Smith Buss & Jacobs LLP

733 YONKERS AVENUE, SUITE 200, YONKERS, NY 10704 T 914 476 0600

Kenneth Jacobs
Partner
914-476-0600
kjacobs@sbjlaw.com

March 11, 2020

To: Board of Directors
Board of Managers

From: Smith, Buss & Jacobs LLP

Re: Board Options to Deal with Coronavirus Exposure in their Buildings

The coronavirus outbreak has highlighted the tension between the rights of the community and the rights of individuals. For now, governments are relying on their inherent police power to protect the community at large. CDC guidelines currently require that travelers arriving from "High Risk" countries (such as China, Iran and Italy) be separated at the airports and only allowed to proceed to their destinations if asymptomatic. The CDC is "strongly urging" all travelers to "self-monitor" themselves for 14 days for symptoms, which means remaining in their homes during that period. Travelers exhibiting symptoms are instructed to "self-quarantine" themselves in the same manner, and if they fail to comply, have been threatened with arrest by local and state governmental agencies. The CDC website now states, "Isolation for public health purposes may be voluntary or compelled by federal, state, or local public health order."

Condos and Co-ops (in this memo, "Associations"), though, do not have governmental authority. They have to rely on the powers conferred on them in their governing documents to control the behavior of their residents. Generally speaking, the Association has the right to deny access to common facilities by owners on a non-discriminatory basis, but no one has addressed the limits of the Association's power to restrict the actions of an individual owner. Meanwhile, owners are asking the Board what it intends to do to protect them against an outbreak within the building.

Most Co-op Proprietary Leases and Condominium By-laws, or their accompanying House Rules and Regulations, include clauses similar to the following:

> "No Unit shall be used or occupied in such a manner as to interfere with the occupants or owners of adjoining Units, or endanger or unreasonably annoy them. No nuisance shall be committed or permitted to occur in or about the Units or the Common Elements."

> "No Unit Owner shall permit anything to be done within their Units or the Common Elements that will interfere with the rights, comforts or conveniences of the other Unit Owners…No Unit Owner will permit anything to be done within their Unit which would be in violation of any law."
>
> "The Tenant-Shareholder shall not act or permit anything to be done in the Apartment or the Building which is in violation of the law, or is hazardous."

The Association is given the further right to go to court to enforce these provisions in the event of a breach or threatened breach.

Based on the above, how far do these powers go? Can the Association require residents – regardless of whether they show evidence of illness or are asymptomatic -- to remain in their homes? Bar visitors from the building? Bar deliveries? Limit social events? Compel the use of a particular elevator? Close down a pool or playroom? What about a laundry room? The Board needs to consider not just what steps might be effective, but also what steps will withstand a court challenge or (conversely) will protect the Association against potential liability claims by owners who assert that the Board has not done enough.

We cannot answer these questions with assurance. We believe that ultimately a court will need to decide what limits a Board can reasonably impose on individuals' activities within multiple dwellings during a health crisis, in the interest of protecting other residents from exposure.

Initially, we suggest that Boards tailor their actions to be consistent with the recommendations of appropriate medical authorities for the community at large. Thus, for example, Boards might require travelers from "High-Risk" or even "medium risk" jurisdictions to remain in their homes for 14 days, and that persons showing symptoms (and their family members in "close contact", another CDC term) be isolated for the same period. The Board might also seek to bar third-party social events, move-ins or move-outs, alterations, or any other activity that involves significant incursions by non-residents. One of our partners has even suggested that the Association offer to pay to house an owner at risk off-site, similar to what the building might offer if it needed to make a reasonable accommodation to a disabled owner during construction.

How far should this go? Does a Board have the power to bar residents from having parties restricted to neighbors, or to bar <u>all</u> visitors to the building, or to require visitors to demonstrate that they have tested negative within the past 72 hours? Would a negative answer change if local authorities acquire that power?

