

WEBINAR

Getting it Right - Reopening Your Building Safely and Sensibly

Sponsored by Smith Buss & Jacobs LLP

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Speakers:



Kenneth R. Jacobs

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Kenneth R. Jacobs oversees the real estate and co-op/condo practice at Smith Buss & Jacobs LLP. In addition to his extensive cooperative and condominium practice, he has over 30 years of experience in commercial leasing, mortgage financing, offering plans, and transactional real estate. As a result, Ken has a solid understanding of the interests of all parties in condominium operations, including how to establish and maintain a stable, confident community association.



Domenick J. Tammaro

Partner, Smith Buss & Jacobs LLP

Domenick J. Tammaro is a co-op/condo partner at Smith Buss & Jacobs LLP. He works extensively with boards to develop progressive building policies and streamline operations. Boards find his communication skills particularly effective with shareholders and unit owners. Domenick has noteworthy experience in negotiating building financing with regional and national lenders for underlying mortgages, having closed commercial and multifamily mortgages totaling in excess of \$350,000,000 over the past 10 years.



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Emanuela Lupu-Ferrante, co-op/condo partner at Smith Buss & Jacobs LLP, provides highly effective general counsel to co-ops and condos throughout New York City and Long Island, bringing valuable expertise to board matters, including litigation, financing, and corporate governance for her clients. She is a strong, astute litigator with experience covering varied commercial and residential issues, including construction, corporate, sponsor, and shareholder disputes.

As New York reopens, the pressure grows on co-op and condo boards and managing agents to resume alterations, moves and showings, to reopen common facilities, and to grant broader access to visitors and service providers. This webinar gives professional advice on developing a sound reopening plan, handling the risks that come with increased traffic within the building and closer interaction among residents, and making sure your staffing, insurance, financial and legal policies are in order as services come back on line.

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How do you address residents who are not following the rules?

Some Condos/Coops have the ability to impose fines if someone violates the house rules.

Managing Agent does not get enough credit because they deal with the tenants and owners daily. They are the shield for the Board. They deal with these issues. And Be cautious, and ensure you enforce rules uniformly. There should be routine procedure

1. Letter from management
2. Followed up with letter from attorney

Because these rules are going to be longer termed than people are anticipating. Reports should go to the Managing Agent in writing... and it is up to them to follow the direction of the Board. The residents should not be complaining directly to the Boards.

What training should owners/management provide to staff and residents?

We have created a policy for staff members and work with each building individually. All need to understand the basics with respect to social distancing, use of PPE, mask, gloves etc. Train staff on questions they should be asking of residents and outsiders coming to perform work in the building. The staff is the primary barriers against the outside. They need to understand proper waivers were signed, enforce them, and ask questions before anyone enters an apartment. They need to understand they need to clean supplies and tools at the end of each shift. Store separately for each staff member to the extent that they have their own equipment. It is management's job to ensure they are trained, prepared and ready to go.

Can we relax our prohibitions against non-live-in-personal providers and what are safety measures that can be put in place to control liability?

Yes, you can allow nannies, personal trainers etc. The restrictions should be relaxed while and you need to set guideline for how you wish to carry out that "opening" to the outside. We have created waivers and indemnification that anyone coming into apartments should sign, whether nanny, personal trainer, house cleaners etc. Speaking about gyms could be more complex. There should be restrictions, they should wear PPE, and understand their access is limited to the unity they are accessing. And they should sign documents waiving liability should they get injured on site.

How do you prepare for OSHA audits and how do you prepare for liability?

If you are following the appropriate protocols, you should be ok. OSHA will ask questions like do you require staff to wear appropriate PPE, social distancing and following protocols? If you have done your best and the staff is still getting sick, you will not be liable. They are focusing on whether the employer is doing what they can reasonably to protect staff from infection. Infection can be acquired from many different places. Your primary protection method is setting protocols and rules and enforcing them and ensuring all are trained effectively. While the phases may change, the rules are not...certainly as more people are coming in and out of the building. It is important you have these rules on paper, staff are trained and sign acknowledging they took the training. You are not on the hook for any employee who lies.

