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THE APPLICATION OF CIVIL RIGHTS LAWS TO HOUSING COOPERATIVES: ARE CO-OPS BASTIONS OF DISCRIMINATORY EXCLUSION OR SELF-SELECTING MODELS OF COMMUNITY-BASED LIVING?

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I. Introduction

New York City has the largest market for cooperative apartments in the nation. The popularity of cooperatives is due, at least in part, to their self-governing aspect, which is effectuated by a board of directors. Self-governance enables tenant-shareholders to carefully maintain and control their living environment including who gains admission to the cooperative. The courts grant cooperative boards great discretion in the management of their affairs and usually defer to their decisions when challenged. This general rule is rooted in the seminal case of *Levandusky v. One Fifth Avenue Apartment Corp.*,[1] in which the New York Court of Appeals held that a standard analogous to the deferential business judgment rule[2] was to be applied when co-op board decisions are challenged.

Cooperative self-governance, however, occasionally gives rise to disputes and litigation between cooperative boards and tenant-shareholders when cooperation breaks down and individual self-interest takes over. Also, disputes sometimes arise between cooperatives and prospective purchasers when cooperative boards, in their zeal to tightly control the make-up of the cooperative population, reject an applicant. When an applicant claims that the rejection was based on their race, religion or other protected class, courts will not hesitate to review the cooperative's decision-making

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1. 75 N.Y.2d 530, 553 N.E.2d 1317, 554 N.Y.S.2d 807 (1990).

2. The business judgment rule prevents the court's interference with the actions and decisions of corporate directors when they exercise good faith and honest judgment in making business decisions. *Id.* at 537-38, 553 N.E.2d at 1321, 554 N.Y.S.2d at 811.

process and apply civil rights laws despite their general reluctance to do so.

New York City has one of the nation's broadest civil rights laws applicable to housing cooperatives. The city law, combined with federal and state protections, provides potential cooperative residents with an array of legal options for pursuing broad relief when they believe their rejection was based on unlawful discrimination. The numbers reveal, however, that despite numerous allegations of systematic and individual discrimination in the cooperative housing market, few claims are pursued. This article reviews reported cases, mostly in New York State, and identifies trends and common principles among them.

Part II provides an overview of the cooperative housing market in New York City and discusses statistical and anecdotal evidence of discrimination within that market. Part III discusses the legal framework of housing cooperatives and specifically focuses on co-op board decision-making power concerning share transfers. Part IV provides an overview of city, state and federal anti-discrimination laws applicable to cooperatives.

Part V, the heart of the article, focuses on cases in which anti-discrimination laws have been applied to cooperatives. It includes a discussion of the seminal case *Robinson v. 12 Lofts Realty, Inc.*[3] as well as a review of objective and subjective factors raised by cooperatives defending against discrimination claims. Part VI contains recommendations for cooperatives and prospective applicants.

II. Overview of Cooperative Housing Market

Reviewing the application of the city's Human Rights Law to the sale of cooperative housing units reveals the important role this form of home ownership plays in the city's housing market. In 1984 there were 247,000 cooperative apartments in New York City.[4] By 1995, the number of cooperative apartments increased to 416,000, housing over one million New Yorkers.[5] Although approximately half the city's cooperative apartments are in Manhattan, they exist in all five boroughs as well and are generally

3. 610 F.2d 1032 (2d Cir. 1979).

4. N.R. Kleinfield & Tracie Rozhon, *In Flat Market, Co-op Life Has Ups and Downs*, N.Y. TIMES, Oct. 30, 1995, at A1, B2 (Chart as corrected on November 2, 1995).

5. *Id.*

accessible to all socio-economic groups.[6] Cooperative ownership is relatively rare outside of New York City, where 95% of all such units in the nation were registered in 1980.[7]

The rapid proliferation of cooperative apartments in New York City has made this form of ownership virtually impossible for New York home buyers to ignore. Navigating the maze of often arbitrary application procedures has become a rite of passage among urban dwellers who wish to join these "private clubs." Tales of befuddled applicants facing hostile interviewers, malicious inquiries, unreasonable financial demands and baffling rejections have become a colorful, if disconcerting, part of urban folklore.[8] Although these tales may entertain, amuse and elicit expressions of sympathy, there is much at stake in the cooperative application process.

Behind the scenes, cooperatives enjoy a unique form of self-governance through their boards of directors. Legal commentators describe cooperative boards as "residential private governments exercising legislative . . . powers over those living within their territorial boundaries."[9] This power extends to those who wish to purchase cooperative shares.

