

Real Estate

MB

Section 11

A Condo 'Flip Tax'? Lawyers Say Yes.

By JAY ROMANO

ONE way a co-op can raise money is by imposing what is commonly called a flip tax. It's not really a tax — it's a fee, sometimes totaling tens of thousands of dollars, that must be paid to the co-op when an apartment is sold.

Condominiums usually don't use flip taxes. (There's a reason; keep on reading.) But while a condo is not a co-op, real estate lawyers say it should be possible for condos to impose a more moderate version, in the form of a transfer fee.

Arthur I. Weinstein, a Manhattan lawyer who is vice president of the Council of New York Cooperatives and Condominiums, said that flip taxes provide co-ops a convenient alternative to imposing assessments or borrowing for necessary repairs and improvements. The flip tax can be a

flat fee, a percentage of the seller's profit or a percentage of the sale price. And the amount can be large — in a co-op closing this month, Mr. Weinstein said, the flip tax was more than \$100,000.

But while the State Legislature and the courts have allowed co-op boards to impose flip taxes if the offering plan or proprietary lease allows them, the condo situation is different.

Why? The answer, said Richard Siegler, a Manhattan co-op and condominium lawyer, can be found in a common-law rule that prohibits "unreasonable restraints on alienation."

"Alienation," Mr. Siegler said, is in this situation legal terminology for the sale or transfer of real property.

"The rule against unreasonable restraints invalidates unduly restrictive controls on transfers of real property," he said, noting that since co-ops are technically shares in a corporation rather than real estate, the rule does not apply to them. But since condos are real property, any unreasonable restraint on a sale could run afoul of the rule.

The critical word, though, he said,

is "unreasonable."

"The courts have started to recognize that condos, like co-ops, necessitate a balance between individual rights and protections and communal rights and protections," he said. "And generally, New York courts will uphold restrictions on the sale of property that are deemed to be reasonable."

So, Mr. Siegler said, if a condo establishes a transfer fee that is reasonable and that has been approved by the unit owners, the courts are likely to uphold it. In fact, he said, a number of condo buildings he repre-

sents have already amended their bylaws to impose the fees. (He added, though, that no New York court has as yet ruled on the issue.)

But what might be considered reasonable?

Eric Gonchar, a Manhattan co-op and condo lawyer, said it is unlikely that the type of flip tax im-

posed in some co-ops would be deemed reasonable. "If you're charging a fee of 15 percent of net profit, that's going to amount to a lot of money and probably wouldn't be considered reasonable," he said.

But, Mr. Gonchar said, a more modest fee — perhaps a flat fee of a few thousand dollars, or a fee based on a small percentage of net profit or sale price — would probably pass the reasonableness test.

Devising a transfer fee that would be considered reasonable is relatively easy, though, compared with the other requirement: getting unit owners to go along with the idea.

Mr. Gonchar said that a change in a condo's bylaws requires the approval of at least two-thirds of the unit owners. In some condos, he said, a unanimous vote is required.

But it is possible, he said, that the authorization for a condo to impose a transfer fee is already in its governing documents.

"I don't think you'll ever see a reference to a flip tax in a condominium's offering plan," Mr. Gonchar said. "But there might be a reference to a transfer fee buried there somewhere."



Tom Bloom