Opening Amenities: What should Board do to set policies to reopen common facilities like laundry, rooms, gyms etc. Should there be occupancy limits, schedules, and waivers? How useful are protocols when it comes to limiting liability or do you just put up a sign that says use at your own risk?

No, you must enforce protocol. Provide PPE, sanitizing, have signage that indicates they should use the sanitizer, have receptacles for disposals of PPE, have log in for pools and gyms for tracing purposes. Create barriers (depending on the size and equipment) disconnect machines etc., to enforce social distancing. Move furniture and use signage to remind people not to move furniture or re-plug in equipment. As far as gyms you may want to remove mats, weighted balls, and free weights because they are harder to clean. Have people bring masks and own water, disconnect water cooler. Create zones for people to come in and use for the day. Occupancy limits should be set for pools, gyms, roof decks probably 25-50% capacity. The state has not issued guidelines on pools and gyms yet, so all you can do is apply the governor's orders to these different policies.

For pools – you must establish your own policies. The Governor's policies are the minimum. Am I going to restrict occupancy, who can use, what kind of supervision for children, do I need extra training for lifeguards, are they the enforcers? There are a lot of questions that need to be asked specific for each common facility. Are you allowing domestic workers into community room, swimming coaches etc. Ask these questions? Remove all furniture from pool deck and have tenants bring towels as this reduces the need to clean, reduces risks. Barrier needed for people signing in as you have at concierge desk.

Community Rooms – these are undervalued. These are indoors, the current regulations require use of masks if one cannot practice social distancing. Some buildings have large roof decks and furniture. Rearrange furniture to help guarantee social distancing you can be a little more relaxed with respect to face coverings, but I do not recommend it for liability purposes. If people are sitting 20 feet away, and they are not wearing a mask, you don't want to serve a lawyer's letter but community rooms are different... as they have max occupancy set by the state. Your rules on community rooms will need to be fluid and you will need to be aware of the rules as they change. We have used and recommend waivers.

Hold harmless letters? Documents that release people from liability - Should these be used? Should users release Condo coop from liability before they open the amenities

I would highly recommend any user of common facility sign a waiver. That's the starting point, if you want to use it you must acknowledge the implication of Covid and understand the building can only do so much with respect to cleaning and you will need to waive the cooperative condo and board. This is not unique to Covid. Waivers were in use prior to COVID, but it adds another element to what was already there.

Movers/Contractors seeking to enter the building & Real Estate Transactions. How do we deal with these topics?

Real Estate Showings – lots of boards will prefer to keep brokers out but they will need to be realistic. There will be people who want to sell, rent, or sublet depending on the type of entity. You are going to need to let brokers in. We are against open houses – it is too early. But you will need to set up a process from the brokers. Have them sign a waiver in advance, make sure you are getting the paperwork done from everyone coming in. Probably the broker will want to show people amenities, - have a staff member accompany them limit the time, set, and enforce policies

Movers are easier – they are coming in for limited amount of time. Many buildings have limited hours for moving. There were policies preexisting. Two sets of crews, one that loads the elevator and take sit down and the other that take sit out. Scheduling becomes an issue. You will need to make sure they have waiver signed as well, ask the question re their COVID status (*fever, exposed, travelled etc.*) Keep these on record and make sure you have covered the basis. And get confirmation from moving company they have their own protocols and are following them

Contractors – exterminator, plumber etc. – they are also there in the building for a limited amount of time. We encourage the boards have waivers and indemnifications signed as well acknowledging the rules and guidelines and that they have their own that they are following. Allowing contractors into individual apartments is permissible but it will be up to the boards as to when they want to allow and how they want to prioritize. Set up a policy on how you want to prioritize, whose project was stalled, how long are the projects, how many will you allow at once, how many contractors allowed in the building at once etc. You need to be reasonable and understand the needs of your unit owners

Open Houses – most buildings will be against open house, because of the impossibility of controlling flow of traffic and number of people coming in. I have boards that are all over the place - some allow, some do not. Do they get accompanied and charge a fee to have a staff member available to ensure people are not “wandering about”. Understand there maybe costs associated with allowing open house and of course follow the law.