The board of directors' role in the transfer of cooperative shares ostensibly protects each shareholder's monetary investment and the building's financial integrity through the selection of financially sound applicants. Cooperative boards also maintain the building's quality of life and social exclusivity through the selection process which serves as a communal screen allowing "club" admission only to those who "fit in." Given increased competition for units, and the economic instability of recent times, cooperative boards are de-

6. *Id.* "Four times the number of co-ops exist today than in 1982, and they sell for $15,000 as well as $15 million." *Id.*

7. Stuart Moskowitz, *Cooperative Apartments: The Enforceability of Transfer Restrictions and the Impact of Bankruptcy*, 18 REAL EST. L.J. 142, 143 n.4 (1989); Robert Nelson, Note, *Examining Cooperative Conversion: An Analysis of Recent New York Legislation*, 11 FORDHAM URB. L.J. 1089, 1089 (1983)(citing OFFICE OF POLICY AND DEVELOPMENT RESEARCH, U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, PUB. NO. PB81-118234, THE CONVERSION OF RENTAL HOUSING TO CONDOMINIUMS AND COOPERATIVES: A NATIONAL STUDY OF SCOPE, CAUSES AND IMPACTS: XI-1 (1980)).

8. *E.g.*, Tracie Rozhan & N.R. Kleinfeld, *Getting Into Co-ops: The Money Bias*, N.Y. TIMES, Oct. 31, 1995, at A1; Peter Hellman, *Co-op Board Hell*, NEW YORK MAG., Nov. 6, 1995, at 27; Jay Romano, *Passing a Co-op Interview*, N.Y. TIMES, July 30, 1995, § 9, at 5.

9. Note, *The Rule of Law in Residential Associations*, 99 HARV. L. REV. 472, 472 (1985)(citations omitted).

manding more personal information from applicants and imposing stricter social and financial qualifications.[10]

Although there are no city-wide statistics on the percentage of applications rejected by cooperative boards, realtors estimate that the rejection rate is 5% or less.[11] On its face, this rejection rate seems low. The low estimate, however, does not necessarily mean that unlawful discrimination is absent from the co-op application process. Real estate professionals suggest that the low rejection rate results from applicants self-selecting buildings where they believe they are welcome. Real estate professionals also admit that there is significant discriminatory steering by brokers who have knowledge of where a particular applicant will "fit in."[12] Without this rigorous pre-screening of applicants, it is estimated that far more applicants would be turned down.[13]

Anecdotal accounts of self-selection by applicants and discriminatory steering are supported by statistical data. A recent series of New York Times articles underscored the concern that a seemingly low rejection rate by cooperative boards disguises a racial imbalance that may be attributed to unlawful bias. For example, as illustrated in Table 1, the overwhelming majority of co-op owners in New York City are white.

As demonstrated by the Tables 2 and 3, the underrepresentation of minority groups in cooperative units is apparent even when controlling for income levels across racial lines. In short, minority group members are less likely to own cooperative apartments than whites at all economic levels.

The New York State Court of Appeals has vested cooperative boards with broad discretion concerning their decision-making. Consequently, few rejected buyers file discrimination complaints with government agencies or courts. A cooperative board's sweep-

10. Dee Wedemeyer, *Co-ops Tighten Standards for Buyers*, N.Y. TIMES, July 8, 1984, § 8, at 1.

11. *See* Rozhon & Kleinfeld, *supra* note 8, at A1 (reporting that the Corcoran Group registered a turndown rate of 2.5% in 1995 and indicating that this percentage is on the rise); Michael DeCourcy Hinds, *When a Co-op Board Rejects a Buyer*, N.Y. TIMES, Nov. 2, 1986, § 8, at 1, 20 (indicating that few buyers rejected by co-op boards challenge the decision).

12. There is an implicit acknowledgment among brokers that categories of unpopular applicants for "restrictive" or "conservative" co-op buildings exist. For example, unmarried women, gay and lesbian couples, families with children, lawyers and physicians are some of the disfavored categories. Some brokers simply do not take these applicants to such "restrictive" buildings. *See* Rozhan & Kleinfeld, *supra* note 8, at A1.

13. *Id.*; Hinds, *supra* note 11, at 1; Iver Peterson, *As Co-ops Spread, Discrimination Concerns Grow*, N.Y. TIMES, Feb. 25, 1990, § 10, at 5.

TABLE 1

RACE OR ETHNICITY	ALL NYC HOUSEHOLDS	NYC CO-OP HOUSEHOLDS
White	48.4%	79.9%
Black	23.4%	6.3%
Hispanic	20.7%	7.4%
Asian	5.9%	5.2%
Other	1.6%	1.2%

Source: Tracie Rozhon & N.R. Kleinfeld, *Getting into Co-ops: The Money Bias*, N.Y. TIMES, Oct. 31, 1995, at B2 (Chart citing Prof. Andrew A. Beveridge, Sociology Department, CUNY at Queens College, from 1993 New York City Housing and Vacancy Survey).

