

COUNSEL'S CORNER

By: Kenneth J. Finger,
Carl L. Finger and
Daniel S. Finger,
Finger & Finger, Chief Counsel,
Building & Realty Institute (BRI)



Reviewing Access to a Co-op's Or Condo's Books and Records

WHITE PLAINS—One of the questions that we are frequently asked by our clients, whether they be a cooperative board, a condominium board or a managing agent, is to what extent does the shareholder or unit owner have in the right to examine the co-op's or condo's books and records.

In view of the difference in the laws covering a co-op and a condo, there are multiple answers to what appears to be a simple inquiry.

Co-ops

With a cooperative, generally most cooperatives are subject to the Business Corporation Law ("BCL") (some cooperatives known as "213s" were formed under the Cooperative Corporations Law and were subject also to federal regulations and laws under "model documents" and also "Mitchell-Lama" cooperatives are subject to other state laws).

Where the Cooperative Corporation's Law does not apply, the BCL is generally looked to for statutory authority.

A corporation is required to keep books and records, minutes of shareholder, board and executive committee meetings and a record of the shareholders (BCL §624 and similarly in the Not For Profit Corporation Law Section 621). While a shareholder is given the right to review the minutes of the corporation's meetings, i.e., Annual and Board meetings, and to, under appropriate circumstances to take excerpts of same, the shareholder can also get names and addresses of shareholders.

The Keys

However, the BCL Section 642(c) establishes that the shareholder may not examine the records above referenced if the shareholder refuses to sign an affidavit that the inspection of the records is not desired for a purpose other than the business or interest of the corporation.

Thus, this right of inspection is subject to the requirement that the inspection must be in good faith and for an appropriate reason and purpose. The Board of Directors has the right, before an inspection is granted, to require an affidavit as to the purpose and an inspection may be denied upon the shareholder's refusal to furnish to the cooperative that such inspection "is not desired for a purpose which is in the interest of a business or object other than the business of the

corporation and that he has not within five years sold or offered for sale any list of shareholders of any corporation of any type or kind."

The shareholder's recourse, under such circumstances, if he disagrees with a refusal to make the records available, is to make application to the Supreme Court of New York State for such information. Additionally, the shareholder has the right, upon written demand, to a copy of the annual balance sheet and the profit and loss statement for the preceding fiscal year.

Other Factors

In addition to the statutory rights above, the common law, which precedes the statutory authority, remains in effect. The common law right of inspection of the books and records of the corporation is not diminished by the statutes, but rather expands those rights. However, the enforcement of the common law right, by court action, allows the court to permit greater or lesser right of inspection as may be necessary under the circumstances of a given situation.

As with the statutory right of examination, the common law right permits an investigation into the reason the inspection is sought. The courts have required a legitimate reason for an inspection before granting

same.

To the extent that the court may apply the various corporate rationale, under the common law, to the context of a condominium unit owner seeking to inspect records, presumably the requirement of a bona fide reason for the inspection would similarly apply, although there is no statutory authority specifically authorizing in a condominium such an affidavit as the Business Corporation Law. The purpose may be generalized or specific depending upon the records sought.

Based on the within, a party seeking to inspect the books and records of the corporation should be required to state with precision the books and records sought for the inspection and reason that same are sought for inspection.

The Board may review the information and determine whether the reason is a good faith basis and act accordingly.

Condos

Section 339-w of the Real Property Law provides that: "The manager or board of managers, as the case may be, shall keep detailed, accurate records, in chronological order, of the receipts and expenditures arising from the operation of the property. Such records and the vouchers authorizing the payments shall be available for examination by

the unit owners at convenient hours of weekdays. A written report summarizing such receipt and expenditures shall be rendered by the board of managers to all unit owners at least once annually."

Real Property Law Sec. 339-w thus requires a board of managers to keep records of receipts and expenditures, which "shall be available for examination by unit owners." However, there is no provision in the Condominium Act authorizing an inspection of a list of unit holders. This is in contrast to Business Corporation Law Sec. 624 (which is applicable to cooperative corporations), which permits any shareholder to examine the "record of shareholders and to make extracts there from for any purpose reasonably related to such person's interest as a shareholder."

