Real Estate

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What **Legalizing Marijuana** In NY Could **Mean** for **Real Estate Attorneys**

BY JENNIFER J. CORCORAN AND MARIO D. COMETTI

A future marijuana-friendly New York state could have attorneys seeing green as cannabis-based businesses seek assistance navigating the complicated process of state laws, including those related to real estate transactions and landlord-tenant laws.

Legal, adult-use marijuana is estimated to generate $3.1 billion statewide and $1.1 billion in New York City annually, according to a recent report released by New York City Comptroller Scott M. Stringer.

Talk of legalizing recreational marijuana in New York has gone from chatter to consideration following Governor Andrew Cuomo's January directive to study potential impacts of a "regulated" marijuana program. New York State Department of Health Commissioner Howard Zucker indicated on June 18 that the department will recommend legalization of marijuana for adult use in the state in its final report.

With recreational marijuana legal in neighboring Massachusetts, Vermont and Maine—as well as six other states and Washington, D.C.—many predict that it is only a matter of time before New York State adopts its own regulated marijuana program for adults over age 21.

Areas of New York law, including public health, tax, finance, general business, penal and criminal procedure were amended as a result of the 2014 Compassionate Care Act (CCA), which legalized medical marijuana. Although potential amendments to the Real Property Law are not included in the proposed MRTA, potential amendments should not be ruled out, specifically as they relate to real estate lease and agreement laws, including Article 7 of New York Real Property Law §220—if and when recreational marijuana becomes legal.

> If and when **recreational marijuana** becomes a reality in New York State, a **real estate attorney** might just become a marijuana entrepreneur's **best friend**.

Federal and State Conflicts

The conflict between federal and state laws creates a complicated situation for landlords and cannabis-based business owners, since marijuana is a Schedule 1 drug, meaning it has no medicinal value, may be abused, and is in the same category as LSD and heroin.

While the federal Controlled Substances Act makes it a crime to rent property on which a controlled substance will be manufactured, stored or distributed, it has not typically been enforced by the federal government. However, the Obama-era policy (the Cole Amendment) of not interfering in states' marijuana laws was rescinded earlier this year. Attorney General Jeff Sessions announced that it was up to federal prosecutors to determine what to do when state and federal drug laws intersect.

A case challenging marijuana's Schedule 1 classification was rejected by a federal district court in the Southern District of New York (*Washington v. Sessions, III*, 17 Civ. 5625 (AKH) (S.D.N.Y. Feb. 26, 2018)), earlier this year, with the judge saying that the Drug Enforcement Administration would be a more suitable forum.

In other developments, the proposed Veteran Research Acts Administration Medicinal Cannabis Research Act, if approved, would allow the VA to conduct research on the efficacy and safety of medicinal cannabis. If enacted, it could put marijuana's classification in question.

Commercial Leases

Because of the challenges and complexities that exist with regard to obtaining rental property or real estate for any cannabis-related purpose, potential marijuana growers and retailers could benefit from hiring a real estate attorney. Additionally, examination of state landlord-tenant laws governing the manner in which lease and rental agreements are drafted has the potential for amendments if recreational marijuana becomes legal in New York.

Cannabis entrepreneurs often cannot obtain the proper licenses to sell without first verifying they signed a lease to rent an appropriately zoned property. Yet, most marijuana businesses are not legally allowed to conduct business using credit cards, or to use bank accounts, and the inability to provide these financial documents to potential landlords makes finding space all the more difficult.

Other roadblocks can include situations in which landlords do not want to lease to marijuana retailers because of existing stigmas about marijuana, concerns about federal law (violation of the Controlled Substance Act can result in asset forfeiture) or security concerns due to the cash-only nature of the cannabis industry (due to marijuana's Schedule 1 status).

As a result of the cash-only nature of the industry, when a landlord deposits more than $10,000 in cash—or money order—the bank is required to submit a suspicious-activity report (a.k.a. SAR) to the federal government, according to Gavel2Gavel, a construction and real estate law blog that has studied the legalization of marijuana and its correlation to the real estate industry.

Other issues facing marijuana business owners include being aware of distance requirements from entities such as schools or parks, as well as zoning laws that limit where cannabis-related businesses can be located.

As for cultivating marijuana, it requires signifi- » Page 12

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Accessing the **Neighbor's Property**: Is Your **Dream** Project Becoming a **Nightmare?**

BY JONATHAN GRIPPO

Imagine you are about to embark on that long-awaited, desired (and needed) construction project. You have been saving and planning for this project for a long time. The design is complete and the contractor is ready to go, and at that moment you are told that the scope of the construction requires you to enter upon your neighbor's property.

In fact, there is no alternative means of performing the construction without accessing your neighbor's property and encumbering it in some way. What are your options? In the normal course of things, you, as the party requiring such access, would seek to obtain permission, or a license, to access your neighbor's property. The terms and conditions governing such access would be contained in a license agreement (more about that below) entered into by you, as the party seeking access (i.e., the licensee), and your neighbor, the party granting such (i.e., the licensor). Clearly, this approach requires a willing and cooperative neighbor. However, what are you to do when such access is refused or an agreement cannot be reached? The answer lies in Section 881 of New York Real Property Actions and Proceedings Law (RPAPL), a somewhat old, but perhaps infrequently used statute that allows a project owner to petition a court for a license to enter upon a neighbor's property. This article will briefly summarize the procedure for obtaining such court-ordered license and identify some practice pointers for potential litigants.