TABLE 2

RACIAL OR ETHNIC IDENTITY	PERCENTAGE OF CO-OP HOMEOWNERS WHO EARN BETWEEN $50,000 AND $99,999
White	30%
Black	14%
Hispanic	15%
Asian	15%

Source: Tracie Rozhon & N.R. Kleinfeld, *Getting into Co-ops: The Money Bias*, N.Y. TIMES, Oct. 31, 1995, at B2 (citing Prof. Andrew A. Beveridge, Sociology Department, CUNY at Queens College, from 1993 New York City Housing and Vacancy Survey).

TABLE 3

RACIAL OR ETHNIC IDENTITY	PERCENTAGE OF CO-OP HOMEOWNERS WHO EARN BETWEEN $100,000 AND $199,999
White	44%
Black	11%
Hispanic	18%
Asian	27%

Source: Tracie Rozhon & N.R. Kleinfeld, *Getting into Co-ops: The Money Bias*, N.Y. TIMES, Oct. 31, 1995, at B2 (Chart citing Prof. Andrew A. Beveridge, Sociology Department, CUNY at Queens College, from 1993 New York City Housing and Vacancy Survey).

ing powers, however, are not absolute. While it is true that cooperative boards may reject applicants for any non-discriminatory reason, or for no reason at all, the courts draw the line at civil-rights violations. They will carefully evaluate challenged cooperative board decisions to determine whether discrimination was a fac-

tor. Given the low vacancy rate of housing units in the city, the proliferation of co-ops, and the anecdotal and statistical evidence supporting allegations of discrimination in the application process, it is important to examine the power of cooperative boards to veto the housing choices of New Yorkers.

III. General Legal Parameters Applicable to Housing Cooperatives and Board Decision-making

A. Overview of the Legal Foundation of Housing Cooperatives

Housing cooperatives are *sui generis* in nature.[14] Most housing cooperatives are stock corporations[15] formed pursuant to the New York Business Corporation Law, the Cooperative Corporation Law or the Not-for-Profit Corporation Law.[16] Under the stock corporation structure, the cooperative holds title to the premises and leases units to tenant-shareholders, who own shares in the cooperative corporation.[17]

The certificate of incorporation, corporate by-laws and proprietary lease provide the framework for the cooperative's operation and governance.[18] Housing cooperatives are self-governed by a

14. Alexy v. Kennedy House, Inc., 507 F. Supp. 690, 697 (E.D. Pa. 1981); Jones v. O'Connell, 458 A.2d 355, 358 (Conn. 1983); Plaza Road Cooperative, Inc. v. Finn, 492 A.2d 1072, 1075 (N.J. Super. Ct. App. Div. 1985); State Tax Comm'n v. Shor, 43 N.Y.2d 151, 154, 371 N.E.2d 523, 524, 400 N.Y.S.2d 805, 806 (1977); Chemical Bank v. 635 Park Avenue Corp., 155 Misc. 2d 433, 435, 588 N.Y.S. 2d 257, 258 (N.Y. Sup. Ct. 1992); Sanders v. Tropicana, 229 S.E.2d 304, 307-08 (N.C. Ct. App. 1976). *See generally* 2 PATRICK J. ROHAN & MELVIN A. RESKIN, REAL ESTATE TRANSACTIONS: HOUSING COOPERATIVE LAW AND PRACTICE, § 1.01 (Bender 1995).

15. Nelson, *supra* note 7, at 1091; ROHAN & RESKIN, *supra* note 14, § 1.01(3)(d); Lawrence Nussbaum III, *Transfer Restrictions on Cooperative Apartments: Tyrannical Reins or Necessary Restraints?*, 30 WASH U. J. URB. & CONTEMP. L. 147, 150 (1986).

16. *See* N.Y. BUS. CORP. § 401 *et seq.*; N.Y. COOP. CORP. LAW § 10 *et seq.*; N.Y. NOT-FOR-PROFIT CORP. LAW § 401 *et seq.*; N.Y. GEN. BUS. LAW § 352-e *et seq.*; *see also*, Arthur E. Wallace, Comment, *Restrictions on the Use of Cooperative Apartment Property*, 13 HASTINGS L.J. 357 (1962); Philip Smith, Comment, *A Survey of the Legal Aspects of Cooperative Apartment Ownership*, 16 U. MIAMI L. REV. 305 (1961); Note, *Cooperative Apartment Housing*, 61 HARV. L. REV. 1407 (1948).

17. ROHAN & RESKIN, *supra*, note 14, § 1.01(1). There are alternative methods of cooperative formation and structure. Under the co-ownership method, tenants are co-owners of the building through joint tenancy or tenancy in common agreements, and have exclusive occupancy rights. This form of ownership is extremely impracticable. *Id.* § 1.01(3). Under the trust structure, a trust is established and title to the building is transferred to the trust. A trustee may manage the building or hire a manager. The trust declaration contains the provisions governing the co-op. Under this arrangement, tenant-shareholders have lesser control over management. *See* Nussbaum, *supra* note 15, at 150 n.22; ROHAN & RESKIN, *supra* note 14, at § 1.01(3).

