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LEGAL LIMITATIONS ON THE POWER OF A COOPERATIVE'S BOARD OF DIRECTORS TO REJECT SUBLEASE APPLICATIONS,

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The rights and obligations of cooperatives and their shareholders are defined primarily by a proprietary lease. Many proprietary leases require the prior written consent of the cooperative's Board of Directors to any proposed sublease. The power of a cooperative Board to reject a sublease application, however, is not unlimited.

A Board may not refuse to approve a sublease application based on any grounds that violate either state or federal anti-discrimination laws. Under the New Jersey Law Against Discrimination, a Board may not refuse to sublease a unit because of the race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, or sex of the applicant. In addition, it is unlawful to discriminate against any sublease applicant because of a handicap of any intended occupant of the apartment. The term "handicap" is defined very broadly by the law and includes, by way of example, alcoholism, physical and psychological disabilities, AIDS or HIV infection. Federal law contains similar prohibitions.

A Board also may not refuse to lease an apartment to a person because his family includes children under 14 years of age. Nor may a Board discriminate against a blind or deaf person. (Lease provisions prohibiting pets do not apply to guide dogs.) But it is not illegal to refuse to lease an apartment because of the poor creditworthiness of the applicant.

Although many Offering Statements and Plans of Cooperative Organization prohibit a cooperative from refusing a sublease or assignment based on "race, religion or color," the current anti-discrimination laws prohibit such discrimination on many more grounds. These laws take precedence over the Offering Statements.

Moreover, although Offering Statements frequently state that no reason is required for a Board to refuse a requested sublease, court decisions from New Jersey and other states suggest that a Board may not arbitrarily refuse to sublet an apartment unit. Instead, a Board may need to have a reason for its refusal to approve a sublet. One New Jersey court has indicated that a Board decision to impose an overall policy restricting subletting must be based on reasonable business judgment and may not be unreasonable, arbitrary or capricious. It is quite possible that a New Jersey court would impose the same standards on a Board's decision on a specific sublease application.

In addition, and by way of example, if a cooperative shareholder seeks sublease approval to avoid defaulting on his maintenance obligations, a strong argument can be made

that the cooperative may not refuse its consent to a suitable subtenant. If the cooperative unreasonably rejects a suitable subtenant, a court might hold that the cooperative violated its duty to take reasonable steps to reduce, or "mitigate", its damages (lost maintenance from the defaulting shareholder), and the cooperative might be barred from suing the shareholder for breaching the proprietary lease.

Although New York law is not binding on New Jersey's courts, it is helpful to review on cooperative issues. Two New York court decisions reached different results on the question of whether the refusal to sublet a cooperative apartment must be reasonable, and if so, what the reasonable criteria are that a Board may use in determining whether or not to grant the sublease request. One decision stated that the standards for suitability of a subtenant include the proposed subtenant's financial capabilities, the size of the family and whether the apartment will be used for an unsuitable or improper purpose. The second decision upheld a proprietary lease that stated that any consent to subletting may be subject to such conditions as the Board may impose, without any limitation on the right of the Board to grant or withhold consent. The court further stated that a Board's rejection of a sublease application could not be reviewed by the courts. The court also observed "there is no reason why the owners of the cooperative apartment house could not decide for themselves with whom they wished to share their elevators ... facilities ... responsibilities in their home." Thus, the two New York courts that have considered the issue have split. One court limited the Board's right to refuse consent by a rule of reasonableness and the other court stated that (absent discriminatory purposes) Boards have an absolute right not to agree to a sublet for any reason or no reason at all.

Cases in other states also have considered the proper grounds upon which a Board may refuse to consent to a sublease. Although the cases do not exhaustively list permissible areas of inquiry, the courts have approved inquiry into the financial ability of the applicant to pay and social reasons. One court has stated that since the "basic social reason is that the shareholders shall be living in close proximity to one another, they have an interest in seeing that their neighbors are friendly and like-minded about matters of common concern such as noise, pets, et cetera." One other court has stated that these are legitimate considerations, adding that whether a potential sublessee would have annoying habits as a neighbor is relevant. These cases are unanimous in stating that if a Board of Directors withholds consent to sublease, such refusal must be reasonable in light of the significant needs and purposes of the cooperative. Thus, a Board should tailor its questions to further the needs and purposes of cooperative living.

To summarize:

- (i) a Board may not ask questions that touch upon areas protected by state and federal anti-discrimination laws;
- (ii) a Board may ask questions relating to the applicant's financial qualifications;
- (iii) a Board may ask questions pertaining to social considerations, but such questions should reasonably relate to the significant needs and purposes of cooperative living; and
- (iv) a Board should avoid summary denials of sublease applications that are unsupported by reasons justifying the refusal.