<u>If a Resident Refuses to Cooperate</u>. If a resident refuses to cooperate with the Board's instructions, we do <u>not</u> recommend "self-help" such as imposing fines. Instead we recommend that the Board report the uncooperative resident to governmental authorities such as the NYC Department of Health or even the CDC. The Board might even call the police and ask them to intervene. We emphasize that none of these agencies currently have the legal authority to <u>require</u> a

resident to comply with a quarantine; however, assuming they respond, they each have a significant intimidation factor should they choose to act.

As a last resort, the Board should consider seeking court intervention, i.e., an injunction barring the prohibited behavior, combined with a Temporary Restraining Order ("TRO") granting immediate interim relief due to the immediacy of the claimed threat to the other residents. In this way the Board is protected by a court determination as to whether its proposed restrictions are reasonable under the circumstances, rather than being accused of being too draconian or too lax.

Whatever a Board decides, it should implement its decision by a formal vote rather than informal discussion among members or management. This will help both to insulate the Association from liability and to limit risky decisions by individual members or agents.

Attached to this memo is a sample letter that Boards might circulate to owners if they decide to implement restrictions on activities within the building. We emphasize that these are not recommendations for Board action, but guidelines for the procedures that Boards should follow if the Board decides to act. We expect that Board policies and notices to owners will need to be updated regularly as the scope and severity of the epidemic changes.

B. Other Coronavirus Issues:

(a) Should the Board notify other owners of Illness? Does the Board have an obligation to notify other owners if a resident is self-monitoring or self-quarantining? Would such a notice be general or actually identify the Unit? (Are we equating a sick owner with a Level 3 sex offender?)

The CDC advises that when possible, the Association should notify other owners of a known health risk in the building, but should not disclose any personal or medical information about any individual resident. Of course, this still sets an unclear boundary. Should the Board identify the unit or the floor, or simply disclose that a resident is ill and that the Board will notify owners when the resident has recovered? And would that obligation change if the residents passed a house rule requiring the Board to provide specific information (see (d) below)?

Initially, a Board should ask a sick or quarantined individual whether they consent to disclosure of the information. If they consent in writing, the Board may make the appropriate disclosures. However, if they do not consent or fail to respond, the Board may still have a duty of disclosure but should not reveal any personal information. Most practitioners are advising Boards simply to alert owners that someone in the building is infected, without identifying the floor or the unit, in order to avoid potential liability for violations of the Fair Housing Act or to minimize the risk of an error.

We agree, but for a different reason. At some point we expect that many buildings in New York City will have multiple cases of coronavirus. Some of these cases will be known and others may not. Therefore residents should assume that someone on their floor may be ill and act accordingly. For the Board to try to identify the location of multiple cases will not provide additional protection to owners.

We also expect that the Board will be inundated by other residents with demands for further information. Boards should respond that a resident should assume that it affects their floor.

The Board should also inform the CDC and their local health authorities. The CDC has the power to make additional disclosures, trace contacts, quarantine individuals, and take other actions that it deems medically necessary.

If a staff member gets sick, the Association can bar the staff member from entering the building until a medical provider has confirmed that they are no longer ill. We believe the Board has the power under those circumstances to identify the ill staff member in case they have come into "close contact" with owners in the past few days, e.g., if they have made repairs within a Unit. But in that case, the Board also should notify all owners when the employee has recovered.

(b) Can a Board affirmatively inquire about health status? The Fair Housing Act and the Americans with Disabilities Act largely prohibit landlords and employers from inquiring about the medical condition of tenants or employees. Staff and management should avoid asking questions such as, "Have you been diagnosed with Coronavirus?" Interestingly, guidance from the EEOC (Equal Employment Opportunities Commission) states that employers may test the temperatures of their employees without violating the ADA when state or local authorities have declared that a pandemic has been declared within the community.

Again, most practitioners are advising Boards that they "should not" ask about a resident's health status, since that could be perceived as a discriminatory act. The Board should consider whether a third-party agency, such as the local Health Department or even the police, would have greater latitude if the concern is obvious.