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Terms of the Agreement

Before examining the procedures for obtaining a court-ordered license pursuant to RPAPL §881, it would be remiss if this article did not provide a brief summary concerning certain, but certainly not all, terms that may be included in a license agreement, if one can be agreed to:

1. The Grant of a License—a provision setting forth the scope of the license (i.e., what areas of the neighboring property can be accessed and by whom);

2. Term/Schedule for the Work— provision setting forth the term of the license, upon the expiration of which, all work impacting licensor's property will be removed;

3. Payment of Expert and Legal Fees—licensor will want a lawyer and professionals to assist in the review of licensee's work and the preparation of the license agreement. These costs should be borne by the licensee;

4. Pre-Condition Survey—as the party seeking access, licensee will want to document the conditions of the neighboring property before work commences;

5. Scope of the Protection Work—the scope of the work impacting the licensor property will need to be attached to the license agreement. This way all parties know what is to be performed and what is expected;

6. Insurance—licensee, as well as its contract(s) performing the work, will need to obtain and maintain liability insurance. In addition, licensor should be named as an additional insured under such liability policy. Make sure all proper endorsements are issued securing such additional insured status;

7. Indemnification—licensor will want to make sure the license agreement contains a broad indemnification provision, which will require licensee to indemnify and defend licensor from and against claims arising from the construction project and any work performed at the licensor property;

8. Repair of Property—a provision setting forth licensee's repair obligations should be well documented;

9. Mechanic's Liens—licensor will want to make sure that if any liens are filed against its property, licensee will discharge/satisfy such liens at its own cost;

10. Termination—in the event of a breach of the license agreement by licensee, licensor may want the right to terminate the license agreement earlier than the natural expiration of the term; and

11. License Fee—finally, licensor may seek remuneration from licensee for the use and encumbrance of the licensor property.

Heading to Court

The foregoing section presupposes that the parties can reach an agreement concerning the access and use of licensor's property. This section, on the other hand, summarizes the procedure for obtaining a court-ordered license pursuant to RPAPL §881 when reaching an agreement is impossible, and also identifies certain practice tips in a litigant may want to consider in commencing such RPAPL §881 proceeding.

As noted, RPAPL §881 provides for the mechanism by which a party may apply to » Page 12

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Proposed **Rent** Regulatory **Amendments** Seek to Shift **Balance** of Power **Toward Tenants**

BY JEFFREY TURKEL

Tenant advocates in the New York State Legislature have proposed a series of bills designed to dramatically increase tenant protections and decrease property rights.

These proposals, and others to come, will be debated in Albany next year when the rent laws come up for renewal. This article will discuss three of those proposals, concerning the Urstadt Law, limits on MCI rent increases, and the elimination of high rent vacancy deregulation.

Repeal of the Urstadt Law

The Urstadt Law, originally enacted pursuant to L. 1971, ch 372, gives the New York State Legislature virtually exclusive authority to amend New York City rent regulatory laws, rendering the New York City Council largely powerless. A proposed bill (S.3179/A.5557) seeks to repeal the Urstadt Law.

The relevant history is as follows: In 1969, the City Council bypassed Albany and enacted the Rent Stabilization Law (RSL). Albany responded in 1971 by enacting three statutes that curbed rent regulation: Chapter 371 (vacancy decontrol of rent-controlled apartments), Chapter 372 (the Urstadt Law), and Chapter 373 (denying rent regulatory protection to non-primary residents).

The Urstadt Law was premised on the Legislature's belief that wresting control of rent regulation from the City Council would encourage new construction and limit incursions on Albany's power. The Urstadt Law disenabled New York City from (1) enacting any law that would make regulated apartments subject to "more stringent or restrictive provisions of regulation and control than those presently in effect," and (2) extending regulation to housing accommodations presently exempt from control.

The scope of the Urstadt Law was addressed in *City of N.Y. v New York State Div. of Hous. & Community Renewal*, 97 NY2d 260 (2001). There, the New York State Court of Appeals held that the city's adjustment to the MBR formula under rent control, designed to measure property value with greater accuracy, did not violate the Urstadt Law. In response, the Legislature amended the Urstadt Law pursuant to L. 2003, ch 82, §1. The amendment stripped the City Council of all » Page 12

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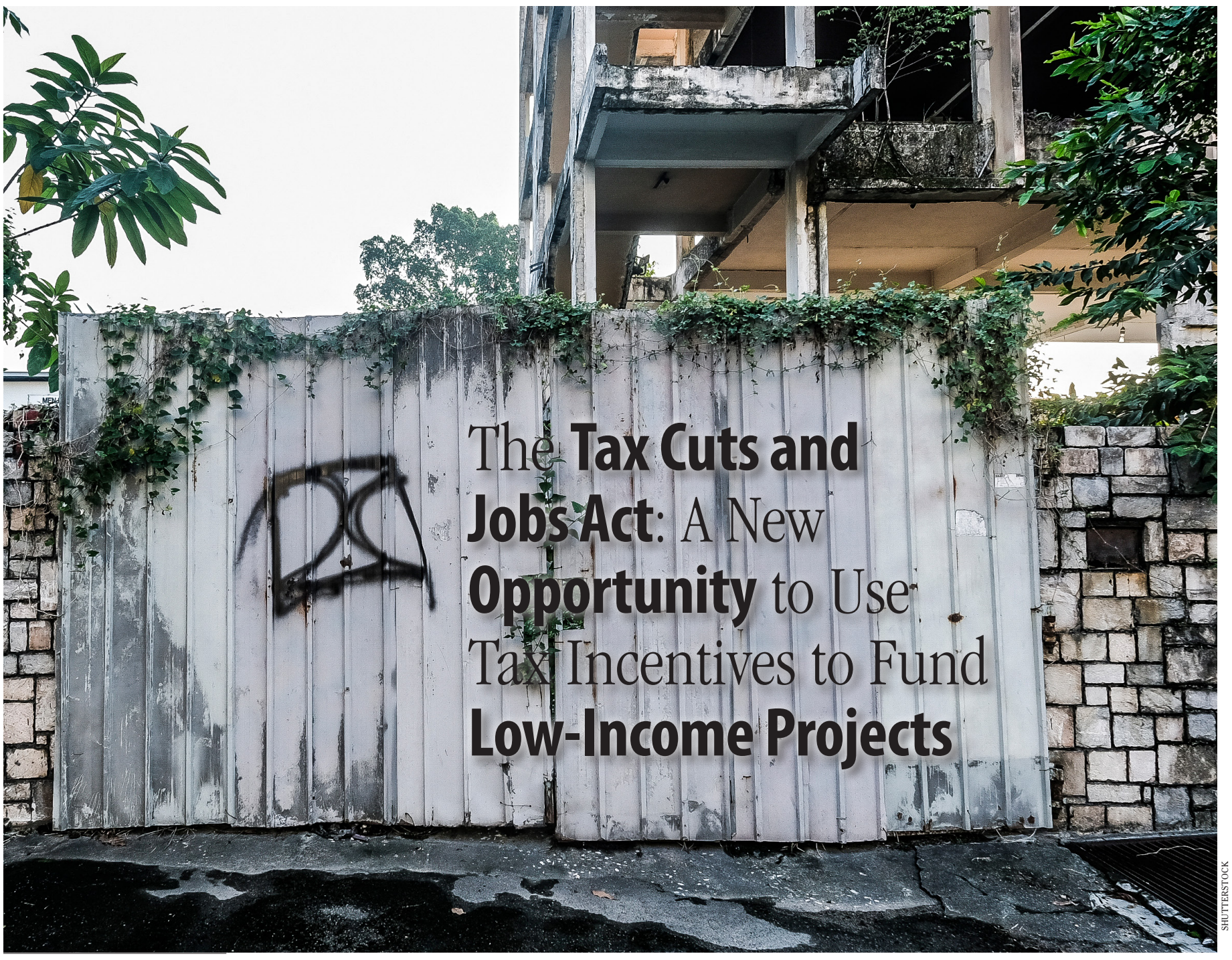

