Association of the Bar of the City of New York
Committee on Cooperative and Condominium Law

Memorandum in Opposition to Intro. 504

November, 2005

The Committee on Cooperative and Condominium Law (the "Committee") has reviewed the proposed local law, Intro. 504, that would amend the New York City Human Rights Law in order to require apartment cooperative boards to set forth in writing specific reasons for every withholding of consent to the sale of an apartment. The Committee strongly opposes Intro. 504 for the reasons set forth below.

<u>It Has Been Established in New York that Cooperative Boards May Withhold Consent for Any Reason Other Than a Discriminatory Purpose</u>.

It is a fundamental aspect of apartment cooperatives in New York that their governing boards may withhold consent to the sale of an apartment for any reason or no reason as long as they do not act in an unlawful, discriminatory manner.[1] Most proprietary leases (if not all) for New York City cooperatives grant this broad power to the board because it is the most important way in which the cooperative can control the members of its community, which is a key attribute of cooperative living. As the New York Court of Appeals has stated most recently: "The very concept of cooperative living entails a voluntary, shared control over rules, maintenance and *the composition of the community*."[2] Earlier, the Court had observed that "there is no reason why the owners of the co-operative apartment house could not decide for themselves with whom they wish to share their elevators, their common halls and facilities, their stockholders' meetings, their management problems and responsibilities and their homes."[3]

The only limitation imposed on cooperative boards in their decision as to whom shall enter the cooperative's community is that such boards may not behave in an unlawful discriminatory manner. In New York City, Section 8-107.4 of the Administrative Code prohibits a cooperative board from acting in a discriminatory manner in connection with the sale of an apartment. Furthermore, the New York City Human Rights Commission enforces such law and provides a free complaint mechanism for those affected by discrimination prohibited by the law.

The Committee supports the rigorous enforcement of the New York City Human Rights Law in the cooperative context and supports any action that would appropriately improve such enforcement. Nevertheless, the Committee respectfully disagrees with the drafters of Intro. 504

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[1] *Weisner v. 791 Park Avenue Corporation*, 190 N.Y.2d 426, 160 N.E.2d 720, 190 N.Y.S.2d 70 (1959).

[2] *40 West 67th Street v. Pullman*, 100 N.Y.2d 147, 790 N.E.2d 1174, 760 N.Y.S.2d 745 (2003).

[3] *Weisner*, *supra* note 1, at 434, 160 N.E.2d at 724, 190 N.Y.S.2d at 75.

who maintain that such new legislation is necessary to enhance the enforcement of the existing Human Rights Law. The actual benefits that might be provided by Intro. 504 are doubtful and are far outweighed by the burdens it will place on all the cooperative boards who review apartment purchase applications in a legal and appropriate manner.

The Proposed Legislation Will Not Discourage or Expose Unlawful Discriminatory Acts by Cooperative Boards.

The Committee does not doubt that occasionally (although we do not know how frequently) a cooperative board will withhold consent from the sale of an apartment for an unlawful discriminatory purpose. However, it is the experience of the Committee members that the vast majority of denials by coop boards are due either to the financial inadequacy of the prospective purchaser or perceived flaws in the purchaser's character, both of which reasons are legitimate under the terms of the proprietary lease and the law.[4] Furthermore, most boards make certain that any decision to withhold consent from a sale complies with all applicable laws.[5]

It is a harsh truth that if a cooperative board wants to reject a purchaser for an unlawful discriminatory reason, it will proceed to do so and, knowingly engaging in unlawful behavior, will lie about it. Requiring the board to set forth such lie in a certified statement as required by Intro. 504 might, but very well might not, deter the board from proceeding in an unlawful fashion. Intro. 504 does not permit a court to examine the veracity of the required statement; it simply prohibits a board from contradicting such statement in a subsequent proceeding. It imposes penalties for the failure to issue such statement or delay in doing so, not for the contents of the statement. These penalties will not deter discriminatory actions but will deter legitimate board decisions.

The Proposed Legislation Will Impose Undue Burdens on Cooperative Board Members and Have a Chilling Effect on the Purchase Application Process.

Despite the publicity garnered by luxury cooperatives in New York City, most cooperatives have modest financial reserves, and most cooperative boards are composed of hard working New Yorkers who devote precious time to serve on such boards. These boards try to operate as fairly and efficiently as possible, and they carefully evaluate every apartment sale, which evaluation, in today's market of ever increasing prices and uncertain loan interest rates, has become a difficult task. The board first makes certain that the prospective purchaser can afford the carrying charges of the apartment, and then, if the purchaser seems financially secure, interviews the purchaser to determine if he or she will be, in the words of *Weisner*, someone with whom they wish to share their homes. This is the process for the vast majority of coop apartment sales and it is completely legal. Unfortunately, Intro. 504, although well-intentioned, will have a chilling effect on this process by deterring rejections of purchasers for legitimate reasons.