(c) When does concern about health bleed into discrimination? NYC Department of Health further suggests that if someone is denied the chance to work after having completed their "quarantine," they should complain to the Human Rights Commission. Staff should not target persons simply because they come from High-Risk jurisdictions. See also above.

(d) Should the House Rules be amended to give Boards greater power in these situations? Can the Board amend the House Rules to address specific issues in connection with Covid-19, such as implementing the restrictions discussed in this memo? We do not believe that an illegal regulation imposed by the Board would survive a court challenge. However, would such a regulation be enforceable if it is passed by a vote of the owners? In other circumstances, courts have upheld what would appear to be radical restrictions (such as prohibitions on sales of units to non-residents) on the grounds that condominium by-laws and proprietary leases are "contracts" among the owners, and thus modifications should be honored.

(e) Should the Board switch to teleconferences in lieu of face to face meetings? Some managing agents are already declining to attend in-person Board meetings. Most Co-op and Condo By-laws allow participation in meetings via conference call or even Skype, so long as the participant can hear what others are saying and participate in some manner.

(f) Should the Board prepare for "virtual" meetings of owners? New York State recently amended its laws to allow for "virtual" attendance and electronic voting at meeting of co-op shareholders. (Oddly, the same amendment was not extended to condominium associations, but we expect that was simply a typical legislative oversight.) Boards may be forced to consider implementing these options sooner than they expected.

(g) How to handle deliveries? Should the Board allow packages to be delivered directly to the door, or should owners be required to come downstairs? Should staff perform that service? What if the owner has been exposed?

(h) How do we protect staff? Should staff be allowed to perform repairs within apartments? What is the duty of staff to inform the Board if they believe someone in the apartment may be sick? Guidelines should be established for employees as well as owners.

(i) How do we deal with staff shortages? Buildings may need to prepare for staff shortages due to quarantines or illness. Past preparations for service strikes may provide a useful template.

(j) Should we close amenity rooms? How about laundry and mail rooms? Most buildings are closing their common amenity spaces such as playrooms, pools and gyms. As of now, most buildings are keeping their mailrooms and laundry rooms open, but wiping them down frequently. The Board would have the authority to close any of these facilities in an emergency.

(k) Could the building be liable for failure to deliver services? Most proprietary leases and condo by-laws contain provisions similar to the following:

> "The [Association] shall not be liable for any failure or insufficiency of any…service to be supplied by the Association, or for interference with light, air view, or other interests of the [owner]. No abatement of rent or other compensation…shall be made or allowed because of the making or failure to make or delay in making any repairs, alterations or decorations to the Building…or for interruption or curtailment of any service agreed to be furnished by the Association, due to…difficulty or delay in security supplies or labor or other cause beyond the Association's control, unless due to the Association's negligence."

Given that the governor has declared a state of emergency, the Association should be immune from claims due to a failure to deliver services on a timely basis during the epidemic. However, Associations should be cautious about using this as a blanket excuse.

It is possible that a rental tenant might claim a breach of its lease or the warranty of habitability, or seek a diminution of services due to closure of common facilities or confinement to a particular apartment. This is not necessarily a Condo or Co-op issue, but could affect cash flow from

owners who rent. Also, some buildings have prohibitions against Board action that adversely affects Sponsors who hold unsold apartments.

(l) Insurance. Boards should check their insurance policies to determine whether losses suffered as a result of the epidemic (whether to the Association or to a third party relying on the Association) might be covered by its insurance.

The boundary line between invasion of privacy and protection of the community is bound to be strained until we know more about the risks of Covid-19 and ways to combat it. Boards will face pressure from all sides in the meantime. We will keep all buildings updated as to changes in public policy that may affect cooperatives and condominium impacted by the epidemic. Please feel free to contact our offices if you would like any further guidance.

Smith, Buss & Jacobs LLP