

Memorandum in Opposition

REAL PROPERTY LAW SECTION COMMITTEE ON CONDOMINIUMS AND COOPERATIVES

RPLS #2

June 10, 2021

S. 1449-A

By: Senator Sanders
Senate Committee: Codes
Effective Date: 90th day after it shall have
become a law

AN ACT to amend the civil rights law, in relation to discrimination in the ownership of cooperative housing.

LAW & SECTION REFERRED TO: Section 19-a of the civil rights law.

REAL PROPERTY LAW SECTION COMMITTEE ON CONDOMINIUMS AND COOPERATIVES OPPOSES THIS LEGISLATION

I. BACKGROUND

The Real Property Law Section's Legislative Sub-Committee of the Cooperative and Condominium Law Committee of the New York State Bar Association urges the State Senate to reject this bill as it does not provide any additional protections to prospective sellers or purchasers that do not already exist and will likely lead to unnecessary litigation which Co-op Boards and its shareholders will be forced to incur expenses to defend. Substantively, the premise that many prospective purchasers are arbitrarily or discriminatorily rejected is not supported by the vast experience of the members of the Committee¹. More importantly, however, if the bill were to pass and become law, it would likely lead to the opposite of its intended effect in that Co-op Boards would likely be more inclined to simply deny an applicant based on the written application if there were inadequacies instead of meeting with the applicant to try to learn more for fear of a discrimination claim.

II. DISCUSSION

¹ The Cooperative and Condominium Law Committee is comprised of lawyers who concentrate in the representation of cooperatives and condominiums, shareholders, sponsors and advise the boards on their rights and responsibilities.

While Civil Rights Law Section 19-a is captioned “Prohibition Against Unreasonable Withholding of Consent”, there is nothing in the statute which imposes any standard of reasonableness. Rather, the legislation simply requires the corporation to “provide the prospective purchaser with a written statement of its reasons for withholding consent...” The vast majority of rejections are based on financial considerations of the prospective shareholder. These decisions are given the protection of the business judgment rule. However, as a result, any rejection for discriminatory reasons would not have business judgment protection and would subject the Cooperative Corporation (and its shareholders) to fines, penalties and appropriate legal action for engaging in conduct which is already illegal. There is simply no need for this proposed law.

In that regard, any prospective purchaser who believes that the stated reason for rejection was pretextual and the true reason was discriminatory already has a remedy. In fact, they are also able to file claims with the respective Commission on Human Rights within the applicable jurisdiction which triggers an investigation at no cost to the complainant. An allegedly aggrieved applicant can also bring an independent action for discrimination. In fact, if challenged, we suggest that the legislature would find that very few discrimination claims are filed based on rejected purchases. So why then is this law needed? It is believed this is more of a desire and response to real estate brokers desire to earn a commission than of a true desire to protect purchasers who already have all the protections they need.

It should be noted that enacting the proposed law will actually damage the ability of shareholder sellers to expeditiously sell their apartments. Under the proposed legislation, a rejected purchaser may be able to stay the seller from attempting to further market the unit while the lawsuit is pending causing untold hardship. Since real estate is considered unique, the possibility of injunctive relief being granted to an aggrieved purchaser is substantial. This will result in financial hardship to the seller who will remain liable for maintenance and loan charges while the action is pending.

Third, coupled with the restrictions already improperly imposed on a Cooperative by the Housing Stability and Tenant Protection Act of 2019, the potential of further restrictions on the Cooperative’s ability to govern itself and to determine with whom it will share its financial and maintenance obligations, will further damage the market value of many cooperatives. Board members have a fiduciary duty to their fellow shareholders to insure that potential shareholders have the ability to pay their fair share of building’s expenses. Fear of challenges to their determination will hurt all shareholders if board members are subject to lawsuits for any rejection that is not discriminatory. Imposing a reasonableness standard on this determination (as the captions seems to imply) will result in unwanted and unnecessary court review of board actions. Further, the possibility that an applicant whose finances were marginally sufficient are more likely to be rejected without benefit of an interview (where they would otherwise have the ability to explain their financial circumstances) due to the increased likelihood that a complaint on discriminatory grounds will be filed after the interview is held (i.e., why would the board interview me if

my finances were marginal; it was only after they saw that I was a member of a protected class did they reject me).

III. CONCLUSION

Accordingly, it is the Committee's opinion that the proposed legislation will impose an undue hardship and burden on cooperatives and their shareholders and not provide any additional remedy to an individual who is aggrieved by discriminatory conduct and encourage litigation. For that reason, we **OPPOSE** this legislation.