The **Tax Cuts and Jobs Act**: A New **Opportunity** to Use Tax Incentives to Fund **Low-Income Projects**

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BY STUART M. SAFT

The Tax Cuts and Jobs Act of 2017 (TCJA), enacted Dec. 22, 2017 and included in Internal Revenue Code §1400Z, provides tax incentives for an investment in a qualified Opportunity Zone, the goal of which is to facilitate development in targeted low-income, economically distressed communities.

Opportunity Zones provide the investor with a temporary deferral of capital gains income from a prior investment (Prior Investment), which need not have been for a charitable endeavor, if all or part of the capital gain is reinvested in a Qualified Opportunity Fund (Opportunity Fund). This is intended to encourage investments used to start businesses, develop abandoned properties or provide low-income housing in the Opportunity Zone.

The legislation provides investors with an opportunity to receive (a) a potential appreciation in the Opportunity Zone Investment (OZ Investment), (b) a temporary deferral of capital gain recognition from the Prior Investment, (c) a potential step-up in the investor's basis in the Opportunity Fund, and (d) a possible permanent exclusion of capital gain from the Opportunity Fund investment if the holding period is at least 10 years and the investor retains the investment for at least five years. To gain the benefits, an investor with a capital gain has 180 days from the sale or exchange of the Prior Investment to invest all or part of the gain from the Prior Investment in an Opportunity Fund.

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Capital Gain Deferral

The Opportunity Fund must use the investment to acquire Qualified Opportunity Zone Property (Qualified Property), which is an interest in the underlying business or property in an Opportunity Zone. The investor can hold the interest for as long as the investor desires or as agreed to with the Opportunity Fund, but if the investor sells or exchanges the interest in the Opportunity Fund before Dec. 31, 2026, the investor will immediately recognize the deferred capital gain. However, if the investor holds the interest for at least five years, the investor receives a basis allocation that will offset some of the original capital gain, and the basis allocation increases if the holding period is at least seven years. Nevertheless, the investor's capital gain deferral ends on Dec. 31, 2026, and even if the investment is still outstanding at that time, the deferred capital gain must be recognized on the investor's 2026 tax return. In the event the investor holds the interest in the Opportunity Fund for at least 10 years, the investor's basis in the Opportunity Fund increases to the investment's fair market value at that time, so that any appreciation in the value of the investment through 2028 would be excluded from income.

An open question is what happens if the OZ Investment is sold at a loss and the investor must also recognize the capital gain from the Prior Investment. If the OZ Investment was $10 million and is sold for $4 million, the investor would be obligated to pay tax on the $10 million capital gain from the Prior Investment and would not be able to offset it by the $6 million loss from the OZ Investment.

Corporate Organization

Opportunity Funds can be organized as corporations or partnerships that hold at least 90 percent of their assets in Qualified Property; this is determined by the percentage of Qualified Property held in the Opportunity Fund on the last day of the first six-month period of the Opportunity Fund's taxable year and on the last day of the Opportunity Fund's taxable year. If the Opportunity Fund does not meet the 90 percent requirement, it is required to pay a penalty for each month that it fails to qualify. The amount of the penalty is equal to the excess of (a) the amount equal to 90 percent of the aggregate assets and (b) the aggregate amount of Qualified Property held by the Opportunity Fund, multiplied by the underpayment rate established in IRC§6621(A)(2). An Opportunity Fund can self-certify by attaching a form (that will be available this summer) to the taxpayer's federal income tax return for the taxable year.

The foregoing provisions create a potential problem in that the TCJA describes partnerships and corporations but not limited liability companies. Considering all the advantages for LLCs as an ownership vehicle contained in TCJA, could this have been an oversight by Congress, or did the authors of the legislation believe that they did not have to include LLCs because LLC are taxed as partnerships and have the limited liability of corporations? Or are LLCs an inappropriate investment vehicle for Opportunity Zone investments? Accordingly, prior to using an LLC, a fund should consider obtaining a ruling from the Internal Revenue Service (IRS).