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[4] *Id.*

[5] The most powerful deterrent against impermissible behavior remains the *Biondi* cases, in which the federal court for the Southern District of New York awarded punitive damages against a coop board member for discrimination and then the Court of Appeals held that the cooperative could not indemnify the member against such award. *Broome v. Biondi*, 17 F. Supp.2d 211 (S.D.N.Y. 1997); *Biondi v. Beekman Hill House Apartment Corp.*, 94 N.Y.2d 659, 731 N.E.2d 577, 709 N.Y.S.2d 861 (2000).

1. Requiring the cooperative board to set forth its reasons for every rejection in a detailed written statement will inhibit the board's honest and fair review of a purchaser's application and interview. A cooperative board, just like an employer, needs a certain amount of privacy in which to make uncomfortable decisions. Just as an employer is not required to tell a rejected job applicant why he or she did not get the job, thereby sparing the applicant's feelings as well as the employer's, so too a cooperative board should not be required to tell a rejected purchaser that he or she was rejected because they don't have enough money or, even worse, because their character was unsuitable. What board wants to set forth in a written statement, as required by Intro. 504, that "we are rejecting the purchaser because he appeared arrogant, selfish, and anti-social and we don't want such people in our building"? Even more important, what rejected purchaser wants to read such a statement? And yet, such reason is a perfectly legitimate and lawful reason for rejecting a purchaser. The result of Intro. 504 will most likely be that boards will bend over backwards to approve a purchaser that they might otherwise reject, simply to avoid the ugly confrontation that 504 requires.

2. Another fundamental flaw of 504 is the requirement that the statement must include the source of any negative information about the purchaser received by the cooperative board. References are a key part of the purchase application in any cooperative. If 504 is enacted, no person or entity would ever set in writing anything negative about a prospective purchaser. 504 would immediately nullify any practical purpose of references in the application process.

3. The statement mandated by Intro. 504, which must also include statistics on the cooperative's sales for the prior three years and provides for a short time frame within which the certified statement must be issued, will require the involvement of the cooperative's managing agent and counsel, increasing the cooperative's administrative and financial burdens. The law will turn the rejection of a purchaser into an expensive and time-consuming process and once again, encourage boards to accept all purchasers, which is not a legitimate purpose for the prospective legislation.

<u>The Proposed Legislation Would Overturn a Longstanding Body of Case Law</u>.

While the Council's powers are generally very broad, laws adopted by the Council may not be "inconsistent" with constitutional or general law. The cases define "inconsistent" as imposing prerequisites or additional restrictions on rights under state law so as to inhibit the operation of the state's general laws.[6] There is no case law limiting the application of this principle to state statutes, as opposed to general common law. Here, we have a well-established body of state common law that upholds the right of co-operative boards to disapprove apartment transfers to prospective purchasers with or without reason, provided that anti-discrimination laws are not breached. This case law dates back to New York Court of Appeals decisions in the *Weisner* case, the *Levandusky* case and, most recently, the *Pullman* case.[7] Scores of intermediate

[6] *New York State Club Ass'n v. The City of New York*, 69 N.Y.2d 211, 505 N.E.2d 915, 513 N.Y.S.2d 349 (1987).

[7] *Weisner*, *supra* note 1; *Levandusky v. One Fifth Avenue Apartment Corp.*, 75 N.Y.2d 530, 553 N.E.2d 1317, 554 N.Y.S.2d 807 (1990); *Pullman*, *supra* note 2.

appellate and lower court decisions have followed these principles, which are also incorporated in the constitutional documents—the proprietary leases—of many (if not all) cooperative housing corporations. The Council's proposed bill is inconsistent with this body of law in that the restrictions it imposes—requiring that boards certify the reasons for disapproval or be penalized—would inhibit a coop board's exercise of the right to disapprove of an apartment transfer with or without reason. Where there is such a longstanding body of case law, the City Council should not overturn it with legislation that does much more harm than any marginal good.

The Proposed Legislation Will Cause an Increase in Disputes Even Though a Rejection is Legally Permissible.

Intro. 504 is an invitation to proceed to the courts.

This prospective legislation will only result in an increase in actions for reasons unintended by the drafters. Intro. 504 hands a huge stick to sellers, purchasers and brokers that can be used even though a cooperative board has behaved legally. Every cooperative board will face a potential challenge to a legitimate exercise of its power to reject a purchaser, a power upheld by the New York Court of Appeals in *Weisner* and more recently in *Pullman*. The threat of legal action by every rejected purchaser, and even more chilling, the brokers involved in the disapproved sale, will discourage cooperative boards from fulfilling their permissible duties.

