly represented?

In Westchester County, for example, a bill was proposed in January 2018 that if made into law would require co-op boards to provide written explanations for their rejection of individuals who have applied to purchase apartments, explains Stella Goldstein, an attorney with the White Plains-based firm Steinvurzel & Levy Law Group.

"If passed, the bill would also set deadlines for boards to acknowledge receipt of a completed application, and to either accept or reject that application," says Goldstein. "The purpose behind such a law is twofold: Lawmakers are seeking to protect applicants from racial, gender and other

discrimination by co-op boards, as well as to accelerate the process of purchasing cooperative apartments.”

While similar proposals have been made in the past several years in Westchester, New York City, and Albany without success, Goldstein says realtors and county officials believe the bill would have a positive effect on the Westchester market.

“They feel this makes the purchase of a co-op unit more appealing,” she adds, “[while] co-op boards tend to feel that the legislature is overstepping their bounds with such a bill, and that if passed, the law will unnecessarily burden co-op boards at best, and result in increased litigation at worst.”

Under the proposed bill, a board would have 10 days to acknowledge receipt of a completed application. Within that time frame, the board would have to also communicate with the applicant about any missing information in the application, explains Kenneth Finger, Chief Counsel of the Westchester Cooperative and Condominium Advisory Council, which represents 300 to 400 co-ops and condos in Westchester County.

The bill would also require boards to furnish the acceptance or rejection of the application within 45 days from receipt of a completed application. If the application is not formally rejected, it would be approved by default. Finger adds that there is similar legislation pending in New York City as well.

However, says Finger, “This is a concern because as the board gets closer to the 45 days, rather than taking a chance and approving the application, they may reject it for whatever reasons, such as for more interviews, which would make the applicant go through the process and expense again.”

Additionally, pending legislation would require the board to provide written reasons for turning down or rejecting an applicant. While Finger says this measure was designed by lawmakers to reduce discrimination, he feels it wouldn’t necessarily have that effect.

“There aren’t that many refusals, and over the years there have been very few lawsuits as a result of a refusal,” he says. “There is significant legislation and methods of challenging discrimination already, through either the federal civil rights and housing laws, or through state anti-discrimination laws. The mechanism is already in place.”

Another somewhat recent piece of legislation impacting co-op and condos in New York State requires annual disclosures of conflicts of interest. Finger says he doesn't have an issue with this legislation, though he feels it is also somewhat redundant.

"Similar legislation has long been on the books, so this legislation wasn't necessary," says Finger. "But I don't have an objection to it, because if there is a conflict with a certain board members, it should be disclosed – and that board member should recuse themselves from discussion or voting on the particular contract [or issue], and physically remove themselves from the boardroom at that time."

The Airbnb Quandary

According to an April 2018 DMR research report, with 660,000 listings in the U.S., and 43,000 in New York City alone, Airbnb hosts and users show no signs of slowing down, despite the legal battles that have erupted over the burgeoning homesharing trend. For many HOAs, unit owners are growing frustrated with residential neighborhoods that are turning into a hotel culture.

Earlier this year, Boston Mayor Marty Walsh called on the City Council to redefine short-term rental guidelines as way to better define how sites like Airbnb and HomeAway hosts conduct business. The legislation is pending.

Dawn Bauman, Community Associations Institute (CAI)'s Senior Vice President of Government & Public Affairs, explains that related Airbnb issues are impacting condos, co-ops, and HOAs nationwide. CAI, she says, tracks more than 1,000 wide-ranging HOA-related bills each year. There has been an uptick in short-term rental issues in countless towns and cities, she says. "We are seeing a lot of short-term rental [legislation] on the local and city level. These municipalities are losing tax revenue from the hotels, and the hotels owners are annoyed."

On the state level, Bauman says there are more and more legislative items directly aimed at Airbnb and its competitors that seek to prohibit short-term rentals. "There are dozens of cities – including New York City – that prohibit short-term rental, so to bypass that, companies like Airbnb are going to the state legislators to try and persuade them to pass laws that would prohibit local municipalities from enforcing those laws."