Many buildings do not have doorman, so the ability to control the policies that are being set will be limited...maybe the resident manager or super spends more time at the front door. But either way make sure you communicate policies with signs so that people cannot say “I didn’t know”.

4th of July – Gatherings for the holiday on roof decks etc. Can boards forbid events in amenities or control them in some way?

Boards can restrict or prohibit if they want use of any common area, but before they enact any prohibition they should communicate with owners/shareholders/residents. Currently the limit is 10 people. If you can space them in groups you might be able to space them out on the roof deck, but boards can say not because of liability.

Elevator Capacity - How can you limit capacity to 50%? Some people in building are refusing to wear masks or wait for next elevator, it is causing altercations. What would your recommendations be?

If the building in the lobby has a sanitizing station and provides masks, it is easier to provide if someone does not have a mask, you want to avoid confrontation. Some residents do not want anyone in the elevator with them. This is a challenge. You can use floor signage to demonstrate adequate social distancing. If elevator has video, and there are repeat offenders, the board can take action and send a letter asking residents to be more considerate. All these rules are helpful if you set them into house rules. Set guidelines and vote them in as house rules to make it easier to enforce.

In a building that permits smoking, but they have had numerous complaints during the lock down about cigarette and marijuana smell during the lock down. So, what can they do? If there is evidence as to the source, can they letter just that unit, without people feeling targeted or harassed?

This could be an entire seminar. As we talk about reopening guidelines...it is not just smoking - people are becoming overly sensitive... as everyone is home - who is cooking smelly food, smoking etc. Coops have prohibition individuals from allowing smells from affecting other residents. If you have no smoking prohibition you have options. In a condo it is considered a nuisance, but there are still regulations that prohibit odors from exiting a unit... but it is private cause of action if coming into someone's unit or hallways.

Temporary house rules enacted relative to COVID- do these need to be ok'd by the building attorney or can they board just draft and post them? Are there any legal requirements?

Most coop proprietary leases empower the board to adopt house rules, there is no requirement that an attorney review them, but it is a good idea that they do to ensure they are enforceable. You cannot impose unreasonable restrictions on disabled people etc. – if you have concerns consult your lawyer. The money you spend on having lawyer review is nothing compared to what you will spend if something goes wrong.

Someone knowingly let someone stay at their unit who has COVID-19. They stayed in unit to quarantine. Can the association charge extra fees that the incurred during the lock down for sanitizing?

Unless you had a rule in place that says they cannot have visitors you cannot do anything. If you do not have a provision in place, that allows charge backs, for expenses, you cannot do it. If they are staying in the apartment, there should not be extra cleaning expenses. Need to know what rules and regulations the building has in place before can give recommendation. But if someone is walking the hallways with COVID 19 and they are ignoring policies and regulations that most buildings have in place, than the building would have the ability to take action to protect the other unit owners and shareholders by barring them from staying in the building or notifying appropriate authorities who may have special police powers

Waivers – do we need different waivers for different common areas, or can you have one to cover everything and how long does it stay in effect or does it need to be renewed?

We could create a one size fits all waiver but might have clauses that do not apply to specific facilities *e.g. gym vs community room*. As far as having to renew them, if you signed a waiver, and you're a unit owner, as a general proposition (*not specific to pandemic*) it stands for as long as you are a unit owner in that building. Once you sign it- it should be good into the future.

Small building with a conscientious building we think we can safely open our gym and unit residents will adhere to the rules, can we open before state says we can?

