

# Appellate Court Reviews Co-op Board's Discretion In Conditioning Review of Application to Purchase

## COUNSEL'S CORNER

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WHITE PLAINS —The issues appurtenant to board approvals or rejections of prospective sales of cooperative units continue to be ripe for litigation.

In *Wirth v. Chambers-Greenwich Tenants Corp.*, 87 A.D.3d 470, 472, 928 N.Y.S.2d 288, 291 (2011) the Appellate Division First Department recently decided a situation in which a prospective shareholder sought to purchase a unit in the cooperative. This case illustrates some of the limitations and possibilities of the business judgment rule when courts seek to apply such discretion in the context of purchases and sales of cooperative units and the conditions for review of an application or approval thereof imposed by a cooperative board.

In the *Wirth v. Chambers-Greenwich Tenants Corp.*, 87 A.D.3d 470, 472, 928 N.Y.S.2d 288, 291 (2011) case a long history of dissension preceded the attempted sale of the unit. It appears that the Court was concerned that the decision by the cooperative may have been improperly influenced by that background so that the cooperative Board imposed conditions beyond its legal authority upon the review of the application.

The cooperative, in determining whether to review the application to purchase the cooperative unit, and in consideration of the status of the apartment, imposed conditions to be met prior to review of the application to purchase the cooperative unit. Those conditions included that the apartment be used for a joint living-work quarters for artists, that such limitation be disclosed to the prospective purchaser, and the resolution of an outstanding dispute as to the renovation of and use of the roof appurtenant to the unit.

The Court in *Wirth v. Chambers-Greenwich Tenants Corp.*, 87 A.D.3d 470, 472, 928 N.Y.S.2d 288, 291 (2011) determined, first and foremost, that the Cooperative's requirement that the unit be used as a joint living-work quarters for artists was outside the scope of its discretion. The foundation for this determination was the language in the proprietary lease, which permitted the use of the apartment for residential purposes without such further limitation. The Court also reviewed the certificate of occupancy for the building and found it to be for residential purposes without such further limitation. The

Court held that, in substance, the board could not make a decision, or impose a condition, not otherwise permitted by the proprietary lease.

Having determined that the board was not authorized to further limit the use of the apartment, the Court held that the question of whether this decision was made in good faith, upon reliance of the architect retained by the board, or otherwise, must be decided at a trial. The concept that the Plaintiff actually stated a cause of action for breach of a fiduciary duty is an interesting side note considering the prior column reviewing such issues by the authors of this article.

### An Important Fact

Importantly, the Court also found that the cooperative did have discretion to condition the review of the application for sale upon resolution of various conditions within the cooperative unit, i.e., the roof renovation issue. The conditions relative to the roof renovation and use, an issue that predated even the proposed sale, could not constitute a breach of fiduciary duty, according to the court. This is an excellent finding for cooperative boards as it

certainly seems well within the realm of reason to require that a unit be in compliance with the lease and all relevant policies prior to review of an application or at least transfer of the cooperative unit.

Also significantly, the Court permitted the reciprocal claim

achieving that determination.

This case represents the risks that cooperatives undertake in the approval, rejection, conditioning the review of applications, or conditioning the approval of applications, to purchase cooperative units. In conditioning approvals—or

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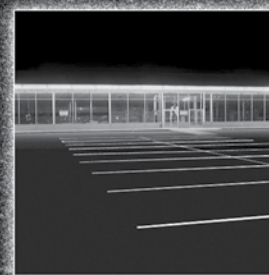
for attorney's fees by the shareholder to proceed. This means that the shareholder prevailed in this case and that the shareholder could obtain an award of the necessary fees. While this award would be contingent on the shareholder prevailing, it is disconcerting in that it may stand for the concept that if a board's rejection or conditional approval is found to be improper, the board could be responsible for reimbursing the shareholder for its fees in an action

even review of applications as herein—cooperatives should be certain to review the applicable issues to assure that the conditions imposed are within the legal authority of the board and cooperative.

**Editor's Note: The authors are with Finger and Finger, A Professional Corporation. The firm, based in White Plains, is Chief Counsel to The Building and Realty Institute of Westchester and the Mid-Hudson Region (BRI).**

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