The COOPERATOR®
The Co-op & Condo Monthly

Without Rhyme or Reason

In Westchester County, and Elsewhere

By Debra A. Estock

The age-old battle between applicants and co-op and condominium boards can sometimes seem like a cunning chess match in which the prospective buyers are pawns awaiting to be knighted with the stamp of approval before they are allowed to move into their brand new castle. Under current state law, co-op and condo boards are protected under a veneer of legal precedents that allows them to reject buyers without having to provide a written reason for their decision.

But, new legislation proposed in mid-September in Westchester County by County Executive Andrew Spano may change the rules of consent, and make boards within the 45 municipalities in the region accountable for their actions. Spano recently proposed a bill that would force decision-makers to explain the reasons behind their decisions within five business days after a denial is issued. A similar bill, under consideration by the state Assembly in Albany, is also progressing towards passage and would apply statewide.

"Co-op and condominium boards are not allowed under current law to discriminate against buyers based on such things as race, religion, sexual preference and national origin. But in practice, there is little ability to prevent the possibility of such discrimination because the boards are not required to explain their decisions," says Spano. "This legislation will change that."

Under the legislation, which would amend Section 700.05(h) of the Laws of Westchester County, it would be considered an "unlawful discriminatory practice for any real estate board, or any board of directors of any condominium corporation or cooperative apartment corporation, because of the actual or perceived group identity of any individual, who is otherwise qualified for membership, to exclude or expel such individual from ownership of any unit or apartment or from membership on any such board, or to discriminate against such individual in the terms, conditions and privileges of ownership of any unit or apartment or of membership on any such board."

Subsequently, the bill continues that "in the event that any real estate board, or any board of directors of any condominium corporation or cooperative apartment corporation makes a decision to withhold consent to the sale of a unit or apartment, certificates of stock or other evidence of ownership in such corporation, such board or corporation shall issue a written statement, in the form to be established by the Westchester County Human Rights Commission, to the prospective purchaser which outlines the reasons for the withholding of consent."

The written statement explaining the board's decision must be issued not later than five business days following the ruling. And, any failure to comply timely with the requirement puts the board in violation and subjects them to an investigation by the Westchester County Human Rights Commission.

Spano's proposal has been endorsed by ranking members of the Board of Legislators, a group of 17 lawmakers who will study the proposal, hold public hearings on it, and determine if the bill should be adopted. The legislation would take effect 60 days after being signed into law.

Board chairman Lois Bronz, a Democrat from Greenburgh, and Andrea Stewart-Cousins of Yonkers, the Democratic majority whip, offered their support. "If we are serious about fair housing, then this is an issue that has to be addressed. We think this is an approach that can help us overcome this discrimination we know exists," Bronz says.

Stewart-Cousins adds, "This is an important piece of legislation. Not only does it protect would-be buyers, but it also protects would-be sellers who sometimes don't understand why their prospective sale is rejected by their co-op board."

The Westchester County Board of Realtors gives the proposal an enthusiastic thumbs-up. "We do support the concept of having co-op boards issue a statement should they reject a prospective purchaser," says Gilbert Mercurio, executive vice president of the county's realty board. "We don't dispute the ability of a board to make its own decisions, provided that those decisions are not in any way discriminatory."

And, continues Mercurio, "in the absence of any information coming from these boards, it creates the impression - or it could create the impression - that discrimination is at work. There are many realtors, who in their practice suspect that in some buildings and with some boards, that discrimination is, in fact, at work." Although it's hard to speculate, Mercurio doubts that there's any official record of hard evidence to support a pattern of discrimination, if one exists at all.

"We don't think this unduly burdens co-ops at all to say what their reason is, and it will totally clear the air and make it plain that discrimination is not at work."

There is some question as to whether the bill, if enacted, would be enforceable without state intervention. Andrew Neuman, the assistant to the county executive, says the legislation "falls well within the county's police powers" and no enabling legislation from Albany would be required.

