

Trust In, and For, a Cooperative?

COUNSELS' CORNER

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WHITE PLAINS—We have recently received inquiries regarding Cooperative Policy as to the permissibility of the transfer of a shareholder's stock/shares to a trust.

We presume that many cooperatives have this issue relative to the request so we thought this was a timely article.

Generally there are two types of trusts that are used for holding cooperative shares: a qualified personal residence trust (QPRT) or a grantor / revocable / living trust.

When a board has received a request for a transfer to a trust, the Board should review it with counsel in accordance with its general policy. If no policy has been adopted, we recommend that the Board adopt one.

One policy is obviously "no," it will not allow transfers to a trust. Should the Board choose to allow transfers to trusts, there are legal ramifications and may possibly be greater financial or other risks to the Cooperative. It is necessary for counsel to review the Trust document(s) and prepare other documents, in addition to interfacing with counsel for the Trust. In considering whether or not to approve such a policy, some of the issues are as follows:

QPRT Trust

Some of the main issues arise because the sharehold-

er is generally alive at the termination of the trust and this raises issues of control or ownership of the stock and occupancy of the apartment at that time. The Cooperative has to be aware of same as discussed below.

A trust is a legal entity, not a person. Thus, although in a QPRT trust the shareholder reserves the right to use the apartment for a finite period of time, the Board should confirm through an agreement with the shareholder that only the shareholder(s) will occupy the apartment. An agreement to this effect should be prepared by counsel and executed by the shareholder as a condition to the approval.

The trust agreement, pursuant to applicable QPRT law, limits the amount of cash that can be held by the trust. The Trust agreement must be reviewed for, among other things, the assurance that cash will be regularly infused into the trust to meet the assessments and maintenance. Additionally, given that an entity is involved, it will be necessary for a personal guaranty to be prepared obligating the resident or former shareholder(s). Counsel can prepare this form also.

Given the nature and legal requirements, when a QPRT trust fixed term expires, the use of the apartment automatical-

ly passes to the beneficiaries, or for the benefit of the beneficiaries. Thus, if the Apartment Corporation approves of the transfer of the stock into a trust, it is in effect approving the later transfer out of the trust to the beneficiaries. If the Board does not want to grant such pre-approval, the shareholder's wishes might not be achieved. If the shareholder survives the expiration period, he / she may well want to transfer the apartment to a beneficiary only to sublease the apartment back from the beneficiary to assure his / her continued occupancy. We recommend against granting such pre-approval. If the Board does not want to pre-approve a transfer, there will have to be a document executed which confirms that only the shareholder(s) can reside and continue to reside in the apartment, even after the expiration of the trust period. There must be an assurance that any further transfer must be approved by the Board and the consent to the transfer to the trust cannot be deemed a consent to a later transfer (unless the Board so chooses to pre-approve such a transfer). This is another agreement that counsel will have to prepare.

The Trust Agreement also must be analyzed to assure that upon the death of the shareholder(s), and the trust

ceases to exist or is converted to another type of trust, there must be an assurance that any further transfer is subject to the co-op's approval.

Grantor / Revocable / Living Trust

Although Grantor Trusts are different from QPRT Trusts, in that many people use them as Estate Planning Devices to transfer assets without pro-

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bate, the issues to the Cooperative may be similar to those set forth above as to QPRT trusts. For example, there are also issues of ownership and occupancy.

The Cooperative should require, as with the other type of trust, an agreement confirming that the occupancy of the apartment is limited to the shareholder(s).

A personal guaranty is still advisable given the fact that the shareholder(s) may be transferring limited assets into the trust.

A further agreement assuring that no further transfers are deemed approved by this

approval of the ownership by the Trust should be executed. Thus, no further transfer can be permitted, even to a named beneficiary of the trust, without the Board's approval.

General Concerns

•Some trusts have what is called "spendthrift" provisions, preventing the invasion of the trust corpus / principal for the purpose of paying debts. The Cooperative cannot accept this type of clause even though in New York such a clause does not preclude creditors from seeking payment. This should be avoided by the execution of an amendment to the Trust waiving this clause as to the Cooperative.

•Permitting ownership by non-persons and entities. The Board may consider this at conflict with the general concept of owner occupancy. We cannot say how a lender would

view this type of ownership in analyzing the percentage of owner occupancy.

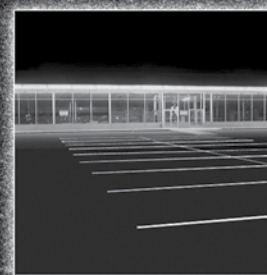
•Argument that the Cooperative is at greater risk because of the division of legal and equitable ownership; i.e., the trust owns the apartment; the former shareholder has the right to the use of the apartment, and beneficiaries may also have an interest.

•Some people have stated that the additional documentation is, in effect, an amendment of the proprietary lease, which cannot be accomplished without shareholder approval. Although there is no case law on

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Residential Developments Are Helping to Revitalize the Village of Ossining, Spokesmen Stress in New Report

OSSINING—The Village of Ossining's waterfront and Main Street shopping crescent are poised for a transformation as four new residential mixed-use developments take shape while helping to revitalize the historic village, officials recently said in a new report.

Three projects—Avalon Ossining, 147-155 Main Street and 105-107 Croton Avenue — are currently in the construction phase. A fourth, Harbor Square, is expected to soon follow, with final approvals from the village now in place, officials said.

