NYC Co-Op Boards Beware!

By Marc Schneider, Schneider Mitola LLP

On April 30, 2013, the New York City Council Committee on Housing and Buildings held a hearing regarding Int. No. 188 - a Local Law to amend the administrative code of the City of New York in relation to sales of cooperative apartments. I was present for the hearing and thereafter submitted written testimony against the proposed law.

The law claims to be aimed at preventing discrimination of purchase applicants by Co-op Boards[1]. However, a closer look at the law reveals its purpose is something different.

In summary, the law requires the following:

1. A standardized application and list of requirements to any applicant upon request of same as well as to the NYC Commission on Human Rights (Commission). Any modification to the standardized application must also be submitted to the Commission.

2. A Co-op Board or its managing agent must provide written acknowledgment of receipt of an application or notice of any deficiencies within ten business days of receipt of same. Failure to provide notice in this manner will deem the application complete.

3. The Co-op Board or its managing agent must provide a written determination (i.e. - approval or rejection) within 45 days of receipt of the completed application

4. If an application is rejected, a certification from each board member who participated in the decision to reject the application stating that they did not discriminate against the applicant must be provided.

5. Failure to provide the written documentation (i.e., written decision and certification on non-discrimination) required within 45 days mandates the Board to return the application fee to the applicant.

6. If the Board or its managing agent fails to provide the written decision within ten business days after the 45-day requirement, the applicant can demand the decision in writing. If the Board or its managing agent still fail to provide the written documentation ten calendar days thereafter, the application is deemed approved!

7. If an application is received between July 1st and September 10 of any calendar year, if the Board advises the applicant that it does not meet during July and August, the Board or its managing agent can have until the later of 45 days or September 10 to render its written decision and provide the required written documentation.

8. The Co-op must maintain all records relating to the application for about five years.

9. Failure to comply with the time frames could result in a penalty up to three times the application fees and actual costs incurred by the applicant in preparing and submitting the application (up to $5,000.00) together with attorney's fees and costs. A court or the Human Rights Commission can determine the amount of penalties.

10. A violation can be issued with a fine of between $250.00 and $2,000.00 for the first violation; between $500.00 and $5,000.00 for the second violation; and between $2,000.00 and $15,000.00 for the third violation.

There were many references in the commentary to the proposed law being modeled after a similar law, which was enacted in Suffolk County. First and foremost, you should note, the Suffolk County law was passed *under the radar* without substantial comment from interested parties. Additionally, Suffolk County has far fewer co-ops than New York City. In fact, there are probably only approximately One Hundred or so Co-ops in all of Suffolk County which dwarfs in comparison to the many thousands of Co-ops in New York City. You should note, most community associations in Suffolk County are Condominiums and Home Owners Associations, not Co-ops. Note, however the proposed law is actually significantly different that the Suffolk County Law.

In that regard, please note the following:

1. Unlike the proposed law, there is absolutely no penalty for non-compliance or express right to a civil cause of action under the Suffolk County law (other than a failure to comply with the law can be used as part of an investigation by the Suffolk County Human Rights Commission or evidence in an administrative proceeding).

2. The Suffolk County law does not require a signed document by each board member who was involved with the decision to reject a purchase application affirming no discrimination occurred in connection with the application decision.

3. There is no requirement in the Suffolk County law for a board to keep records for any period of time or be subjected to an audit by an outside agency.

4. The Suffolk County law does not provide that an application is automatically deemed approved if the deadlines required under the law are not met.

5. The Suffolk County law does not afford the aggrieved party the right to attorneys' fees for violating the law.

6. The Co-op boards that I represent are aware of the law and do

comply. However, many times, the timing requirements cause them to render a decision on an application that might otherwise be different if they had more time to consider and address real (non-discriminate) issues such as income issues, occupancy issues, etc.

7. I am not aware of a single Co-op that does not already have a standardized application (i.e. - I have not seen one Co-op have two or more forms of an application).

There was also an attempt to convince the Nassau County Legislature to pass a law similar to the one passed in Suffolk County. However, in that case, the Nassau County Legislature inquired of the Co-op community and ultimately no such law was passed or even put up for a vote.

More important than all of the foregoing, the law being proposed is totally unnecessary and inappropriate. In that regard, a review of the proposed law indicates that it is being put forward for the purposes of protecting a purchaser from being discriminated against in connection with a board's denial of an individual's purchase application for a cooperative apartment. There are already protections available for these aggrieved parties by virtue of the Federal Fair Housing Act, the New York State Human Rights Law, New York City Human Rights Law and New York State Civil Rights Act; all of which make it illegal to discriminate against a prospective purchaser based upon said purchaser's race, creed, ethnicity, gender, age, family status, etc.

Additionally, a statement was made at the hearing that the Suffolk County law reduced complaints dramatically. I believe the law has had no impact other than to inconvenience boards and cause purchasers who might otherwise have been accepted to be denied! If a prospective purchaser claims discrimination related to their application in a Suffolk County Co-op, I believe they would avail themselves of the foregoing laws (as applicable) and not the Suffolk County law, which was passed.

It is important to note that pursuant to the *Business Judgment Rule*, Co-op boards are permitted to accept or reject an applicant provided their decision is in accordance with the rules set forth in the Co-op's governing documents. Essentially, the *Business Judgment Rule* prohibits Courts from *second guessing* Board decisions. It is important to note that this rule only applies if the Co-op Board did not discriminate against the applicant or perpetuated other types of wrongful conduct.

Most purchasers who are rejected by a Co-op Board are rejected primarily for financial-related reasons (i.e. insufficient income to support paying the maintenance and any loan obtained to purchase the unit). Clearly, if a prospective purchaser believes that such reasoning is pretextual, he/she would be entitled to seek action under the Federal Fair Housing Act, the New York State Human Rights Law and/or the NYC Human Rights Law which would also permit such purchasers to seek attorneys' fees if they are successful. Clearly, prospective purchasers are not without their rights and remedies.

Most claims which are filed with the New York State Division of Human Rights or New York City Commission on Human Rights for alleged discrimination by a Board in connection with a purchase application are few and far between and are usually dismissed based on findings of "no probable cause" after a full investigation by the Division of Human Rights. Forcing a board to make a decision on an application with strict time deadlines will do nothing to advance the rights of an applicant. In fact, it is important to note, the Federal and New York Legislature clearly did not find merit in including these time frames in the already existing anti-discrimination laws.

To my knowledge, there are not scores of prospective purchasers that are knocking down the doors claiming that the purpose for which this law sets forth is a serious problem, which needs to be addressed. Additionally, you should note that Cooperative Housing Corporations are private corporations. As such, I do not believe that it is appropriate for the City government to interfere with the affairs of a private corporation.

Adding laws such as this will only foster additional litigation and add financial burdens to the cooperative complexes and the residents who reside in the co-ops. If this law were to pass, it would give individuals who are not part of the co-op the right to bring claims based upon a violation of this law, which would then need to be defended by counsel for the Co-ops; especially since the proposed law provides penalties and legal fees (unlike the Suffolk County law). The net result of this would be additional legal fees the Co-op which in turn gets passed on to all of the existing shareholders (i.e. tax payers of New York City) to bear the expense of the many baseless lawsuits which would likely come out of this law. Let's remember, all of the present occupants of the many thousands of Co-op apartments in NYC were all approved by their respective Co-op boards!

1 You should note, there is apparently a "sister" law which will be proposed which will require Co-op Boards to provide the reason for rejection of an applicant.

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