Attorney James Veneruso, a partner with the law firm of Griffin, Coogan and Veneruso, in Bronxville, begs to differ, however. He said his law firm is investigating Spano's legislation to see if the requirement would legally hold weight within Westchester County.

Not a Good Idea

Whether in Westchester or New York County, the attempt to legislate or strip the provisions of Business Corporation Law (BCL) as it applies to all co-ops and condos worries some Manhattan attorneys, brokers and managers and cooperative organizations.

The Federation of New York Housing Cooperatives and Condominiums (FNYHC) is strongly opposed to such legislation, says executive director Greg Carlson. This type of legislation has been proposed in Albany over the past decade without success, Carlson says.

According to a spokesman for the state Assembly in Albany, legislation to amend civil rights law with respect to co-ops and condos was actually first proposed in 1986, and in subsequent years thereafter. This year's version, a bill sponsored by state Assemblyman Sam Colman, who represents the 93rd District in Rockland County, is actually one step closer to passage. Colman's bill, A11356, unanimously passed the Assembly June 20th and is currently in committee in the Senate. Colman's bill would require that cooperative housing corporations provide a prospective purchaser with a written statement of reasons when withholding consent to a purchaser. Colman's bill would take effect 90 days after being enacted.

Laws are on the books to protect against discriminatory practices, says Carlson. "As a federation, we are opposed to this legislation because that's not what a cooperative is. A cooperative is a member organization. As long as they do not discriminate, according to race, religion, handicaps, and all what they call preferred classes, including [a person's occupational status]. That's why people buy into a cooperative because that's the type of building that they want to be in, and they want to control their neighbors. They want to see who their neighbors are going to be without, again, being discriminatory. I can't emphasize that enough about not being discriminatory. For the most part, I advise boards to just act on a financial criteria," Carlson says. Boards are sometimes wary, he says, because applicants might, perhaps unintentionally, try to mislead them to gain a favorable decision.

"I think this legislation is obviously well-intentioned," says Attorney Bruce Cholst of the Manhattan law firm of Rosen and Livingston. Every attempt should be made to eliminate discrimination of any kind, but "I think that this particular piece of legislation misses the mark."

FNYHC President Al Pennisi, a senior partner with Pennisi, Daniels and Norelli LLP, also believes the legislation is unnecessary and usurps the power that co-op and condo boards have been granted in choosing prospective shareholders or unit owners. Buyers are currently protected from illegal discrimination under state, city and federal law through a variety of fair housing and human rights statutes, Pennisi explains. Boards are prohibited from discriminating on the basis of race, creed, national origin, gender and - in New York City and Westchester County - marital status and sexual orientation. Additionally, disabled persons are protected under the guidelines of the Fair Housing Act and the Americans with Disabilities Act (ADA). "They have a mechanism and a vehicle to arbitrate any alleged discrimination that's against any cooperative, so the statute is superfluous," Pennisi says. If a complaint is formally made, the human rights board in that locality will handle it or it might lead to litigation down the road, he says.

Even in today's litigious society, rejected applicants trying to sue for discrimination still have their work cut out for them. Co-ops have wide approval/denial power, Pennisi says, referring to the landmark case of Levandusky vs. One Fifth Avenue Apartment Corp. This case set forth precise guidelines for co-ops to follow in order to withstand judicial review in court, based on the following three principles - the board's actions must be in furtherance of the purpose of the co-op; within the scope of its authority; and in good faith.

"This statute, besides the issue of discrimination," says Pennisi, "is seeking to usurp the business judgment rule, which was promulgated by the Court of Appeals in 1990 in Levandusky, where the board has the right in its business judgment to decide whether or not someone should become tenant-shareholders in their cooperative. As long as they're in good faith and they exercise honest judgment and they further the corporate purposes and don't discriminate, then they're within the law. If the court can't second-guess that board, why then should the legislatures second-guess the board?" Pennisi asks.

Attorney Adam Finkelstein of the Manhattan law firm of Wagner, Davis and Gold concurs. "Well, that would basically blow away a number of years of case law saying that business judgment rule doesn't apply. It blows a hole right through the business judgment rule. That would put a big target on a lot of boards if they had to start explaining things. Then their judgment could be called into question."