18. The certificate of incorporation or corporate charter must be filed with the state and is a prerequisite to the cooperative taking any action as a corporate entity.

board of directors as established within the documents listed above.[19] Boards have extensive control over both shareholder and tenant rights.[20] The board may be empowered to make decisions covering a variety of co-op operations including budgets, maintenance fees and exterior appearance standards.[21]

The unique nature of cooperative ownership gives each tenant-shareholder a financial interest in the corporate entity which owns the building, but without ownership rights to an individual unit. Thus, the shareholder interest in a housing cooperative does not fit neatly into traditional categories of property ownership.[22] Many courts have discussed the "special nature" of cooperative ownership, noting that shareholders do not technically own their apartments, but do enjoy many of the benefits commonly associated

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N.Y. COOP. CORP. LAW §§ 11, 16, 40. The corporate by-laws delineate the tenant-shareholder's rights as well as the building's self-governance structure. ROHAN & RESKIN, *supra* note 14, at § 1.04(6). The occupancy agreement or proprietary lease defines the relationship between the corporation and tenant-shareholders and their mutual rights and obligations. The cooperative's foundation documents are to be read together in defining the contours of board power over shareholders. Fe Bland v. Two Trees Management Co., 66 N.Y.2d 556, 489 N.E.2d 223, 498 N.Y.S.2d 336 (1985); *Chemical Bank*, 155 Misc. 2d at 435, 588 N.Y.S.2d at 258-59 (citing All Seasons Resorts, Inc. v. Abrams, 68 N.Y.2d 81, 497 N.E.2d 33, 506 N.Y.S.2d 10 (1986)).

19. *See* Note, *An Exception to the Levandusky Business Judgment Rule: Owner and Shareholder Interests in Condominium and Cooperative Board Decisions*, 14 CARDOZO L. REV. 1021, 1022 (1993)[hereinafter *Exception to the Levandusky Rule*]; Moskowitz, *supra* note 7, at 147 (discussing board power over the transfer of shares); ROHAN & RESKIN, *supra* note 14, at Ch. 9.

20. *See Exception to the Levandusky Rule*, *supra* note 19, at 1022; Levandusky v. One Fifth Avenue Apartment Corp., 75 N.Y.2d 530, 536, 553 N.E.2d 1317, 1320, 554 N.Y.S.2d 807, 810 (1990):

> [T]he cooperative . . . association is a quasi government . . . . The proprietary lessees . . . consent to be governed, in certain respects, by the decisions of a board. Like a municipal government, such governing boards are responsible for running the day-to-day affairs of the cooperative and to that end, often have broad powers in areas that range from financial decisionmaking to promulgating regulations regarding pets and parking spaces.

21. *See Exception to the Levandusky Rule*, *supra* note 19, at 1021-22 n.3; ROHAN & RESKIN, *supra* note 14, at § 9.03(9)(a).

22. The nature of the shareholder's property interest is best described as a legal hybrid of both personal and real property. For example, cooperative ownership has been considered personal property in dispositions under a will, and real property under financial securities law. For further discussion see Rohan & Reskin, *supra* note 14, at § 1.01(2) (citations omitted); *Chemical Bank*, 155 Misc. 2d at 436, 588 N.Y.S.2d at 259; Harvey S. Epstein, *Weisner Revisited: A Reappraisal of a Co-op's Power to Arbitrarily Prohibit the Transfer of Its Shares*, 14 FORDHAM URB. L.J. 477, 491 (1986); Note, *Legal Characterization of the Individual's Interest in a Cooperative Apartment: Realty or Personalty?*, 73 COLUMBIA L. REV. 250, 260-64 (1973); Note, *Cooperative Apartments - A Legal Hybrid*, 13 U. FLA. L. REV. 123, 128 (1960).

with home ownership.[23] For example, cooperative mortgage interest payments and real estate taxes may be deducted from federal taxes. In addition, shareholders build equity and may take out home equity loans based on the value of their shares.[24]

The benefits of individual home ownership, however, are limited by the web of financial interdependence that the cooperative ownership structure creates. At the heart of the shareholders' financial interdependence is the common mortgage which financed the original purchase of the structure.[25] Each shareholder pays their *pro rata* portion of the cooperative's mortgage payment through a maintenance charge which bundles an array of co-op related expenses into one monthly payment.[26]

The cooperative's ability to make mortgage payments depends on each shareholder's ability to make timely maintenance payments.[27] If one or more shareholders default, other shareholders may be forced to make up the monetary difference.[28] A continued failure to cover shortfalls could lead to a foreclosure proceeding in which shareholders lose their apartments or equity investment. Thus, the ramifications of shareholder interdependence are weighty, and potentially fatal to each shareholder's property interest and occupancy rights.

