

# CLIENT ADVISORY

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## TENANTS' CHALLENGE TO REPLACEMENT OF DOOR KEYS WITH CARDKEYS FAILS

After consultation with the New York City Police Department and other security experts, the owner of Peter Cooper Village (Metropolitan Life) announced that it would replace the traditional metal keys to the lobby doors in its twenty-one buildings with "cardkeys," which would not only trigger the locks but also would cause an electronic record to be made of which cardkey had been used. The landlord would require that holders of cardkeys be photographed, including authorized household workers, contractors and guests, with the photos to be embossed on the cards and stored electronically. In addition, the landlord was to maintain discretion over whether to issue a cardkey to a guest and might require his or her name and address.

In Stuyvesant Town – Peter Cooper Village Tenants' Assoc. v. Metropolitan Life Ins. and Annuity Co., NYLJ July 19, 2004, p.19, col. 1 (Sup. Ct. N.Y. Co.), the tenants' association and two residents sought a declaratory judgment and an injunction against the new security system. The Court denied the tenants any relief and dismissed their complaint. Among the grounds for its decision, the Court held that that the proposed changes in the security system did not rise to the level of a breach of the landlord's warranty of habitability and that in New York there was no common law right of privacy. The case provides an example of the general approach of today's courts to permit owners of residential property, including cooperatives and condominiums, to keep up with the latest technological advances to improve building security.

## DISAPPROVAL BY A COOPERATIVE OF A SALE ON THE BASIS OF PRICE

Most cooperative proprietary leases permit the cooperative corporation to reject a prospective purchaser for any reason, absent violation of applicable anti-discrimination statutes or bad faith. A question that occasionally arises, especially during weak markets, is whether this power extends to disapproval of the sale of an apartment on the ground that the proposed sale price is too low. Those arguing against such a right point out that the right to reject is directed at the proposed purchaser and not the sale terms. Those arguing in favor of such a right point out (a) that the sale price of a unit can affect the amount other unit owners will be able to secure on sales or refinancings, since a below market sale price will be averaged in by bank appraisers and brokers when determining unit values in a building and (b) that a below market price in a building with a flip tax denies the cooperative revenue.

In Oakley v. Longview Owners, Inc., 165 Misc. 2d 192, 628 N.Y.S.2d 468 (Sup. Ct. Westchester Co. 1995), the Court invalidated a resolution adopted by a cooperative board that approval of an apartment sale would be withheld where the proposed sale price was more than ten percent less than the appraised value of the apartment (as indicated in appraisals obtained by the board). The Court found (1) that such an open-ended and potentially long lasting prohibition

constituted an unreasonable restraint of an owner's right to transfer his property and (2) that the board had no authority, in either the proprietary lease, by-laws or certificate of incorporation, to adopt such a "floor-price" resolution.

In Marine Midland Bank v. White Oak Cooperative Housing Corp., NYLJ March 19, 1997, p. 31, col. 5 (Sup. Ct. Westchester Co.), the Court recognized the cooperative's right, provided in the occupancy agreement, to elect to purchase the shareholder's shares within 60 days after notice of his intent to sell. If it did not so elect, however, the cooperative was directed to cooperate in the sale of the shares to a third party "at whatever price plaintiff deems appropriate." The Court rejected the board's attempt to control the price, on the authority of the Oakley case. It found no authority in the occupancy agreement for the board to restrict the price and held that such authority was "not implicit in defendant's right to approve a third party purchaser as the price to be paid has nothing to do with the person."

On the other hand, a cooperative board which had allegedly disapproved an apartment sale based on price obtained a dismissal of claims against it by a prospective purchaser in Levine v. Yokell, Index No. 600260/95 (Sup.Ct. N.Y. Co., November 12, 1996), *aff'd* 245 A.D.2d 138, 665 N.Y.S.2d 962 (1<sup>st</sup> Dep't 1997). In that case, the purchaser accused the board and its members of breach of contract, breach of fiduciary duty under Business Corporation Law, § 717, and interference with contractual relations. She alleged, among other things, that the members of the board had rejected her application because of the low price and their self-interest in obtaining high prices for the cooperative's apartments. The Supreme Court suggested that such a claim, "if true, might be considered unlawful in the context of a breach of duty owed to a shareholder," but held that it did not state a cause of action on behalf of the prospective purchaser, to whom the board owed no fiduciary duty and with whom it had no privity of contract. On appeal, the Appellate Division affirmed the dismissal of the claims against the cooperative, citing an alternative ground: it held that the board's refusal to approve plaintiff's application was a contingency specifically contemplated in the contract of sale itself and therefore could not have interfered with that contract.

Both the Oakley and Levine courts cited the fundamental principle that "[s]o long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith, courts will not substitute their judgment for the board's." Levandusky v. One Fifth Avenue Apartment Corp., 75 N.Y.2d 530, 538, 554 N.Y.S.2d 807, 812 (1990). The cases discussed above suggest that although only the shareholder and not a prospective purchaser has standing to complain, this so-called "business judgment rule" may not protect a disapproval of a sale on the basis of the sale price if such disapproval is not explicitly authorized in the proprietary lease, by-laws or certificate of incorporation, or (b) if there is evidence that one or more of the directors were motivated by self-interest in maintaining the higher price of their own apartments. A question remains whether the courts would be more sympathetic to a rejection where a low sale price would reduce corporate (as opposed to individual) income under a validly authorized "flip tax" provision.