

SMOKING—STILL STEALING THE SHOW

By Richard Klein, Esq., Romer Debbas LLP

Previously I have written two articles for *Mann Report Management* that focused on the issue of smoking—how smoking bans are on the rise in residential buildings in New York City and how to draft and enforce resolutions for a cooperative and/or condominium's operative documents that would effectively ban smoking throughout the building and in individual apartment units.

Now, almost a year after those articles appeared, smoking is still stealing the show thanks to Local Law 147. Signed into effect in August of 2017, Local Law 147 requires owners of all Class A multiple dwellings, including cooperatives and condominiums, to adopt a "smoking policy" no later than August 28, 2018.

But more notable than an owner having to adopt a policy, the law provides for certain disclosure requirements with respect to this policy. Once a smoking policy is adopted, the law requires owners to incorporate the policy into any agreement to rent or lease a unit. This means that tenant-shareholders of a cooperative or unit owners of a condominium must provide notice of the policy to potential purchasers or tenants/subtenants.

First, it is worthwhile to touch on the main aspects of Local Law 147. For starters, what constitutes a smoking policy anyway? Under Local Law 147, a "smoking policy" is simply a written declaration that clearly states where smoking is permitted or prohibited on the premises. In terms of what constitutes the "premises," the policy must address indoor locations such as interior common areas and dwelling units, but also outdoor locations such as common courtyards, balconies, patios, and rooftops.

Further, the law does not require the "smoking" policy to include any specific restrictions on smoking other than what is already prohibited by law. Therefore, an owner can adopt a policy that just reiterates the existing law, which law already prohibits smoking in common areas of any multiple dwellings with three or more units. So the law does not require a building to enact a more restrictive no-smoking policy, it just requires that every owner adopt a policy and that the policy be disclosed to any potential renter and/or owner. Presumably, this will give a potential owner or renter more information to determine whether he/she wants to live in a particular building.

As indicated, once an owner adopts a policy, the policy must be

disclosed in one of two ways. The owner may provide a copy of the policy to all tenants or the owner may post the policy in a prominent location within the building. After the initial disclosure, owners must then disclose the policy to tenants annually by employing either method used for the initial disclosure (providing copies or posting the policy). Since the law also requires owners to maintain copies of the records showing compliance with these notice requirements, mailing might be the preferred method of notice because owners can obtain proof of mailing to satisfy this requirement.



Interestingly, the law goes a step further and will now require that a building's smoking policy be incorporated into any new agreement, whether they be rental agreements or contracts of sale, to put the potential tenant/purchaser on notice of the policy.

Based upon the foregoing, after August 28, 2018, a seller of a cooperative or condominium unit will have to make reference in the Contract of Sale as to the building's smoking policy and, most likely, have to attach it as an exhibit to the contract, much like what is already done with the Lead Paint Disclosure. Obviously, the contract will need to have some clause which puts the purchaser on notice of the policy by reference. By actually having referenced the policy in the agreement, it will allow the purchaser to be on notice of the smoking policy, and more importantly, it eliminates the risk of potentially misstating the policy by the seller.

Clearly, for the near future, this only applies to contracts entered into for cooperative and condominium units in New York City and does not apply yet to Nassau, Suffolk, or Westchester counties.

Finally, while the law does provide for monetary penalties for violations of the law, it remains to be seen whether a potential buyer of a cooperative or condominium unit would be able to cancel the contract to purchase based upon a seller's failure to disclose and/or reference a building's smoking policy, or if the building never adopted a smoking policy. Would such failure constitute a material breach of a contract? The answer will have to wait for a future article.

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