The financial interdependence of shareholders is often cited as the primary justification for the co-operatives' power to set restraints on the shareholders' right to sell shares.[29] Courts have ac-

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23. *Shor*, 43 N.Y.2d at 154, 371 N.E.2d at 524, 400 N.Y.S.2d at 806; People *ex rel.* McGoldrick v. Sterling, 283 A.D. 88, 126 N.Y.S.2d 803 (1st Dep't 1953); Penthouse Properties, Inc. v. 1158 Fifth Avenue, Inc., 256 A.D. 685, 11 N.Y.S.2d 417 (1st Dep't 1939); California Coastal Comm'n v. Quanta Inv. Corp., 170 Cal. Rptr. 263 (Cal. Ct. App. 1980); Carolyn S. Bratt, *Cooperative Apartments: A Survey of Legal Treatment and an Argument for Homestead Protection*, 1978 U. ILL. L.F. 761.

24. *See California Coastal Comm'n*, 170 Cal. Rptr. 263; Epstein, *supra* note 22, at 487 n.51; Bratt, *supra*, note 23.

25. ROHAN & RESKIN, *supra* note 14, at § 5.01(2). *See also* Nelson, *supra*, note 7, at 1092.

26. ROHAN & RESKIN, *supra* note 14, at § 10.02(1)(a). In addition to the mortgage, the monthly assessment includes interest payments on the mortgage, capital outlays and operating expenses. The proprietary lease sets forth both the amount and method of payment. *See* Nussbaum, *supra* note 15, at 153 n.53.

27. *See* Nussbaum, *supra* note 15, at 155 n.60; Moskowitz, *supra* note 7, at 148.

28. ROHAN & RESKIN, *supra* note 14, at § 5.01(1). The remaining shareholders contribute to coverage of shortfalls on a pro rata basis according to their number of shares. The cooperative corporation may set up a contingency reserve in anticipation of such a short fall. *Id.* § 5.01(1), n.4.

29. *See* Moskowitz, *supra* note 7, at 148. For further discussion of the financial interdependence among shareholders, see *Cooperative Apartment Housing*, *supra* note 16, at 1414-16.

cepted co-op board oversight and control of the share transfer process, including their right to reject applicants, and have underscored the importance of the prospective purchaser's ability to meet co-op related financial obligations.[30] The court in *Mowatt v. 1540 Lake Shore Drive Corp.*[31] succinctly summarized this premise:

> [U]ltimately the tenant-shareholders must bear all the costs of the operation. If one tenant-shareholder fails to pay his shares, the others must, as a practical matter, make up the difference. There is, therefore, a direct and substantial economic interest in the choice of new tenant-shareholders who are financially responsible.[32]

Given the reality of financial interdependence, cooperative boards also oversee the shareholder application process and have the ultimate power to reject or accept applicants.[33]

B. Judicial Review of Co-op Board Decisions

The New York Court of Appeals decision in *Levandusky v. One Fifth Avenue Apartment Corp.*[34] gives cooperative boards broad discretion to conduct their affairs without judicial intervention. *Levandusky* applied a standard of review analogous to the business judgment rule when the decisions of cooperative boards are challenged.[35] Specifically, judicial review of board decisions is not available when the board acts in good faith, within the scope of its authority and in furtherance of the cooperative's interests.[36] In support of the standard, the court noted that:

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30. *See* Weisner v. 791 Park Avenue Corp., 6 N.Y.2d 426, 160 N.E.2d 720, 190 N.Y.S.2d 70 (1959); Moskowitz, *supra* note 7, at 148; Richard Siegler, *Refutation of a Discrimination Claim: Greenhouse Repairs*, N.Y. L.J., Jan. 3, 1996 at 3 [hereinafter Siegler, *Refutation*].

31. 385 F.2d 135 (7th Cir. 1967).

32. *Id.* at 137.

33. *Id.* Board oversight of the application process may be established by restricting the right to assign an apartment or sell corporate stock in the proprietary lease. *See* Nussbaum, *supra* note 15, at 156-57; ROHAN & RESKIN, *supra* note 14, at § 10.02(2). The by-laws and certificate of incorporation may also contain terms requiring board approval for share transfers. Epstein, *supra* note 22, at 487 n.12 (citations omitted).

34. 75 N.Y.2d 530, 553 N.E.2d 1317, 554 N.Y.S.2d 807 (1990).

