COUNSEL'S CORNER

By Dorothy M. Finger, Esq., Kenneth J. Finger, Esq., Carl L. Finger, Esq., and Daniel S. Finger, Esq. Finger & Finger, Chief Counsel, Building & Realty Institute (BRI)

Revisiting Price as a Consideration in Co-op Applications

WHITE PLAINS—Previously the authors of this column provided an analysis of the case law relative to the issue of a cooperative rejecting a proposed purchaser on the basis that the purchase price for the unit was too low. This article will update the case law dealing with this issue.

A very recent case, *Chapell v. Trump Plaza Owners, Inc., 2011 NY Slip Op 32661(U), 10/3/11,* permitted an action brought by a shareholder to go forward after a motion to dismiss by the cooperative although it did not have an articulated policy of a minimum price.

In a complicated decision the judge reviewed the various cases on the subject, including those cited here. The court did find that the cooperative had the authority to approve an application "for any reason or no reason" and that the board had a legitimate interest in securing the highest price of the unit. The Court also held that absent fraud, self-dealing, bad faith or discrimination there was no basis to nullify the business judgment rule, discussed herein.

However, the Court held that the particular facts of the case, which detailed the plaintiff's (selling shareholder's) circumstances and attempts to sell at a higher price, provided sufficient allegations of bad faith. The Court observed that the apparent minimum price, which seemed to be higher than the market price, with unlimited duration on the floor, and no designation of a method for fixing the price could be an unreasonable restraint on alienation.

The Court then denied the Cooperative's motion to dismiss. This means that the Court found that the Plaintiff, while not entirely proving her case, had established a cause of action against the cooperative based on the denial due to the low price predicated on what the court found might be the apparent bad faith of the cooperative.

An Important Task

Perhaps the single most significant responsibility to fall upon a cooperative's Board of Directors is the responsibility of reviewing applications to purchase shares and reside in the cooperative. In agreeing to permit a person to purchase stock and reside in a unit at a cooperative, the Board is agreeing to permit that person to become a member of the community with all of the rights and obligations imposed upon a member of the cooperative community.

Additionally, the terms of the purchase may impact the cooperative from a financial and economic perspective. Thus, many cooperatives regulate the amount of financing permitted against the shares and lease, as well as other financial requirements relative to the proposed purchaser. In this vein the issue of sale price as a consideration as to whether to approve or disapprove a purchaser deserves scrutiny.

A Strong Point

Many Boards of Directors enunciate a concern that if the sale price of a unit is far below the reasonable value of the property, then the result will be the devaluation of other units in the cooperative. This concern is certainly legitimate given that the common manner for valuing units is the price paid for similar units on prior sales. The valuation by prior sales is particularly significant in circumstances where purchasers obtain financing to purchase units and the lender does an appraisal which relies in some, or large part, on prior sales in the cooperative.

Perhaps the single most significant responsibility to fall upon a cooperative's Board of Directors is the responsibility of reviewing applications to purchase shares and reside in the cooperative.

In such a circumstance one "low" sale can devalue future sales. Thus, it is important to review what a Board may and may not do with regard to a sale price.

Generally, a cooperative's Board of Directors may exercise its business judgment in determining whether to approve or disapprove any application (Levandusky v. One Fifth Ave. Apartment Corp., 75 NY2d 530). The "business judgment rule" generally protects decisions by a Board of Directors from review thereof, unless there is an allegation that the Board acted in bad faith or in a discriminatory manner. The question as regards to sale price may thus be confined to whether in considering sale price a Board is acting in a bad faith or in a discriminatory manner and how the courts have interpreted specific Board actions.

An Example

In *Oakley v. Longview Owners, Inc, NYLJ, 5/16/95, P.32, Col. 1,* the Westchester Supreme Court addressed this matter. In that case the cooperative had instituted a policy wherein it imposed an absolute floor on the price which would be approved for the sale of an apartment. The Court held that such a restriction constituted an "open ended and potentially long lasting prohibition". The Court held that although "corporate shares may be reasonably restrained in terms of the alienability…the floor price resolution, as adopted, is a prohibition of transfer and is an unreasonable restraint of alienation."

Thus the Court in *Oakley v. Longview Owners, Inc.* held that a strict price minimum would be an impermissible restraint on alienation and therefore was not legal. While that case might be viewed negatively in regard to the Board's powers, that language was part of an overall review of the particular matter. In that case the corporate documents, specifically the by-laws, certificate of incorporation, and the proprietary lease, did not give the board the authority to impose such a restraint. Language giving the Board the right to refuse "for any reason or no reason" might have formed the basis for a different result.

Another Example

The issue was also addressed in the matter of *Marine Midland Bank v. White Oak Cooperative Housing Corp., NYLJ, 3/19/97, P. 31, Col. 5*. That particular cooperative was a Section 213 cooperative which was formed under federal law and has unique provisions in its documents. The case was complicated by two issues other than the sale price: the cooperative docu-

Continued on page 7