> In considering **investments** in **Opportunity Zones**, timing is key because the investment must occur within **180 days** after an investor obtains a capital gain, which does not provide a great deal of time to consider **alternate** investment **strategies**.

Qualified Property

Qualified Property includes: (a) qualified Opportunity Zone stock, which is stock in a domestic corporation acquired by the Opportunity Fund after Dec. 31, 2017, at its original issue, solely in exchange for cash, and the corporation must be a qualified Opportunity Zone business (Qualified Business) for substantially all of the Opportunity Fund's holding period of such stock; (b) a qualified Opportunity Zone partnership interest, which is a domestic partnership interest acquired by the Opportunity Fund after Dec. 31, 2017, solely in exchange for cash, and the partnership must be a Qualified Business during the Opportunity Fund's holding period of such interest; (c) a qualified Opportunity Zone Business Property, which is tangible property used in a trade or business of an Opportunity Fund that was acquired after Dec. 31, 2017, and the original use of such property in the Opportunity Zone commences with the Opportunity Fund or the Opportunity Fund substantially improves the property, and the use of such property was in an Opportunity Zone during substantially all of the Opportunity Fund's holding period for the property. Qualified Property would be treated as substantially improved by an Opportunity Fund only if during the 30-month period beginning after the date of acquisition, the additions to the basis of such property in the hands of the Opportunity Fund exceed the adjusted basis of such property at the beginning of the 30-month period.

Qualified Business

A Qualified Business is a trade of business in which substantially all of the tangible property owned and leased by the taxpayer is Qualified Property, which is tangible property used in the trade or business of the Qualified Business. Moreover, at least 50 percent of the Qualified Business's gross income must be derived from the active conduct of such business and the average of the aggregate unadjusted bases of the Qualified Property attributable to "nonqualified financial property" is less than five percent. A Qualified Business cannot be engaged in private or commercial golf course, country club, massage parlor, hot tub facility, suntan facility, racetrack or other facility used for gambling, or any store the principal business of which is the sale of alcoholic beverages for consumption off premises. In the event tangible property ceases to be Qualified Property, it will continue to be treated as Qualified Property for the earlier of: (i) five years after the date it ceases to be qualified, or (ii) the date on which it is no longer held by the Qualified Business.

Census Tracts

Opportunity zones are census tracts that are low-income communities, designated as such by the governor or CEO of each state, Washington, D.C. or U.S. possession, who were required to provide particular consideration to areas that: (1) are currently the focus of mutually reinforcing state, local, or private economic development initiatives to attract investment and foster startup activity; (2) have demonstrated success in geographically targeted development programs; and (3) have recently experienced significant layoffs due to business closures or relocations. The Treasury Department has 30 days after receipt of a nomination to determine whether the census tracts would qualify as an Opportunity Zone. The number of Opportunity Zones may not exceed 25 percent of the number of low-income communities in the state. For example, New York Governor Andrew Cuomo has recommended 514 census tracts for designation as Opportunity Zones. In addition, governors also may designate "population census tracts" that are not low-income community census tracts if (a) the tracts are contiguous with Opportunity Zones, (b) the median family income does not exceed 125 percent of the contiguous tract and c) no more than five percent of the designated Opportunity Zones are population census tracts.

There is a similarity between Opportunity Zones and the New Markets Tax Credit (NMTC), which is a tax credit equal to 39 percent of the investment taken over a seven-year period, rather than a temporary deferral of inclusion in income of capital gains and the resulting deferral of tax on the capital gain. However, the Treasury Department's authority for the NMTCs has to be periodically reauthorized by Congress, which is not the case with Opportunity Zones.

In considering investments in Opportunity Zones, timing is key because the investment must occur within 180 days after an investor obtains a capital gain, which does not provide a great deal of time to consider alternate investment strategies. Moreover, since the tax benefits increase based on the time the investment is held, there is an incentive to liquidate capital gains currently and invest in an Opportunity Fund.

Giving **Co-op** and **Condo Boards** the Right To **Grandfather** Existing **Privileges**

BY BRUCE A. CHOLST, KAROL S. ROBINSON AND ALEXANDER LITT

Cooperative and condominium boards frequently wish to modify longstanding governance policies to accommodate shifting needs, trends, and demographics within their communities.

However, they are confronted with the dilemma of how to deal with longstanding residents who have been granted allowances in accordance with existing board policies (e.g., permission to harbor pets, sublet their apartments, maintain washing and drying machines within their apartments, or even install hot tubs) and have adjusted their life styles in reliance upon these licenses such that their *modus vivendi* would be uprooted by an abrupt change in regimen.

One popular solution to this dilemma has been to "grandfather" existing accommodations so that those who have received licenses are permitted to retain their privileges until they naturally expire (i.e. their pet passes, their sublet term comes to an end, or their appliance cannot be repaired), while the new policy applies immediately to those who have not been granted prior approval.

However straightforward this solution may seem, it would likely be in violation of Business Corporation Law (BCL) Section 501(c), which mandates that "each share (of corporate stock) shall be equal to every other share of the same class." Inasmuch as there is typically only one class of stock in a residential cooperative apartment corporation, this provision has been consistently construed to mean that no tenant-shareholder may receive preferential treatment relative to other tenant-shareholders in the administration of corporate policy. A two-tiered policy which permits accommodation through "grandfathering" to some shareholders, but not to others, is clearly preferential in nature. This article suggests a solution to the dilemma, which would permit the expedient of "grandfathering" to facilitate desirable governance changes within residential communities, while still preserving the fundamental BCL mandate of parity among corporate stockholders of the same class. The solution described here should apply to both cooperatives and condominium associations even though the BCL does not apply to condominium associations, because courts routinely apply concepts embodied in the BCL to condominiums by analogy.