35. *Id.* at 537, 553 N.E.2d at 1321, 554 N.Y.S.2d at 811. In *Levandusky*, the co-op board issued a "stop work" order to prevent the plaintiff-tenant from renovating his apartment. *Id.* at 534, 553 N.E.2d at 1319, 554 N.Y.S.2d at 809. Litigation commenced when Levandusky filed an article 78 proceeding to annul the stop work order. *Id.*

36. *Id.* at 538, 553 N.E.2d at 1322, 554 N.Y.S.2d at 812. In support of the deferential standard, the court noted that the proprietary lessees in a co-op consent to be

> "courts are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments. . . . [B]y definition the responsibility for business judgments must rest with the corporate directors; their individual capabilities and experience peculiarly qualify them for the discharge of that responsibility."[37]

Based on these and other considerations, the court concluded that the business judgment rule "best balances the individual and collective interests at stake."[38] Thus, *Levandusky* virtually insulated cooperative boards from judicial review in most aspects of board decision-making.

While the rule enunciated in *Levandusky* enhanced co-op board power in all aspects of property management, the court recognized the potential for board abuse of their discretion "through arbitrary and malicious decisionmaking, favoritism, discrimination and the like."[39] The rule clearly does not prohibit review of board decisions that are beyond the scope of the board's authority, made in bad faith or discriminatory in nature:

> Even when the governing board acts within the scope of its authority, some check on its potential powers to regulate residents' conduct, life-style and property rights is necessary to protect individual residents from abusive exercise . . . .[40]

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governed by a board comprised of members whom they have selected. *Id.* at 537, 553 N.E.2d at 1321, 554 N.Y.S.2d at 811.

37. *Levandusky*, 75 N.Y.2d at 539, 553 N.E.2d at 1322, 554 N.Y.S.2d at 812, *quoting* Auerbach v. Bennett, 47 N.Y.2d 619, 630-31, 393 N.E.2d 994, 1000, 419 N.Y.S.2d 920, 926-27 (1979).

38. *Id.* at 537, 553 N.E.2d at 1321, 554 N.Y.S.2d at 811. The court pointed to a number of other courts, inside and outside of New York, that have adopted the same standard of review for cooperatives and condominiums. *See, e.g.*, Kirsch v. Holiday Summer Homes, Inc., 143 A.D.2d 811, 533 N.Y.S.2d 144 (2d Dep't 1988); Schoninger v. Yardarm Beach Homeowners' Ass'n, Inc., 134 A.D.2d 1, 523 N.Y.S.2d 523 (2d Dep't 1987); Van Camp v. Sherman, 132 A.D.2d 453, 517 N.Y.S.2d 152 (1st Dep't 1987); Papalexiou v. Tower W. Condominium, 401 A.2d 280 (N.J. Sup. Ct. Ch. Div. 1979); Schwarzmann v. Association of Apt. Owners of Bridgehaven, 655 P.2d 1177 (Wash. Ct. App. 1982); Rywalt v. Writer Corp., 526 P.2d 316 (Colo. Ct. App. 1974).

In adopting a standard analogous to the business judgment rule, the Court of Appeals in *Levandusky* affirmatively rejected the reasonableness review applied below by the appellate division and as applied by other courts theretofore. For an extensive discussion of the reasonableness standard of review and comparison of that standard with the business judgment rule, *see generally Exception to the Levandusky Rule*, *supra* note 19.

39. *Levandusky*, 75 N.Y.2d at 536, 553 N.E.2d at 1320, 554 N.Y.S.2d at 810.

40. *Id.* at 537, 553 N.E.2d at 1321, 554 N.Y.S.2d at 811 (citing Note, *The Rule of Law in Residential Associations*, 99 HARV. L. REV. 472 (1985)).

Cooperative legal expert Richard Siegler surveyed twenty cases applying the *Levandusky* standard and concluded that *Levandusky* has not led courts to simply "rubber stamp" cooperative board decisions. On the contrary, courts have refused to enforce the decisions of cooperative and condominium boards in about half of the cases he surveyed.[41]

C. Board Authority Over Share Transfers

The documents prescribing the relationship between cooperatives and its shareholders often restrict the transfer of the proprietary lease and co-op shares by requiring the consent of the board of directors prior to a transfer.[42] While *Levandusky* provides a general rule of judicial deference to cooperative board decisions, a narrower line of case law defines the legal standards governing admission decisions. The courts began to define those legal standards in 1939 when the Appellate Division of the Supreme Court of New York decided *Penthouse Properties, Inc. v. 1158 Fifth Avenue, Inc.*[43]

In *Penthouse Properties*, the tenant-shareholder challenged the validity of the cooperative's restriction on her ability to transfer shares and assign her proprietary lease without the consent of the board or two-thirds of the stockholders. The court upheld the restriction, stating that "the special nature of the ownership of cooperative apartment houses by tenant owners require[s] that they be not included in the general rule against restraints on the sale of stock in corporations organized for profit."[44] Thus, *Penthouse Properties* validated restraints on alienation in the cooperative housing context, but did not pass judgment on whether a board may arbitrarily withhold consent to the transfer of co-op shares.