In 2017, New York State passed legislation to fine condo and co-op owners who list their units on websites like Airbnb. Enforcing the law, however, is proving difficult, notes Bauman. "There is

compliance in place, but if you go on Airbnb right now, you will see that there are tons of condos in New York City listed," she says. "So, enforcement is not yet working."

Goldstein adds that Airbnb has been "the target of much criticism" in recent years, insofar as many hosts do not abide by city and state laws concerning zoning, advertising and upgrades.

"When it comes to cooperatives, there are often bylaws pertaining to subletting that Airbnb hosts ignore – to the fury of their fellow co-op owners in neighboring units," says Goldstein. "Co-ops are, by nature, more selective about who they want in and around their communal property, and while abuses of local and state laws might go undetected, cooperative boards may be more likely to enforce their own bylaws and to penalize violators by fines, and even evictions."

In Finger's estimation, the majority of his condo clients would support restricted Airbnb-related legislation. In many states, including New York, there is a push to have "short-term" rental defined as 30 days or less.

"Most of the co-ops and clients we represent are not investments, but homes," says Finger. "There's a big security issue. There are no interviews or review of who these renters are, and we believe it endangers the residents and their families."

The city of Beacon, New York has placed Airbnb and other short-term rental companies in its sights. A proposed bill was introduced in April 2018 to curtail so-called "transient neighborhoods." The proposed bill would apply to a rental of 30 consecutive days or less, but wouldn't apply to hotels, motels and bed and breakfasts. Airbnb hosts, of which there are 110 in Beacon, would also be capped at a 100-day rental cycle per year.

According to the city of Beacon Local Law Section 223-26.4: "While the City Council recognizes the benefits of short-term rentals allowing homeowners to supplement their income to defray the cost of housing, and to provide lodging for visitors to the City, the City Council finds that the use of a part of or the entire dwelling unit for short-term rentals is inconsistent with the use of the dwelling unit for single family purposes."

The proposed legislation further states: "In order to protect the health, safety and welfare of the City and its residents, it is necessary to restrict the rental of homes for terms shorter than 30 consecutive

days, a practice which is growing in popularity with the advent of internet and social media-based programs that connect property owners and persons seeking short-term rentals.”

Massachusetts Condo Owners Win in Court

According to Bauman, in early 2018, a new ruling came down from the Massachusetts Supreme Judicial Court (*Trustees of the Cambridge Point Condominium Trust vs. Cambridge Point, LLC*, the community’s developer) stating that condominium developers cannot restrict owners from filing construction defect lawsuits.

“Condominium developers cannot unreasonably restrict the ability of homeowners to file suits against them,” notes Bauman. At the crux of the argument was developers’ use of the “poison pill” defense, which protects them from liability for construction defects, design flaws, and other claims condominium owners might pursue against the developers of their communities.

“The court’s ruling protects the more than two million Massachusetts residents living in community associations that are private entities,” says Bauman.

Bauman further explains that the CAI released a survey report in 2017 indicating that nearly 50 percent of construction deficiencies became evident after the statute of limitations had expired, and more than 44 percent of construction defect cases were settled out of court.

“CAI and its international members applaud Edmund A. Allcock, a partner in [law firm] Marcus, Errico, Emmer, & Brooks, P.C., who represented the trustees of Cambridge Point Condominium, the plaintiffs in this suit,” says Bauman. “Homes in Massachusetts community associations are generally valued at least five to six percent more than other homes. It is consequential that the court acknowledged homeowners’ rights to protect their property and seek retribution from developers involving a construction deficiency.”

Keeping Informed

Part of serving on one’s board, or working for boards as a management professional, includes staying abreast of both legislation and litigation that could impact one’s community, either in the short term or the longer term. Doing so can help make you a more informed critical leader, and ensure that you and your constituents aren’t blindsided by any nasty legal surprises.

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