

Changes to Limited Liability Law Regarding Publication

Effective June 1, 2006, the Limited Liability Law ("LLC") §206 changes the procedures for publishing and forming a limited liability company. Most significantly for parties seeking to create an LLC, including those creating an LLC for real estate purposes, are the changes in the publication requirements upon formation of a new LLC.

The revised law provides that within 120 days after the effectiveness of the initial articles of organization of the LLC, notice of the formation of the LLC must be published once a week, for four successive weeks, in two newspapers of the county in which the office of the LLC is intended to be located. One newspaper must be printed weekly and one newspaper must be printed daily, as designated by the county clerk.

This is a departure from the previous law which required publication for six successive weeks. In addition, the statute says that if no proof of publication is filed within 120 days after the entity is formed, then its authority to do business in New York shall be suspended effective as of the expiration of the 120 day period.

Another departure from the previous law involves the content of the notice. LLC §206 (5-a) states in part that the notice must include the names of the ten persons (or less) who are actively engaged in the business and affairs of the LLC and who have the most valuable interests in the company. Further-

more, according to LLC §206(5-b) the following statement must be included in the notice: "The inclusion of the name of a person in this notice does not necessarily indicate that such person is personally liable for the debts, obligations or liabilities of the limited liability company and such person's liability, if any, under applicable law is neither increased nor decreased by reason of this notice." This statement was not required under the old law.

We will have to wait to see how, in practice, these modifications are employed in the real estate marketplace. Stay tuned. If you would like to review the full text of the new statute, it can be found at <http://assembly.state.ny.us/leg/>. Click on the link to New York State Laws.

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Co-op / Condo Corner



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Cooperative Shareholders Who Are Subject To Alternative Minimum Tax Cannot Deduct Proportionate Amount Of Building's Real Estate Taxes

In *Ostrow v. IRS*, the United States Court of Appeals for the Second Circuit unanimously affirmed the lower court's holding that the federal income tax deduction for a cooperative's real estate taxes that is normally available to cooperative shareholders is not available to shareholders who are subject to the "alternative minimum tax" under sections 55-59 of the Internal Revenue Code. In a case of apparent first impression, the Court examined the interplay among several

sections of the Internal Revenue Code, and ruled that the plain meaning of one provision specifically stated that real estate taxes that are otherwise deductible for income tax purposes cannot be deducted in calculating the shareholder's tax liability under the "AMT."

(COMMENT—Many cooperative shareholders may be subject to the AMT. They should take note of this decision, and should consult their tax advisors about its impact on their tax liability.)

Cooperative Board Fails To Rebut Showing Of Apparent Discrimination Based On Disability

In *Hirschmann v. Hassapoyannes*, the Court held that a cooperative apparently discriminated against a purchaser of an apartment under bizarre facts. The Board had interviewed and approved the purchaser. At the closing, the purchaser asked the cooperative's managing agent if he would be able to install a washer/dryer in his apartment, which he apparently

needed due to the aftereffects of cancer surgery. Upon instructions from the Board, the managing agent "adjourned" the closing and, at its next meeting, the Board rescinded its approval of the purchaser, ostensibly because the purchaser had allegedly "lied" at the Board interview by failing to disclose his disability and

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his need for a washer/dryer. In the litigation that ensued between the seller and the purchaser over retention of the contract deposit, the purchaser asserted claims alleging that the cooperative had discriminated against him because of his disability. The New York State Division of Human Rights issued a finding of probable cause that the cooperative had discriminated, and the Court agreed. In denying a motion to dismiss such discrimination claims, the Court rejected the Board's arguments that the purchaser had a duty to disclose his disability—and his concomitant need for a washer/dryer—at the Board interview. The Court also rejected the Board's arguments that its fiduciary obligations to share-

holders required the Board to inquire as to the purchaser's disability.

(**COMMENT**—This case points up, yet again, ways in which Board members can create liability for themselves unnecessarily. While the facts here are fairly unique—it is rare that a Board would cancel a closing and subsequently withdraw an approval based merely on a question by a purchaser at the closing—the case illustrates how easily visceral reactions by one or more Board members can create problems for all fellow Board members and the cooperative. Board members and managing agents must always be cognizant of the scope of federal, state and city anti-discrimination laws, and must always act accordingly.)

Co-Op Board Can Force A Shareholder To Remove An Unauthorized Washer/Dryer And Garbage Disposal

In *Levin v. 40 Fifth Avenue Corporation*, the Appellate Division held that a cooperative could force a shareholder to remove a washer/dryer and garbage disposal that had been installed years earlier. The Court expressly rejected the shareholder's arguments that the cooperative had waived its objections to the installations because they had been done by the building superintendent, and the co-op had not taken action with regard to them for years.

(**COMMENT**—This case is the latest in a series of cases that uphold a cooperative's rights to regulate and enforce rules governing day-to-day living, including the need for consent to the installation of certain major appliances. While this decision ruled in favor of the cooperative, Boards are well-advised to take action as soon as possible after discovering the unauthorized installation of a prohibited appliance, so as to avoid any chance of a shareholder's waiver argument succeeding.)

Holdover Tenant Liable for Damages to Incoming Tenant

A case involving an office building is of great importance to cooperatives and condominiums with commercial tenants. In, *Kronish Lieb Weiner & Hellman v. Tahari*, the Court held that a tenant holding over after the expiration of its lease is liable to the incoming tenant for damages suffered by the incoming tenant by not being able to use the space.

(**COMMENT**—Such holdovers are not an uncommon tactic, and are often done deliberately by an outgoing commercial tenant to force the landlord to waive rent, pay an

“exit tax”, or pay some other consideration to get the outgoing tenant to vacate faster than the legal process would otherwise succeed in doing. Cooperatives and condominiums have been victimized by this cynical tactic, especially with regard to garages leased to third parties, and have been forced to incur large expenses and pay significant sums to induce a holdover tenant to leave. It is hoped that the potential liability of a holdover tenant created under this decision will give such tenants pause, and will encourage them to adhere to their lease obligations and vacate their premises when their leases expire.)

Loss Of Use Of Terrace Due To Building-Wide Repairs In A Cooperative Does Not Entitle Shareholder To Damages For Breach Of Covenant Of Quiet Enjoyment

In *Jackson v. Westminster House Owners Inc.*, the Appellate Division held that a shareholder who had lost the use of his terrace due to exterior repairs by the cooperative was not “evicted” from the terrace and thus, could not claim that the cooperative had breached its warranty of quiet enjoyment to him. In dismissing the shareholder’s complaint and ruling that the shareholder was not entitled to an award of damages, the Court noted that the cooperative’s proprietary lease granted the cooperative the right to make such repairs, and that the making of such repairs had not deprived the shareholder of the use of his apartment itself. The Court also affirmed the

lower court’s decision that the shareholder was obligated to pay the cooperative’s legal fees in the case.

(**COMMENT**—This decision is a powerful tool for cooperatives needing to use terraces as staging areas to make necessary exterior repairs. As buildings throughout the City age, extensive exterior repairs will be needed more frequently. The ability of a single shareholder to “hold up” such repairs by demanding compensation in the form of a maintenance abatement or other payment, would wreak havoc on all other shareholders. This decision will help prevent that from happening.)