Twenty years later, in *Weisner v. 791 Park Avenue Corp.*,[45] the Court of Appeals addressed directly the issue of whether consent to transfer shares could be withheld arbitrarily. In *Weisner*, the plaintiff challenged a provision in the proprietary lease requiring that the tenant-shareholder not assign the lease or any interest

41. Richard Siegler, *The Aftermath of Levandusky*, N.Y. L.J., Mar. 2, 1994, at 3 (emphasis in original)[hereinafter Siegler, *Aftermath*].

42. *Chemical Bank*, 155 Misc. 2d at 435, 588 N.Y.S.2d at 259. That court noted that such consent requirements have been upheld despite arguments that they are an improper restraint on alienation. *See* Moskowitz, *supra* note 7, at 147; Nussbaum, *supra* note 15, at 156-57; ROHAN & RESKIN, *supra* note 14, at § 10.02(2) and App. D-2.

43. 256 A.D.2d 685, 11 N.Y.S.2d 417 (1st Dep't 1939).

44. *Id.* at 692, 11 N.Y.S.2d at 423.

45. 6 N.Y.2d 426, 160 N.E.2d 720, 190 N.Y.S.2d 70 (1959).

therein without the written consent of the board of directors, a majority of directors, or the lessees of record owning at least two-thirds of the corporation's stocks.[46] Plaintiff wished to purchase shares in the cooperative corporation and was refused the necessary consent without explanation. The court upheld the board's decision, concluding that absent a violation of an applicable anti-discrimination statute there was

> no reason why the owners of the cooperative apartment house could not decide for themselves with whom they wish to share their elevators, their common halls and furniture, their stockholder meetings, their management problems and responsibilities and their homes.[47]

Thus, the *Weisner* decision enhanced the cooperative board's discretion over share transfers by approving the arbitrary withholding of consent by the board, absent a violation of discrimination laws.

IV. Applicable Anti-Discrimination Statutes

Weisner and *Levandusky* established that the cooperative's "corporate veil" may be pierced when a cognizable claim is made pursuant to an anti-discrimination statute. As described below, housing cooperatives are covered by a panoply of anti-discrimination statutes. At the federal level, the Fair Housing Act of 1968, its 1988 amendments, and the 1866 Civil Rights Act are the primary providers of protection for shareholders. At the state level, sections of the Civil Rights Law, Executive Law and Real Property Law combine to provide prospective tenant-shareholders with broad coverage. In New York City, the Human Rights Law protects a wide range of classes from discrimination by cooperatives. A brief overview of these statutes is provided in Table 4.

V. Anti-Discrimination Statutes Applied to Housing Cooperatives

This Part will review cases which have applied anti-discrimination statutes to cooperatives. As will be discussed, some common principles and trends can be culled from the cases. Equally apparent, however, are the inconsistencies in approaches employed by courts in deciding such cases.

Whether a cooperative's reason for rejecting an applicant is based on objective or subjective factors affects the cooperative's

46. *Id.* at 431, 160 N.E.2d at 722, 190 N.Y.S.2d at 73.
47. *Id.* at 435, 160 N.E.2d at 724, 190 N.Y.S.2d at 75.

TABLE 4
STATUTORY PROTECTIONS AGAINST DISCRIMINATION BY HOUSING COOPERATIVES

SOURCE	PROTECTED CLASSES	COMMENTS
Federal Fair Housing Act of 1968 and 1988 amendments, 42 U.S.C. § 3601 *et seq.* ("Title VIII")	Race, color, religion, national origin, gender, disability, family status	Statute provides private right of action. 1988 amendments created complaint investigation and adjudication structure within the Department of Housing and Urban Development. Punitive damages limited to $1,000.
Federal Civil Rights Act of 1866, 42 U.S.C. §§ 1981-82	Race	Coverage limited to race and possibly ethnicity and national origin. Unlimited punitive damages.*
Federal Civil Rights Act of 1964, 42 U.S.C. § 2000(d) ("Title VI") **	Race, color, national origin, sex	Prohibits discrimination by any program or entity receiving federal funds.
New York State Executive Law § 296(5)(a)(1)	Race, creed, color, national origin, sex, disability, marital status	Applicability to co-ops is questionable.*** Provides for private right of action. The New York State Division of Human Rights investigates and adjudicates housing discrimination complaints.
New York State Civil Rights Law, § 19-a(1)	Race, creed, national origin, sex	Statute applicable to cooperatives only.
New York State Real Property Law § 235-f	All classes	Known as the "roommate" law; it prohibits landlord from restricting occupancy of residential premises to tenant or tenants and their immediate family.
New York City Human Rights Law § 8-101 *et seq.*	Race, creed, color, national origin, gender, age, disability, sexual orientation, marital status, alienage, citizenship status, occupation or because children would reside with the occupant	Provides for private right of action. The New York City Commission on Human Rights investigates and adjudicates housing discrimination complaints. Broad range of relief available.