Shareholder Equality

Courts have treated the principle of shareholder equality as embodied in BCL Section 501 (c) as being virtually sacrosanct. The seminal case construing this statute insofar as it applies to cooperatives is *Fe Bland v. Two Trees Management,* 66 N.Y.2d 556, 498 N.Y.S.2d 336 (1985). Here the Court of Appeals reviewed the validity of transfer fees (popularly known as "flip taxes") enacted by two different cooperatives. One of the co-ops in the *Fe Bland* case enacted a transfer fee which required the seller to pay between $50 and $200 per share depending upon whether he was an original purchaser from the sponsor or an outsider and whether he had been an owner for five years or more or a more recent purchaser. This fee, on its face, treated shareholders of the same class differently. In the other instance, the transfer fee payable by the seller was fixed at 2 percent of the gross sales price. This fee was therefore disparate among shareholders as applied because each seller receives a different price for his stock and thus is forced to pay different transfer fees. The Court of Appeals struck both transfer fees with the pronouncement that "equality is required between shares of the same class." 66 N.Y.2d at 567.

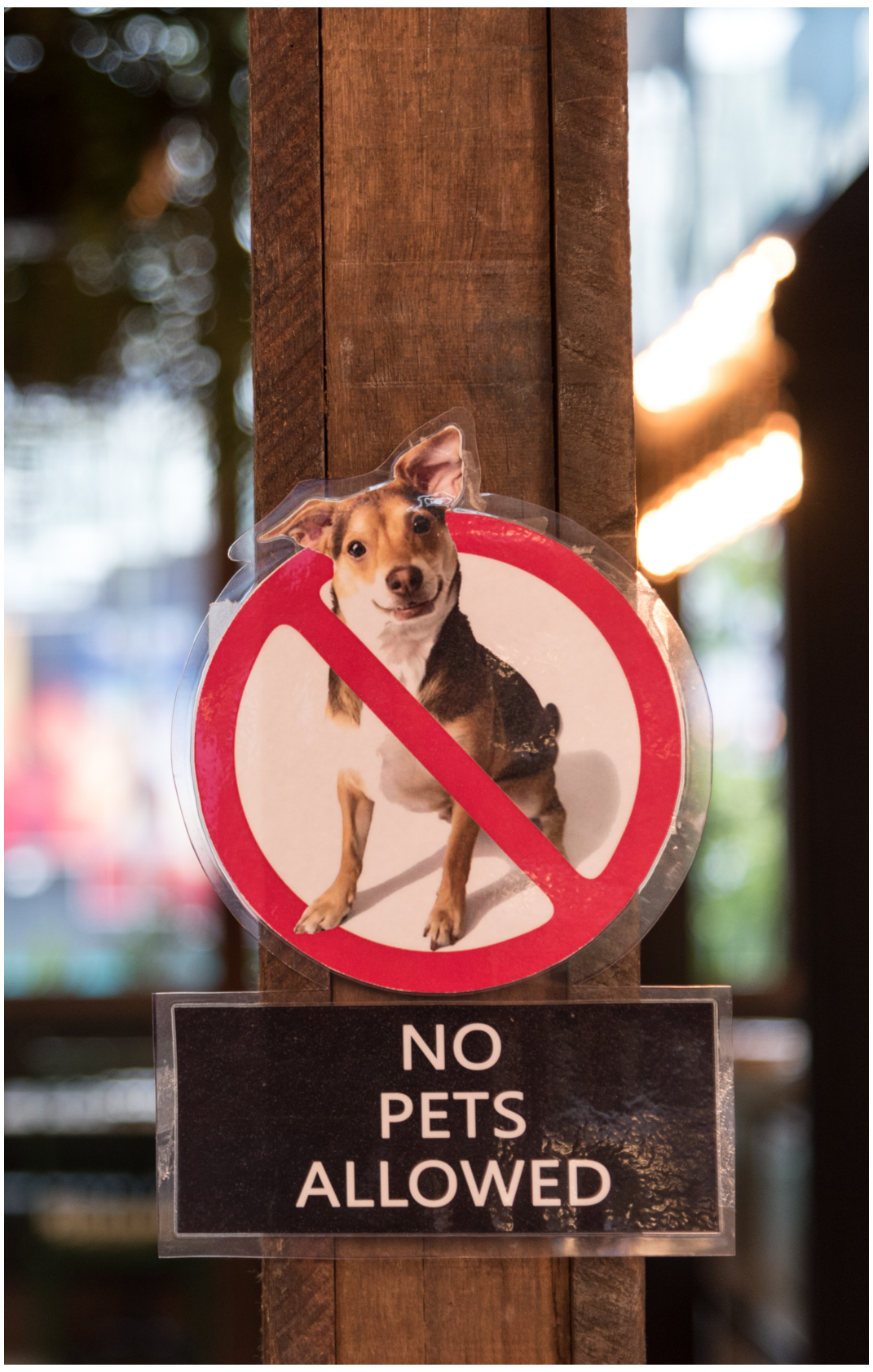
> The **grandfathering** principle can **easily** be equitably and transparently **applied** and so should be codified into law.

In response to a vigorous lobbying effort by the Co-op Bar, BCL Section 501 (c) was amended to create an exception to the equality mandate for validly enacted co-op transfer fees. This is the sole exception to the rule of parity among shareholders of the same class. See BCL Section 501 (c) (3).

The Reach of BCL 501(c)

The First Department has applied BCL Section 501(c) to strike provisions contained in cooperatives' governing documents which confer preferential rights on original purchasers from the sponsor as opposed to subsequent purchasers with respect to subletting, moving in/out, and closing fees and procedures. *See Wapnick v. Seven Park Ave. Corp.*, 240 A.D.2d 245, 658 N.Y.S.2d 604 (1st Dept. 1997); *Spiegel v. 1065 Park Ave. Corp.,* 305 A.D.2d 204, 759 N.Y.S.2d 461 (1st Dept. 2003). *See also Krakauer v. Stuyvesant Owners*, 301 A.D.2d 450, 753 N.Y.S.2d 367 (1st Dept. 2003*); Lenox Hill Hosp. v. 305/72 Owners,* 90 A.D.3d 470, 933 N.Y.S.2d 866 (1st Dept. 2011).