Intro. 504 also provides rejected purchasers two bites in litigation. In one section, the proposed law provides that neither the apartment corporation nor its board may introduce evidence concerning its rejection that was not set forth in the required certified statement.[8] In the following section, it then provides that "[n]o action or proceeding commenced pursuant to this chapter shall determine or purport to determine either the genuineness of the reasons provided in the statement required . . . . or shall determine any question of whether any person has committed an unlawful discriminatory practice", but "[i]f a judgment rendered pursuant to an action or proceeding commenced pursuant to this chapter purports to do so, a person shall nevertheless retain all rights to commence an action or proceeding alleging the commission of an unlawful discriminatory act, and insofar as any judgment rendered pursuant to this chapter purports to make findings regarding either genuineness or whether an unlawful discriminatory practice has been committed, such purported findings shall not be given any force or effect in any other action or proceeding."[9] Thus, a rejected purchaser could bring an action against a cooperative for failure to comply with the terms of the new law, and if in such proceeding it is determined that the cooperative did not behave in an impermissible, discriminatory manner, the purchaser could still commence a new action for discrimination. These proposed provisions expose cooperatives and their boards to multiple actions on the same issue and invite frivolous litigation.

The Financial Penalties Set in the Legislation are Draconian and Potentially Impermissible and May Not Be Covered by Directors and Officers Liability Insurance.

[8] Proposed N.Y.C. Admin. Code § 8-1107.

[9] *Id*. § 8-1108.

Intro 504 imposes stiff penalties for a boards' failure to issue the required statement, as follows: for the first failure, no less than $1,000 and no more than $15,000; for the second failure, no less than $5,000 and no more than $20,000; for the third or any subsequent failure: no less than $10,000 and no more than $25,000;[10] and for a willful noncompliance, punitive damages.[11] The required statement must be issued within five business days after the board has made its decision to withhold consent.[12]

These penalties are draconian both by their excessive amounts and the fact that they would not be covered by the cooperative's directors and officers insurance. Furthermore, under the *Biondi* decision, a cooperative would not be able to indemnify the board members from such penalties, and every board member would personally liable.[13] The threat of such exposure for an unwitting noncompliance of a board member otherwise performing his duties in a legitimate manner will undoubtedly discourage reasonable persons from serving on a cooperative board.

The Committee supports any measure that will successfully deter discriminatory behavior, but it can only protest legislation such as Intro 504 that will personally expose board members to harsh penalties for legitimate behavior and will deter dedicated, honest, and fair persons from serving on cooperative boards.

The Real Effect of Intro. 504 is to Deter Boards from Withholding Consents to Sales.

Intro. 504 purportedly seeks to prevent cooperative boards from engaging in unlawful discriminatory behavior. However, judging from its probable effects as set forth above, it seemingly seeks to discourage boards from withholding consents to apartment sales, which is an impermissible purpose in light of the Court of Appeals' pronouncements of the law in *Weisner*, *Levandusky*, and *Pullman*. A board that would otherwise be permitted to reject a sale under New York law would, under 504, face drawn out disputes with rejected purchasers, disgruntled sellers, and disappointed brokers, not to mention harsh financial penalties not covered by its insurance. The result will only be a decrease in legitimate board refusals to consent to sales. One might not like the fact that cooperative boards have the power to prevent the sale of an apartment to a specific purchaser except for an unlawful discriminatory purpose, but such power is a fundamental, if not the most important, attribute of cooperative ownership, imbedded in the law of New York as acknowledged and ratified numerous times by its highest court. The Committee cannot stress how important is that such law not be eradicated by the enactment of Intro 504.

Conclusion

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[10] *Id*. § 8-1105.

[11] *Id*. § 8-1106.b.

[12] *Id*. § 8-1104.a.

[13] *Biondi v. Beekman Hill House Apartment Corp., supra*, note 5.

The Committee acknowledges that discrimination in housing, including apartment cooperatives, against persons protected under city, state, and federal civil rights laws remains a problem that we must seek to eradicate by all legitimate means, and the cooperative and condominium bar plays an important role in the enforcement of such laws. Nevertheless, the Committee feels very strongly that the legislation proposed in Intro. 504 will not legitimately serve to prevent discrimination or assist complainants who have been denied housing due to unlawful discrimination. It will only prevent discrimination by having the overly broad effect of preventing all rejections of cooperative apartment applicants, the majority of which are legitimate and legal rejections. The better approach would be to strengthen the existing civil rights laws by increasing penalties for proven discrimination and providing enhanced legal services for victims of discrimination, not by restricting cooperative boards from exercising their permissible powers in a sensible manner.