Gyms are the number one cause of infection. That is why they are waiting to open them and that is why they are in Phase 4. The question is - does the Governor mandate apply to private gyms? Legally they are not supposed to. Many people are petitioning for private gyms to

be reopened. If you decide to do it than you should adhere to strict guidelines, but the Executive Order did not distinguish between public or private gyms - so it applies to both although we do know of many buildings considering opening their gyms early.

Numbers of residents have lost jobs and laid off or hours cut and are struggling. What options do boards have for maintenance fees etc. Is there anything Boards are restricted from doing, or can they offer credit or anything?

If you're going to do this you must do it equally for all unit owners *e.g. you can't waive 3 months for common charges for a single resident or shareholder, you need to do it for all (credits, reductions etc.)*. If you really want to help them, then I suggest gathering the residents who have the financial wherewithal to assist and ask them to assist rather than asking the building to cover the cost. Currently buildings cannot evict tenants. As a policy matter, I would not encourage boards to consider "credits" for unit/shareholders you are operating on a breakeven basis, you have reserves, but you are going to need that money. It is not a matter of foregoing profit. You have to be aware of your building's financial needs. Buildings will need more money to reopen, close and deal with the various twists and turns of the pandemic.

Issue of people working from home. Potentially there can be new renovations and work done in apartments. E.g. new kitchen etc. should one of these take precedence over the other, should job be staggered etc.?

You do need to triage and prioritize alteration projects. Anyone that was in the middle of a job should be given priority to finish before new projects are started. Projects should be staggered to the extent that you can. Depending on the size of the building and how you can create the most possible safe conditions. There are tenants who have to move in but need alterations to be done before they can move in, should that take priority before someone else gets to finish their project, so they have somewhere to live.

Should boards feel obligated to notify residents of all contractors entering the building e.g. Apt. X is renovating a kitchen, do we need to inform the building that this is occurring and how much info should be given?

Before Covid, many preexisting alteration policies required they informed neighbors on their floor that work would be ongoing, so they have a notification of it. It depends on how many projects are going on at once... yes, they should provide that information.

Obligation to protect residents from liability. The board has not mandated face coverings in garden or roof deck. Are they courting legal disaster by not doing it?

State rules require masks when in public places. What is a public place? It is not clear whether it is outside, or if they also had exterior common areas located within the building. The strict legal answer is that it is not 100% clear if you could enforce this as a violation of state policy. It is surprising the board has taken that position. Speak with the managing agent and maybe they will step ahead of the board and make the decision for them. That is a real head scratcher - that the boards are not enforcing common guidelines. Unit owners should not simply accept this, they should force the board to enact these rules. Have a petition signed, petition the board, get management to assist.

Since we are contractually required to notify mortgage holders when someone is 3 months in arrears. What can we do when people are not paying because of job loss?

If the mortgage holder is insured by Fannie Mae, they are barred from foreclosure proceedings. The money gets deferred. There is a standard Fannie Mae form that deals with this. Try calling them, they are human beings too. Your bank may have a favorable policy, do not just assume you are stuck.

When you are not paying your maintenance fees, the coop can notify your bank and does. So, when shareholder gets notice (*and lender*), the banks are still paying the arrears on behalf of the owner and then will seek reimbursement.

Final Statements

Boards adopting policies – do not adopt one you are not willing to or capable of enforcing. If you do not have a doorman building how will you have a sign in sheet? Keep it simple and focus on [solutions, work arounds] and what you can enforce.

Silent heroes – remember them, as you're setting policies, involve your staff members in the decision making process, get their input and have them play a role in what you're setting because they will be the ones enforcing it and remember your managing agent because they're working harder now than they were before and expenses are likely to go up, remember that when it comes time to renew contracts.

Consider some of these temporary policies may become permanent. Staggered hours maybe more effective, you might see the benefit of imposing fines... adopting new policies. May work out to long term benefit and communicate with the owners. People feel reassured when they are apart of the process.