In *Bregman v. 111 Tenants Corp.*, 97 A.D. 3d 75, 943 N.Y.S. 2d 100 (1st Dept. 2012), the First Department extended the reach of BCL Section 501 (c)'s mandate of shareholder parity beyond preferential cooperative governing documents, holding that a discriminatory inducement issued by a conversion sponsor to a subscribing purchaser, which granted her more favorable subletting rights than the standard form proprietary lease conferred on all tenant shareholders, was preferential and therefore void. *Accord*, *DeSoignes v. Cornasesk House Tenants' Corp.*, 21 A.D.3d 715, 800 N.Y.S.2d 679 (1st Dept. 2005); *Jones v. Fordham Hill Owners Corp.*, 225 A.D. 2d 465, 639 N.Y.S.2d 384 (1st » Page 12



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Neighbor

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the court for a license to access a neighboring property.

Section 881 states:

> [w]hen an owner or lessee seeks to make improvements or repairs to real property so situated that such improvements or repairs cannot be made by the owner or lessee without entering the premises of an adjoining owner or his lessee, and permission so to enter has been refused, the owner or lessee seeking to make such improvements or repairs may commence a special proceeding for a license so to enter pursuant to article four of the civil practice law and rules. The petition and affidavits, if any, shall state the facts making such entry necessary and the date or dates on which entry is sought. Such license shall be granted by the court in an appropriate case upon such terms as justice requires. The licensee shall be liable to the adjoining owner or his lessee for actual damages occurring as a result of the entry.

As expressly noted in the statute, a party seeking access to a neighboring property may commence a special proceeding pursuant to Article 4 of New York Civil Practice Law and Rules (CPLR). A special proceeding may be commenced by the filing of a notice of petition and petition or an order to show cause and a petition. A litigant should consider the positives and negatives of either case, however, one potential benefit of commencing by order to show cause is its (generally) quicker return date. Only the owner of a property who seeks to make "improvements" to its property may commence such action, and in order to perform such improvements, a showing must be made that access to the neighboring property is required. Such party must state the facts making such entry necessary, the date on which entry is sought, and a showing that such entry has been refused by the neighbor. And, yes, such a proceeding is constitutional. *Chase Manhattan Bank v. Broadway, Whitney Company*, 24 N.Y.2d 927, 928-29, 301 N.Y.S2d 989, 990 (1969).

The term "improvement" is broadly defined and includes, among other interpretations, constructing a new building on land or performing such work that increases the value or utility of land or enhances its appearance. *North 7-8 Investors v. Newgarden*, 43 Misc.3d 623, 627, 982 N.Y.S.2d 704, 708 (Kings Co. Sup. Ct. 2014).

Taking the express requirements of RPAPL §881 into consideration, in granting a license, courts will apply a standard of reasonableness, conducting a balancing test by weighing the competing interests of the parties. *MK Realty Holding v. Scneider*, 39 Misc.3d 1209(A), 2013 WL 1482745 (Qns. Co. Sup. Ct. 2013) (relying on, *Mindel v. Phoenix Owners*, 210 A.D.2d 167, 620, N.Y.S.2d 359 (1st Dept. 1994)). A court will grant a license when the inconvenience of the licensor, refusing to grant such license, is outweighed by the hardship of licensee, if such license is not granted. *Chase Manhattan Bank*, 59 Misc. 2d at 930. However, it is important to keep in mind that no license issued by a court may permit a licensee to install or perform work on a neighboring property that would be considered, or result in, a permanent encroachment. *Foceri v. Fazio*, 61 Misc.2d 606, 607, 306 N.Y.S.2d 1026, 1017 (Qns. Co. Sup. Ct. 1969). Not surprisingly, property rights in the United States are sacrosanct and a court, at least pursuant to RPAPL Section 881, cannot require one party to accede to a scope of work that will permanently encumber its own property.

> Not surprisingly, **property rights** in the United States are **sacrosanct** and a court, at least pursuant to RPAPL Section 881, **cannot require** one party to accede to a scope of work that will permanently **encumber** its own **property**.

As the statute expressly requires, a licensee must state the facts making entry onto the neighboring property necessary, the date or dates on which entry, and that access to a neighboring property has been refused. This showing must be set forth in affidavit(s). Therefore, it is incumbent on a licensee to submit an affidavit from a construction expert (e.g., an architect, site-safety engineer or contractor) who can attest to the foregoing. In addition, such affidavit should state, among other things, the scope of the work impacting licensor's property, and that no other alternative means are available to licensee to avoid impacting licensor's property. It is also helpful to provide a copy of the drawings or plans setting forth the scope of the work to be performed on licensor's property, and ideally, the plans will have been filed and approved by the applicable governmental authority having jurisdiction over the work.

In addition, and at minimum, a licensee will want to show that it will indemnify licensor, obtain insurance and name licensor as an additional insured under such insurance policy. In fact, it may be worth submitting with the moving papers a draft of a proposed license agreement. This will give the court a guide as it assesses whether, and to what extent, a license should be granted. However, it must be noted, that Section 881 does not require a court to issue a license, only that it provides a licensee to seek one. *Matter of 155 W. 21st St. v. McMullan*, 61 A.D.3d 497 (1st Dept. 2009). Further, any license issued by a court "shall be granted by the court in an appropriate case upon such terms as justice requires." So, it would not be surprising to see that many of the provisions noted above, and potentially others, would be imposed by a court in granting a license.

