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In Co-ops, 'Equality' Can Be a Bit Elastic

By JAY ROMANO

NEW YORK'S Business Corporation Law requires that shareholders who own the same class of stock be treated the same, and in a co-op, this usually means that monthly maintenance and special assessments must be calculated on a per-share basis.

But sometimes co-ops want to impose fees that are calculated in a different way.

One of the most common is the sublet fee.

"Most co-ops in New York want to discourage subletting," said Richard Siegler, a Manhattan co-op and condominium lawyer, on the ground that renters may not have the same long-term concerns as tenant-shareholders.

But how can such a fee be calculated?

Traditionally, case law has allowed a co-op board to impose a sublet fee calculated as a percentage of the sublet rent.

But more recently, the courts have been applying the "equal treatment" rule and requiring that sublet fees be based on the number of shares owned.

Another issue that comes up is how to assess shareholders for building improvements. For example, Mr. Siegler said, buildingwide window replacement may be more difficult to manage than it first seems.

Since the law requires that assessments be calculated on a per-share basis, how does a board deal with owners who have already replaced their windows at their own expense?

Mr. Siegler said that while all shareholders must be assessed on a per-share basis for the total amount of the job, the board could give a credit against future maintenance charges equal to the cost of the windows replaced in the past.

Another possibility might be for the co-op to buy the windows from the shareholders who installed them.

Mr. Siegler noted that one exception to the per-share rule relates to flip taxes.

In 1985, the New York State Legislature basically overturned a decision of the Court of Appeals by allowing flip taxes to be calculated in other ways, not just on a per-share basis, provided the proprietary lease allows the co-op to impose flip taxes in the first place.

Bruce A. Cholst, a Manhattan co-op and condominium lawyer, said that another way to raise money without a buildingwide assessment is through a "reverse assessment" levied against new buyers — a fee that is colloquially known as the "welcome, stranger" tax.

Such a fee, Mr. Cholst said, can be imposed on buyers before they become shareholders and before they sign their proprietary leases. At this point, the buyers are not yet shareholders and are not subject to the leases.

Mr. Cholst said that the courts could find such a strategy to be an elevation of form over substance in evading the equal-treatment rule and an "artful dodge" to circumvent it.

But **Alexander Suslensky**, another Manhattan real estate lawyer, says he believes that such fees will pass muster in the courts.

"I think the key distinction we're talking about here is that the future shareholder agrees to be treated differently," he said.

The bottom line? When a co-op says, "Welcome, stranger," let the buyer beware.