"It certainly will change the case law drastically," agrees Attorney John LaGumina, a partner and founder with Quinn and LaGumina, LLP, in Purchase. "The courts have uniformly held that you don't have to give a written reason or any reason." LaGumina believes that enacting legislation might be a moot point, however. If discrimination is alleged and a legal case ensues, the reason would be found out in the discovery process and 9 out of 10 times, the reason for denial is always financial. But, "I don't really have a problem with legislation that provides that you have to have a reason," says LaGumina. He adds, though, that the process may get bogged down if the denied purchaser can keep coming back after remedying the reasons that caused the denial in the first place. "It could create a whole new series of litigation."

Denial, Denial

According to Neil Binder, a broker and co-principal with the Bellmarc Companies, a New York City residential brokerage and property management firm, 90 percent of the time the reasons for denial are pretty straightforward, and usually revolve around financial worthiness. Boards, he says, tend to reject purchasers: if the applicant does not meet the minimum cash equity requirement set forth for the building, or if the financial information shows inadequate income to support a purchase; if the applicant has a pet and there is a no-pet rule in the building; if the applicant has been dishonest or deceptive in their application material; or if the applicant presents himself at the interview in an abusive, suspicious, or offensive manner. Binder says he opposes the legislation because it will expose boards to litigation and can undermine a system where often, sensitive information should be kept confidential.

Boards must have the ability to come to a reasonable decision. "They must say to themselves, "˜do I want this person to be my neighbor?'," says Binder. An example, would be a high-profile individual or a celebrity. "I don't want Mick Jagger living in my building. I don't want paparazzi hanging around outside. So, what's the reason? I rejected him because he's Mick Jagger." Another more extreme example would be the person's political or moral leanings, he says. What happens if the person makes a bigoted or racist comment during or after the interview - more than likely, that too, would lead to a denial, says Binder.

Boards must have a fair and equitable process in which all applicants are judged, says Robert Grant of Midboro Management. "It's so easy to justify approval or denial if you have a set of financial criteria to follow. As long as the board applies that standard evenly, even if you're a protected class, you won't win a discrimination case," says Grant.

In issuing a denial, boards have the discretion of determining not only the financial worthiness of an applicant, says Attorney Eric Gonchar of Kane Kessler, P.C., but also their intent. A board can withhold approval if they decide that the purchaser intended to merely invest in the apartment and sublet it. And most applicants do not fight being rejected, says Gonchar. "Many prospective purchasers "˜swallow their pride' after a co-op board denial and move on. Most feel that it is not appealing to sue the people that you may be sharing a home with and most do not pursue the purchase of a co-op once denied."

Cholst says that discrimination may be inherently hard to prove. Case law dating back to the 1950s has allowed boards wide latitude. Unless they openly discriminate, boards pretty much have the right to choose their neighbors, he says. He cites as an example, the case of Sidney Weisner vs. 791 Park Avenue Corporation. In its 1959 decision, the court states, that absent any statutory discrimination, "there is no reason why the owners of the cooperative apartment house could not decide for themselves with whom they wish to share their elevators, their common halls and facilities, their stockholders' meetings, their management problems and responsibilities and their homes."

And, according to Cholst, boards that discriminate "will never admit to their misconduct in writing. They're simply going to invent a pretextual rationale for their decision, such as, "˜we don't feel that the applicant is compatible with our building,' and that is a legal basis for rejecting somebody.

"The only thing that this legislation accomplishes is to encourage deception. It does nothing to address occurrence of any act of discrimination or to identify any of the perpetrators. Even without this legislative intervention, a rejected applicant, if he feels

he's been victimized by discrimination, and he sues, then in the course of defending these allegations, the board will have to justify its decision to the judge and the jury. So it's not as if boards under the current law can hide behind their position and act without fear of accountability," observes Cholst.

Debra A. Estock is Managing Editor of The Cooperator.