Since an RPAPL §881 action is governed by Article 4 of the CPLR, discovery is limited. Indeed, CPLR §408 provides that discovery in a special proceeding requires court approval. However, courts have broad discretion in permitting discovery in special proceedings, and a trial may even be warranted if "triable issues are raised." *Greens at Washingtonville v. Town of Blooming Grover*, 98 A.D.3d 1118, 1119, 951 N.Y.S.2d 201 (2d Dept. 2012); CPLR §409.

Is it Over?

Like any litigation, an RPAPL §881 proceeding can be expensive and relatively time consuming, however, in the absence of an agreement with a neighbor, it serves has a valuable option to allow a licensee proceed with its project and start making that dream a reality.

Amendments

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power except the authority to (1) extend or decline to extend rent regulation; and (2) amend rent regulatory statutes to *deregulate* particular classes of housing accommodations.

The First Department addressed the interpretation of the amended Urstadt Law as recently as April 5, 2018 in *Alston v Starrett City*, 161 AD3d 37 (1st Dept. 2018). The court unanimously held that city legislation designed to ban discrimination against tenants based on "lawful source of income," including Section 8 federal housing vouchers, violated the Urstadt Law. The court held that the city statute unlawfully compelled "a landlord to renew a lease for up to five years at a minimum increase tied to other city rent regulatory programs to which the housing unit is not presently subject."

The proposed bill repeals the Urstadt Law in its entirety, thus permitting the City Council to amend the rent laws at will. This is the most far-reaching proposal of the bills under consideration. It may also be the least likely to pass.

Irrespective of its merits, which are not addressed here, the bill is essentially about transferring political power from the Legislature to the City Council. It is not clear why New York State legislators (other than those who are tenant advocates and whose districts are in New York City) would give away such power. When legislators control the levers of power on a particular issue, advocacy groups fighting for influence will shower those legislators with campaign contributions. Those same legislators can seek votes and endorsements based on the need to protect tenants, or, conversely, the need to strengthen property rights. If the Urstadt Law disappears, so too would that money and power.

End of Permanent Increases

Section 26-511(c)(6)(b) of the RSL authorizes rent increases where a building owner performs work that qualifies as a major capital improvement (MCI). The increase is amortized over eight years if the building has 35 or fewer units; otherwise the amortization period is nine years. The statute also limits the amount of an MCI rent increase to 6 percent per year, which could lead to an even longer amortization period.

DHCR and its predecessor, the New York City Conciliation and Appeals Board, had always construed the MCI provision as warranting a *permanent* increase in the stabilized rent. Tenant advocates took the opposite position. In *Ansonia Residents Ass'n v New York State Div. of Hous. & Community Renewal*, 75 NY2d 206 (1989), the Court of Appeals held that DHCR's interpretation of the statute was not inconsistent with its language. Turning to the legislative history and public policy, the court wrote:

> As we have recognized, the dual purposes of the Rent Stabilization Law were to protect tenants from eviction as a result of rapidly spiraling rent increases and to encourage future housing construction by allowing landlords reasonable rent increases so that they could profit from the operation of their properties. Thus an interpretation of section 26-511(c) to allow permanent rather than only temporary rent increases for major capital improvements serves the purposes of the Rent Stabilization Law by providing owners with an incentive to make improvements which benefit owners and tenants alike. Under the construction of the statute urged by the tenants, owners would have little incentive to invest in major capital improvements if they can only recover the cost of their investment, and in fact might incur additional expenses in maintaining such an improvement after its initial cost had been recovered. (Internal citation omitted).

> One proposed bill repeals the **Urstadt Law** in its entirety, thus permitting the City Council to amend the rent laws at will. This is the **most far-reaching** proposal of the bills under consideration. It may also be the **least likely to pass**.

The proposed legislation (S.4312) would, among other things (1) make MCI rent increases a separate charge that would not be compounded by annual rent adjustments; and (2) eliminate the charge once the cost of the improvement is fully amortized.

Again, the wisdom of the proposed legislation will not be discussed here. It should be noted, however, that the fundamental economic reality that the Court of Appeals recognized in 1989 still stands: If owners are not economically incentivized to improve their buildings, they will not do so. Instead, they will patch and repair building systems, delaying upgrades for as long as possible. Although the proposal would result in lower rents—the obvious goal of the legislation—it would concomitantly encourage disinvestment and accelerate the physical decline of New York City's aging housing stock, much of which is pre-war.

Another inevitable outcome is that the bill would injure businesses that manufacture and/or install roofs, boilers, elevators, windows, plumbing systems, electrical systems, and other common MCIs. The union and non-union employees of such businesses would also be injured.

Repeal of Luxury Deregulation Based on Vacancy

RSL § 26-504.2, the subject of the Court of Appeals' recent decision in *Altman v. 285 West Fourth LLC*, deregulates "high rent" apartments that become vacant. Over the years, the threshold rent for deregulation has increased from $2,000 to $2,500 to $2,700, as thereafter increased each year by the annual one-year guideline percentage authorized by the Rent Guidelines Board.

Luxury vacancy deregulation was added to the rent laws by the Rent Regulation Reform Act of 1993 (L. 1993, ch 253). The New York State Senate Introducer's Memorandum in Support described the Legislature's intent as follows:

With regard to the high rent vacancy decontrol provisions of this bill, current rent regulation statutes define a 'housing emergency' as a vacancy rate of less than 5%. The vacancy rate for apartments renting at $2,000 or more, however, exceeds 12.5% (2.5 times the statutory standard). Thus, there is clearly no 'housing emergency' for apartments renting for more than $2000.