Once completed, the developments will offer more than 400 new rental units in the village, from affordable housing to luxury apartments, officials added. The report said that officials from The Village of Ossining are hoping to attract young professionals and empty nesters alike looking for a combination of affordable living, waterfront views, and convenience, with easy access to mass transit and New York City a mere 45 minutes away.

Avalon Ossining and Harbor Square are both planned as luxury developments, the later with a full-service concierge. Two developments, Avalon Ossining and 147-155 Main Street, have scheduled completion dates in the first half of 2014, the report said. "These brand new apartments are perfect for anyone interested in living in an urban, yet historic community," said Ingrid Richards, the Village's manager of downtown and economic development. "We are very excited to see these de-

velopments progress. Our growing retail and restaurant businesses will also benefit greatly from the new additions." Earlier this year, the Stagg Group, a Westchester-based developer, purchased the village-owned property at 147-155 Main Street. The parcel, known as the "We Can Do It" lot, has been vacant for more than 15 years following a devastating fire. Construction is now underway for a five-story, mixed-use building containing 31 apartments, 1,202 square feet of retail space, and 3,185 of restaurant space. The new brick and masonry building will blend with the village's existing historic architecture and is expected to be move-in ready by April or May of 2014, officials said.

A Milestone

"The redevelopment of this parcel represents another milestone of success for the Village of Ossining," said Mayor William R. Hanauer. "It will complete the historic Main Street shopping crescent and represents yet another forward step in the renaissance of the village and the rejuvenation of its downtown." Also in the construction phase, 105-107 Croton Avenue will feature 14 rental units, as well as 2,700 square feet of retail space, the report said. Hanauer added: "Those living in the Stagg building will have market rate and affordable quarters with the convenience of contemporary living in our historic downtown, across the street from the farmers market and within walking

distance to the Ossining Station. New Croton Avenue tenants will have more reasonably priced units, convenient to

community is one mile from the Ossining Metro-North Railroad Station and within walking distance to nature trails and hiking

Once completed, the developments will offer more than 400 new rental units in the village, from affordable housing to luxury apartments, officials added.

excellent shopping, as well as three of our excellent schools." Owned and operated by Avalon Bay Communities Inc., Avalon Ossining will offer 168 brand-new luxury apartments for lease starting in February, 2014. Located at 217 N. Highland Avenue on the site of an old office building now demolished, the new, smoke-free community will feature one, two and three-bedroom apartment homes. Amenities ranging from large contemporary kitchens and energy-efficient appliances, to private balconies with stunning views of the Hudson River are included, officials said. Avalon residents will have access to a state-of-the-art fitness center, an outdoor swimming pool, a clubhouse, a children's playground and a WiFi Café. The

along the Crawbuckie Nature Preserve, spokesmen added. "Ossining has always been home to people of all economic abilities. To guarantee that we continue to provide affordable housing, the Board of Trustees passed a policy in 2006, then codified and enacted that policy in 2009, mandating that all development of six units or more provide that 10 percent of the units be affordable as defined by the state," said Hanauer.

He added: "What the Village has always lacked, however, is luxury rental apartments. With the construction of Avalon and Harbor Square, people with significant disposable income will have luxury apartments with spectacular river views, with some affordable units among them."

On The Waterfront

Ginsburg Development Companies, LLC recently received final approval from the Village of Ossining's Board of Trustees for Harbor Square, a 188-unit luxury rental community on the Hudson River waterfront, the report said.

Located on Westerly Road, across the street from the train station and adjacent to the historic Main Street business district, Harbor Square will offer apartments ranging in size from studios to three bedrooms, many with balconies. Additional amenities include a rooftop fitness center, spa and swimming pool. Currently scheduled to open in the spring of 2015, Harbor Square's 4.5-acre site will also feature a new restaurant and waterfront park, according to spokesmen.

"All four of these residences will have attendant commercial space, which together will accomplish our goal of spreading the tax base," said Hanauer. Those interested in receiving more information on downtown and economic development in the Village of Ossining can contact the Village Manager's Office at 914-941-3554, or visit www.villageofossining.org, officials said.

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this issue, this does not appear to be a major problem since among other things, the specific proprietary lease with the individual shareholder could be amended to reflect this policy when necessary, apartment by apartment.

•Payment of flip tax and other charges to the Cooperative. Does the Board want to have a flip tax paid in this situation? There are also transfer agent fees.

•Payment of counsel fees. If the Board adopts a policy to allow such transfers, the expenditure of counsel's time can be substantial. Trust agreements can be very complex and they have to be carefully reviewed with the Board's protection in mind. Boards that have dealt with issues such as this require that the shareholder bear the full cost of the Cooperative counsel's legal fees even if the transfer, for some reason, does not materialize. The time expended will be in the area of review of the trust agreement (and these can be quite complex and complicated); discussion and drafting of new documents; explanation

of documents and purpose of same to Shareholder(s) counsel; seeking of opinion letter from counsel and review of same; and supervision of execution or review of documents after execution to assure proper execution.

Conclusion

While the ownership by a trust may be complex and create legal problems, as well as some degree of risk to the Cooperative, it would appear that these problems and risks can be generally eliminated by the drafting and signing of the Board's documents as prepared and reviewed by the Board's counsel.

The issue of whether or not the Board wants to allow ownership by a non-person is discretionary with the Board, as is the basic issue of whether the Board wants to allow Trust Ownership.

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

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