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YOUR HOME

YOUR HOME; The Right Of Refusal In Condos

By JAY ROMANO

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MOST present and future apartment-owners are acutely aware that it is easier to buy or sell a condominium than a co-op because transferring ownership of a co-op usually needs the consent of the building's board while the transfer of a condo usually does not.

What is less well understood, however, is that virtually all condo boards can exert some measure of control over who becomes an owner in the building. That ability, real estate lawyers say, comes from what is known as "the right of first refusal" -- a legal concoction that gives condo boards the ability to derail an impending sale by buying the apartment from its current owner.

"Any time you have a communal living arrangement, there is an interest on the part of the majority of the owners to exercise some say over who lives in the building," said Robert E. Parella, a professor of law at St. John's University School of Law in Jamaica, Queens. "And somewhere along the way it got rather firmly rooted in New York that with a co-op, the governing documents would very often allow the co-op to arbitrarily withhold consent to a transfer, while with a condominium, the only kind of restriction that most people believe would stand up would be the right of first refusal."

The reason for the difference, Professor Parella said, is rooted in the differences in the form of ownership.

Since a co-op is a corporation, he said, the co-op board can control who lives in the building by controlling who is allowed to become a corporation shareholder and proprietary leaseholder. And as long as the co-op does not violate federal, state or local laws against discrimination, Professor Parella said, it is typically free to grant or withhold its consent to a transfer of shares in the lease "for any reason or no reason at all."

With a condo, the apartment itself is considered to be real estate. And under a legal doctrine that has roots in centuries-old English common law, it is not permissible to impose an "absolute restraint on alienation" when transferring ownership of real estate to someone else.

"That means that you can't transfer total ownership of real estate to someone else and then say the new owner can never sell it," Professor Parella said.

In other words, he said, if the governing documents that create a condo let the condo board prohibit a unit-owner from selling his or her apartment, that prohibition would very likely be considered a impermissible restraint on alienation.

As an alternative, however, most condo governing documents give the board a right of first refusal when an apartment is being sold.

"A right of first refusal basically means that the condominium association itself has the right to become the purchaser of apartments being sold in the building," said Richard Siegler, a Manhattan co-op and condo lawyer. Mr. Siegler explained that the primary reason a condominium board would want such a right is to ensure a community of

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"friendly, qualified, congenial residents."

"In other words, the right of first refusal gives the board the ability to weed out a buyer who is really undesirable," Mr. Siegler said. "And they do that by buying the apartment themselves."

He pointed out that while condos do not have the same ability as co-ops to delve into a buyer's personal and financial background, some condo bylaws require the seller to provide some information about the buyer.

"Knowing something about a buyer's income and assets would be key," Mr Siegler said. He added that if the seller would not provide the information, the board could essentially block the sale by refusing to issue a waiver of its right of first refusal.

It is possible, he said, for condo boards to exercise the right of first refusal for other reasons.

For example, he said, a board may want to provide a new or larger apartment for a superintendent or may want an apartment that can be used by the condo association itself. A board may also want to exercise the right of first refusal if it believes that a particular apartment is being sold at less than market value.

"As prices have escalated, some condominium boards are looking at buying apartments and then reselling them at a profit as a means of building up the association's reserve fund," Mr. Siegler said. He added that since the condo association must buy the apartment on the same terms and conditions the seller is prepared to accept from an outside buyer, the seller is no worse off when the right of first refusal is exercised. (At the same time, Mr. Siegler said, condo bylaws typically do not provide for a right of first refusal when the unit is being sold by a sponsor, when title is being transferred as a result of a foreclosure or when a unit owner is selling to an adult family member or to a trust set up for the benefit of a family member.)

As handy as the right of first refusal might be, however, it is typically difficult to execute.

"The reality is that in many cases, the right of first refusal is almost impossible to use," said Howard Schechter, a Manhattan co-op and condo lawyer.

Mr. Schechter pointed out that under most condo bylaws, the board must exercise the right of first refusal within a specific time after being told of an impending sale by a unit owner. "In some cases, the time period can be as little as five days," he said, adding that only in unusual cases would a board have more than 30 days to exercise its right of first refusal.

As a result, he said, a board typically has less than a month to come up with the cash -- or obtain financing -- to buy the apartment.

To compound that problem, Mr. Schechter said, most condo bylaws make the board get the consent of a majority of the unit owners before exercising the right of first refusal.

"And most bylaws say the board can only get the consent of the unit owners after first calling a meeting," he said, adding that since it is not unusual for condo owners to live outside the building, getting most of the unit owners assembled for a vote within a short time is daunting. And while it may be possible to amend the bylaws to allow unit-owner consent to be provided in writing or to expand the time period for exercising the right, doing either typically requires the consent of 75 or 80 percent of the unit owners.

Dennis H. Greenstein, a Manhattan real estate lawyer, said that condos considering amending the bylaws to make it easier to exercise the right of first refusal should move cautiously.

"One of the main reasons condominiums are so popular is because they are easy to sell," Mr. Greenstein said, adding that if a condominium makes it too easy to exercise the right of first refusal, that could have a negative effect on the attractiveness of the

building to buyers.

Notwithstanding such concerns, some lawyers recommend that their co-op clients also include a right-of-first-refusal provision in their governing documents.

James G. Samson, a Manhattan co-op lawyer, said that while co-ops had a right to reject buyers -- leaving the seller with no alternative but to find another buyer -- there was usually no provision in a co-op's governing documents that affirmatively gave the co-op a right of first refusal.

"Having an automatic opportunity to buy every time an apartment comes up for sale is invaluable," Mr. Samson said.

He explained that since co-ops generally have better access to financing than condos because the co-op owns real estate, it would be much easier for a co-op board to exercise the right of first refusal. And having such a right would come in handy, he said, in situations where an apartment is being sold for considerably less than market value.

"There is no hard and fast rule a board can use to decide when to buy an apartment," he said. "But if the board is about to reject a sale because the price is too low, that would probably be a good time for the co-op to buy."

Drawing (Tom Bloom)

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