The proposed legislation (S.3482/A.433) makes no finding as to the vacancy rate of apartments renting above the current ($2,733.75) threshold. If the vacancy rate exceeds 5 percent, it is difficult to understand why rent regulation, rather than the free market, should control. Notably, the Legislature has *not* proposed to eliminate high-income deregulation, whereby tenants earning more than $200,000 per year in apartments at or above the deregulation threshold will lose their right to continued stabilization protection. There are two obvious reasons for this inaction. First, media stories about millionaires and movie stars paying regulated rents do not help the cause of rent regulation. Second, the number of apartments deregulated based on high income, as opposed to vacancy, is quite small.

It remains to be seen which, if any, of these proposals will become law.

Condo Boards

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Dept. 1996). The First Department proclaimed:

> We view the directive of BCL 501 (c) as not limited to unequal treatment in proprietary leases or by-laws. It precludes the proposition…that a shareholder purchasing common shares may, by contract with the Cooperative, obtain special rights that could not be granted in the corporate documents themselves."

97 A.D.3d at 83.

The First Department has further extended the mandate of BCL Section 501 (c) to board conduct, striking *corporate action* which results in disparate treatment to shareholders. Thus, in *Pilipovic v. Laight Coop. Corp.*, allegations by a tenant shareholder that the board's denial of an alteration request resulted in his apartment being the only one in the building to have only one safe mode of egress was deemed to state a cause of action for violation of BCL Section 501 (c). 137 A.D.3d 710, 29 N.Y.S.3d 280 (1st Dept. 2016). *Accord White v. Gilbert*, 2012 N.Y. Misc. LEXIS 3736; 2012 NY Slip Op 32042 (U) (Sup. Ct. N.Y. Cty., 2012). (However, the First Department's holding in *Moltisanti v. East Riv. Hous. Corp.*, 149 A.D.3d 530, 52 N.Y.S.3d 333 (1st Dept. 2017) appears to be contrary.)

Courts have solidly reaffirmed the sanctity of BCL 501(c)'s directive that shareholders of the same class be treated uniformly, even elevating the precept to the level of "public policy." See, *Spiegal v. 1065 Park Ave., supra*, 759 N.Y.S. 2d at 463. Indeed, the only occasions in which courts have refused to apply this doctrine are when the evidence presented in a particular case does not support allegations of disparate treatment (*23 E. 10 LLC v. Albert Apt. Corp.*, 2010 N.Y. Misc. LEXIS 5151, 2010 NY Slip Op. 32970 (U) (Sup. Ct. N.Y. Cty. 2010); *Razzano v. Woodstock Owners Corp.* 2012 N.Y. Misc. LEXIS 4942, 2012 NY Slip Op 32628 (U) (Sup. Ct. N.Y. Cty. 2012)) or when the aggrieved shareholder and the shareholder who is alleged to be receiving preferential treatment are deemed to hold different classes of stock in the subject corporation (*Tiemann Place Realty v. 55 Tiemann Owners Corp*, 141 A.D.3d 56, 33 N.Y.S.3d 174 (1st Dept. 2016)). In *Tiemann* the First Department held that cooperative offering plans which accord "holders of unsold shares" preferential rights and privileges over resident shareholders do not violate BCL Section 501 (c) because such holders "effectively constitute a separate class of shareholders." 33 N.Y.S. 3d at 179.

Legislative Intervention

As noted above, co-op boards are often stymied in their desire to effect governance policy changes to address shifting needs and demographics within their building due to the concern of uprooting the established life styles of those shareholders who have acted in reliance upon and have been benefitting from the existing rule, perhaps for decades. While many boards have in fact resorted to grandfathering in these situations, we believe, in light of the courts' uniform application of BCL Section 501 (c), that this practice will be stricken upon its inevitable challenge.

Absent legislative intervention co-op and condo boards will be impeded in their efforts to operate their communities at optimum efficacy. We believe the time has come for the Legislature to consider an amendment to BCL 501 (c) which would carve out an exception to its applicability in situations where cooperative (and condominium) boards amend their governance policies prospectively, but elect to "grandfather" accommodations made to existing shareholders under the policy then in existence. Such an exception would not be unprecedented, as the Legislature has already enacted a similar carve out for "flip taxes" payable to residential cooperative apartment corporations.

As a matter of equity, all co-op and condo owners would theoretically have access to the grandfathering principle, though some would lack access to a given amenity. While I may be precluded from installing a hot tub like Ms. Colombo's today, I may be able to enjoy my vegetable garden in 2028, when the board precludes those who have not been reaping harvests of heirloom tomatoes and romaine lettuce from breaking new ground. The grandfathering principle can easily be equitably and transparently applied and so should be codified into law.

Marijuana

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cant lighting and heat usage and can lead to high energy bills for landlords or property owners, that should be addressed in some fashion in any lease. Environmental concerns with regard to how the property and surrounding areas are affected could potentially prompt stricter property regulations.

In California, for example, as of January 2018, marijuana industry licensees must comply with environmental regulations or risk losing their license and face civil fines or criminal prosecution, according to the Drug Policy Alliance.

Housing

Questions also arise related to marijuana use in multi-family housing or federally assisted properties. Nationwide, bans on smoking in apartments or condos currently does not violate landlord-tenant or fair housing laws, even where marijuana has been legalized by local ordinance or state statute.

The Department of Housing and Urban Development, for example, bans the use of marijuana in federally assisted properties, including medical marijuana use. Landlords may legally adopt policies to prevent smoking of tobacco in common areas and individual units in New York State.

Looking Forward

It remains to be seen how the use of medical marijuana in non-smokable forms could affect state and federal law. Effective Dec. 27, 2017, allowable medicinal marijuana alternatives in New York include "topicals such as ointments, lotions and patches; solid and semi-solid products, including chewable and effervescent tablets and lozenges; and certain non-smokable forms of ground plant material," according to the New York State Department of Health.

If and when recreational marijuana becomes a reality in New York State, a real estate attorney might just become a marijuana entrepreneur's best friend.