While privacy of the unit owners may be a desirable goal, with condominiums we are dealing with owners whose interest therein is a public record as the deeds to their

taining the list from the public records.

Moreover, since the most up to date and accurate list of persons entitled to vote will normally be that maintained by the board, delivery of that list may avoid controversy should there be a conflict between the public records and the information maintained by the board.

Lastly, a unit owner's desire to communicate reasons for opposing, for example, a proposed by-law amendment to their fellow unit owners is a sufficient bona fide reason for obtaining the list.

The statutory authority for unit owner review of condominium records ends with the right to review receipts, expenditures, and vouchers authorizing such payments at convenient hours of the weekdays. However, Courts have applied corporate law to condominiums on occasion with reference to the inspection of various records of the condominium.

Courts have both upheld the rights of unit owners to view unit owner lists and denied that

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units are normally recorded (RPL Sec. 339-s) and they are subject to individual real property taxation (RPL Sec. 339-y), the records with respect to which are also public.

Communication

While unit owners could thus obtain the requested information from public records, there is no valid reason why the board should not furnish a unit owner this information and avoid the owner having to incur the time and expense of ob-

unit owners have a right to view unit owner lists. In contrast, board members have been held to have unequivocal rights to view all corporate records.

Editor's Note: The authors are attorneys with Finger and Finger, A Professional Corporation. The firm is based in White Plains. Kenneth J. Finger is chief counsel to the Building and Realty Institute of Westchester and the Mid-Hudson Region (BRI).

Strategic Management of Tax Liabilities

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is tax free return of basis, part is return of gain which is taxed at capital gain rates, and part is interest. There is no interest or penalty on these deferred payments of the tax.

On top of that the tax payments will be made with depreciated dollars. The tax dollars will be worth far less than they are today due to inflation. If invested properly, the money in the trust could grow at a greater rate than that of inflation and even the distribution rate. The interest rate in the note to you is dictated by the IRS to be a competitive rate, i.e., 6 percent to 10 percent.

Another Method

While we have primarily focused on the capital gain tax, the amount of gain due to straight line depreciation is also deferred with a DST™. But if you have taken accelerated depreciation in excess over straight line, this amount is not deferrable.

There is substantial flexibility

in investing the trust's funds. The money may be invested in securities, real estate, or even in a new or existing business.

The primary requirement of the trust's investment objective is simply to produce the cash flow necessary for the annual payments to the grantor.

The Benefits

There are significant benefits for the property which the grantor transfers to the trust:

1. Whatever is left in the Trust at the time of the grantor's death will pass to the beneficiaries completely free of estate and gift taxes.

2. This arrangement does not trigger any gift tax consequences no matter how much trust assets are worth.

3. Trust assets will not need to go through probate when the grantor dies.

More Positives

The deferral of Capital Gains Taxes can produce a dramatic increase in the growth of trust

assets. That is not the only benefit:

1. The trust can make a cash sale. It is not forced to make an installment sale to the outside buyer in order to spread out the capital gain tax. This is an advantage because you never know whether the outside buyer will make all the payments on an installment sale.

2. The DST™ payment amount and term is designed for what you want per your needs and objectives.

3. The formal mechanics of the trust provide the discipline that some find helpful in providing for their own retirement.

4. The DST™ works equally well for single or married grantors.

Nothing is given away to charity as happens with the competing strategy known as a Charitable Remainder Trust.

The DST™ allows all the principal and accrued interest to be paid to the grantor. In most cases, the DST™ yields more bottom-line dollars to the prop-

erty seller than the Charitable Remainder Trust.

The DST™ may generate substantially more wealth over the long run than a taxed sale. Depending on your circumstance, it may be superior to a Charitable Remainder Trust, installment sale, private annuity, or like-kind property exchange in many respects.

Frequently Asked Questions

Q: How can I know the amount of my payments from the trust?

A: The payments are what you, the grantor, desire. Depending on your income goals and other objectives, the amount and length of term are your choice.

Q: What happens if I live longer or die sooner than my life expectancy?

A: Payments continue for the term that you have chosen. The term can be extended. After your death (or the surviving

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