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Co-op and Condominium Voting Agreements: Limitations and Opportunities

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New York Business Corporation Law (BCL) is the primary statute that guides governance for cooperatives in New York. BCL §620 expressly permits two or more shareholders to agree in writing to vote in the manner set forth in the agreement.

A tool used most often in corporate America, voting agreements are utilized by shareholders to secure or maintain control of the board, and/or otherwise effectuate desired corporate actions such as mergers, asset sales, or securing amendments to the corporation's governing documents (e.g. by-laws, certificates of incorporation, etc.).

While these use-cases can certainly apply to cooperative and condominium buildings, there is little discussion as to how and when that may be appropriate and enforceable.

New York Business Corporation Laws

The following provisions of the BCL apply directly to voting agreements:

1. BCL §501(c): One-Share, One-Vote Rule

· Absent contrary provision in the certificate of incorporation, each share is entitled to one vote.

· Limitation: Cannot circumvent the "one share, one vote" standard via agreements that disproportionately empower certain shareholders unless explicitly authorized in governing documents.

Credit: Freedomz/Adobe Stock

· Voting agreements must not violate the statutory presumption of equal voting rights unless the corporation's certificate of incorporation allows for unequal voting classes.

2. BCL §620: Shareholder Voting Agreements

· Shareholders may enter into written agreements regarding how they will vote their shares.

· Agreements can be perpetual or limited in term.

· Note: While permissible, voting agreements cannot bind directors in their fiduciary capacity or circumvent board authority — i.e., they can›t usurp board decision-making under the guise of shareholder voting.

3. BCL §713: Conflicts of Interest

· If a voting agreement is used to entrench interested directors, or is part of a scheme to

approve a conflicted transaction, the underlying transaction can be voidable.

· Requires (i) disclosure of director interest in transactions and (ii) approval by majority vote of disinterested directors or shareholders.

The New York Condominium Act (Real Property Law Article 9-B)

It is important to know that for Condominiums, the New York Condominium Act (Real Property Law Article 9-B) Section 339-v requires the by-laws to specify how votes are conducted and how decisions are made (e.g., quorum, voting thresholds).

The Condominium Act does not expressly address voting agreements among unit owners in the way the BCL does for shareholders. Voting agreements may be permissible among condo unit owners as private contracts, but they are not specifically authorized under the Condominium Act.

Given the foregoing, case law on the subject can provide clarity. Enforceability hinges on contract law principles and must not violate the declaration, by-laws, or public policy.

Further, absent controlling provisions of the Real Property Law ("RPL"), Courts will likely look to the BCL for guidance, as public policy dictates. For example, in *Pomerance v* McGrath, 104 AD3d 440, 442 (1st Dept. 2013), the Appellate Division First Department held that though not expressly provided for in the Real Property Law a condominium "unit owner should be given rights similar to those of a shareholder under Business Corporation Law §624" [pertaining to the right to inspect corporate books and records].

Voting Agreements Must Not Run Afoul with Parity BCL 501(c)

In one recent decision, the First Department considered whether such voting agreements run afoul with the parity requirements set forth in BCL 501(c) (*see Oliver 889 LLC v. 889 Realty Inc.*, 212 AD3d 531 [1st Dept. 2023]). BCL 501(c) requires that "each share shall be equal to every other share of the same class."

In *Oliver 889 LLC*, the First Department was asked to determine whether a voting agreement entered into between a cooperative corporation and a shareholder and proprietary lessee of a commercial retail unit was void under BCL §501(c).

The lower court had invalidated the agreement, finding it inconsistent with the principle of share parity. On appeal, the cooperative emphasized that BCL §501(c) does not prohibit such agreements—and that in fact, BCL §620(a) explicitly authorizes them.

The Appellate Division concluded that while BCL does indeed authorize voting agreements, the subject agreement essentially terminated the commercial shareholders' voting rights since it continued in perpetuity and so was unenforceable.

Given *Oliver 889*, it would seem that so long as the voting agreement is sufficiently limited in scope and duration, a voting agreement between shareholders should be enforceable. As the Appellate Division has previously recognized, "a contract that is clear on its face must be enforced according to the plain meaning of its terms." This principle is particularly strong in commercial contexts. In *Bank of New York Mellon v. WMC Mortg., LLC*, 151 AD3d 72 (1st Dept. 2017), the court affirmed that "commercial contracts negotiated at arm's length by sophisticated, counseled businesspeople" are entitled to enforcement according to their terms—even where the outcome may later seem disadvantageous to one party.

Boards should note that nothing in BCL §501(c)—even when applied to residential cooperatives—prohibits shareholders from entering into voting agreements. Where residential and commercial shareholders differ in voting power, BCL §501(c) allows flexibility: either share-based or unit-based voting structures may be adopted, as long as proper procedures are followed.

Courts Will Uphold Voting Agreements and Even Reform Documents to Reflect Them

In *Oliver 889* the Appellate Division First Department also confirmed that New York courts will uphold severable contract provisions—even if other provisions are deemed unenforceable (*see also Christian v Christian*, 42 NY2d 63 [1997]). The agreement in *Oliver 889* contained a severability clause, allowing its enforceable terms to survive any judicial scrutiny of its more contentious aspects.

Moreover, the possibility of equitable reformation is not theoretical. The court in *Ench v. Breslin*, 241 AD2d 475 (2nd 1997) reformed a corporation's certificate of incorporation to reflect a unanimous voting requirement that had been memorialized in a shareholder agreement. Even though the formalities of certificate amendment had not been observed, the court honored the parties' intent because no third-party rights were impaired.

Boards and managers should understand that the courts are not blind to the practical realities of closely held entities like cooperatives. Where documents reflect a common understanding—especially as part of a bargained-for transaction—courts may reform or enforce them despite technical deficiencies.

Bad Faith Undermines Challenges to Voting Agreements

The appellate brief in *Oliver 889* also highlighted the importance of good faith. The plaintiff in that case had openly admitted its intent to use a technical voting majority to rewrite the proprietary lease and business terms of a negotiated commercial deal. The cooperative argued that this "bad faith" conduct barred the plaintiff from seeking equitable relief to invalidate the voting agreement. As courts have long held, a party with "unclean hands" cannot seek to invalidate a contract it previously relied upon.

For instance, in *Sackman Enterprises Inc. v. Bd. of Managers of Chesterfield Condo.*, 192 AD3d 565 (1st Dept. 2021) the First Department held that a plaintiff's bad faith rendered equitable relief "unavailing". And in *Ross v. Moyer*, 286 AD2d 610 (1st Dept. 2001) a party who had breached fiduciary duties was barred from obtaining equitable remedies altogether.

These doctrines are particularly salient for co-op and condo boards, which often rely on stable governance structures to protect building operations and finances. Voting agreements that preserve those structures should not be lightly undone, especially where one party is attempting to exploit ambiguities for leverage.

Judicial Reluctance To Undermine Commercial Real Estate Transactions

New York courts have consistently emphasized that commercial certainty is a "paramount concern" in real estate transactions. In *Wallace v. 600 Partners Co.,* 86 N.Y.2d 543 (1995), the Court of Appeals stated that contracts—especially those involving real property—should be interpreted to give effect to the parties' intentions, and that the need for stability in real estate is particularly strong.

Thus, where voting agreements are part of share sales, lease negotiations, or building conversions, boards should ensure that the agreements are documented clearly and that the intentions of all parties are evident in the record.

In return, they can expect courts to uphold those agreements—so long as they were entered into voluntarily, disclosed appropriately, and do not violate express statutory prohibitions.

Best Practices

Voting agreements are a powerful tool for ensuring stability in cooperative and condominium governance, particularly in buildings with mixed-use or commercial components. However, to withstand scrutiny and avoid unintended consequences, these agreements must be carefully crafted and implemented. Based on recent case law and statutory guidance, boards and their counsel should consider the following best practices:

Use Written Agreements That Clearly State Intent. Ensure voting agreements are in writing, signed by all parties, and drafted in plain, unambiguous language. Clearly state the purpose of the agreement (e.g., to preserve residential control or to ensure continuity in board governance).

Tie Agreements to Share Transactions or Corporate Events. Courts are more likely to uphold a voting agreement that is part of a bargained-for exchange, such as a share sale or lease grant. Document the agreement contemporaneously with the transaction and cross-reference it in proprietary leases or shareholder ledgers.

Include Severability and Reformation Clauses. Add a severability clause so that even if one provision is invalidated, the rest of the agreement remains enforceable (*see Christian v. Christian*). Consider a clause expressly permitting unit-based voting if share-based voting is deemed unenforceable under BCL §501(c).

Include Fiduciary Carve-Out Clauses. Using a voting agreement to push through a self-dealing or conflicted transaction may trigger scrutiny under BCL §713 or provisions of the By-Laws applicable to interested transactions, which requires disclosure of director interest in transactions and typically a majority vote of disinterested directors or shareholders.

Account for Statutory Compliance. Familiarize counsel with BCL §620(a) (permitting shareholder voting agreements), and confirm that the agreement does not conflict with any express limitations under BCL §501(c**)** or §609. In buildings with commercial units, consider whether BCL §501(c) even applies, as it expressly references "residential premises."

Ensure Disclosure and Board Authorization. If directors or officers have a financial interest in the voting arrangement, comply with BCL §713 by disclosing material facts and seeking board or shareholder approval. Avoid even the appearance of self-dealing to maintain enforceability and avoid later challenges.

Be Prepared to Defend Against Claims of Inequity. Courts will not assist parties acting in bad faith. If a shareholder attempts to void a voting agreement after benefiting from it, equitable doctrines like estoppel and unclean hands may apply (*see Sackman Enterprises* and *Ross v. Moyer*). Maintain a clear paper trail showing the original intent and consistent reliance on the voting arrangement.

Review and Update Governing Documents. Ensure that the certificate of incorporation, by-laws, and proprietary leases do not conflict with or undermine the voting agreement. Where applicable, consider reforming the certificate of incorporation to reflect unit-based or other agreed-upon voting structures—even if all statutory formalities haven't yet been completed (*see Ench v. Breslin*).

For condominiums, board's should review the condominium's by-laws carefully as some contain clauses that restrict proxy arrangements or coordinated voting. It is recommended to use a stand-alone agreement that is narrow in scope, carefully drafted, and does not conflict with governing documents. Remember to be mindful of fiduciary duties if the agreement relates to board election or decision making.

Consult Experienced Counsel. Before entering into or enforcing a voting agreement, boards should consult with attorneys who understand both cooperative law and corporate governance. Voting agreements are not "one-size-fits-all" and must be tailored to each building's structure, history, and shareholder composition.

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