* For a broader discussion of the independence of and differences between Title VIII and the Civil Rights Act of 1866 *see* JAMES A. KUSHNER, FAIR HOUSING: DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT AND REVITALIZATION § 1.05 (2d ed. 1995); ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW 304-05 (1983).

** In Emil v. Dewey, 66 A.D.2d 758, 411 N.Y.S.2d 865 (N.Y. App. Div. 1978) (mem.), *aff'd on other grounds*, 49 N.Y.2d 968, 406 N.E.2d 744, 428 N.Y.S.2d 887 (1980), the plaintiff asserted claims under the state Executive Law and Civil Rights Law. The First Department dismissed the claim holding that Civil Rights Law § 19-a does not cover marital status. The Court of Appeals affirmed the outcome based on the plaintiff's violation of the administrative scheme set forth in the Executive Law, but did not comment on the applicability of Executive Law § 296 to cooperatives.

Executive Law § 292(10) defines "housing accommodation" to include "any building, structure . . . intended, arranged, designed or to be used or occupied as the home, residence or sleeping place of one or more human beings." Thus, it is quite clear that this definition would encompass cooperatives, despite the First Department's pronouncement in *Emil*. Subsequent case law has been inconsistent. *See, e.g.*, 66-36 Yellowstone Blvd. Co-op Owners, Inc., 599 F. Supp. 79, 80 n.2 (E.D.N.Y. 1984) (granting plaintiff in co-op race discrimination case recovery under state executive law and federal law); Murphy v. 253 Garth Tenants Corp., 579 F. Supp. 1150 (S.D.N.Y. 1983) (applying executive law to cooperative, but holding that plaintiffs failed to establish claim); Bachman v. State Div. of Human Rights, 104 A.D.2d 111, 481 N.Y.S.2d 858 (N.Y. App. Div. 1984) (applying both Civil Rights Law §19-a and Executive Law § 296(2-a) to publicly assisted housing cooperative). *But see* Pardy v. Fountainhead Owners Corp., N.Y. L.J., Oct. 2, 1985, at 14 (N.Y. Sup. Ct.) (dismissing plaintiff's claim that cooperative rejected his application based on his daughter's young age on the grounds that such discrimination not covered by Civil Rights Law).

*** Other potential sources of federal protection include the Fourteenth Amendment's Equal Protection Clause. *See, e.g.*, Escalera v. New York City Hous. Auth., 425 F.2d 853 (2d. Cir.), *cert. denied*, 400 U.S. 853 (1970); Swann v. Gastonia Hous. Auth., 675 F.2d 1342 (4th Cir. 1982). *See* SCHWEMM, *supra* note *, at 333; KUSHNER, *supra* note *, at § 1.07.

Also, Executive Order 11,063, as amended, forbids discrimination based on race, religion, national origin or sex in housing that is owned, operated or assisted by the federal government. Exec. Order No. 11,063, 3 C.F.R. 652, 653 (1959-1963), *reprinted as amended in* 42 U.S.C. § 1982 (1994). *See* KUSHNER, *supra* note *, § 1.03.

ability to defeat a plaintiff's discrimination claim. In general, greater judicial deference is given to board decisions based on objective factors. The most commonly invoked objective factor is the prospective purchaser's inadequate finances.[48] On the other hand, reliance on subjective factors usually triggers more intense judicial scrutiny and hinders the cooperative's chances for success.

A. Robinson v. 12 Lofts Realty

The seminal case applying anti-discrimination laws to housing cooperatives is *Robinson v. 12 Lofts Realty, Inc.*,[49] in which the Second Circuit outlined the legal framework for analyzing cooperative board decisions. The plaintiff in *Robinson* was a black prospective purchaser who was rejected by the defendant cooperative despite being financially qualified. Plaintiff sought preliminary and permanent injunctions permitting him to purchase shares in the cooperative.[50]

The defendant cooperative did not dispute plaintiff's financial qualifications. Instead, the cooperative justified its decision to reject plaintiff based on what the court described as subjective factors. For example, despite plaintiff's vehement denials, the defendant relied on rumors that the plaintiff planned to use the apartment as an after hours club and put plumbing lines through another shareholder's ceiling. The court found these defenses noncredible and concluded that "a Fair Housing Act claim cannot be defeated by a defendant which relies on merely hypothetical reasons for the plaintiff's rejection."[51] Some board members also cited plaintiff's alleged hostility, arrogance and uncooperative behavior as a basis for the rejection.[52] The court also found these proffered reasons to be insufficient.

In holding for plaintiffs, the court's legal analysis focused on the plaintiff's objective qualifications and on eliminating subjective non-discriminatory reasons as the basis for his rejection.[53] Accord-

48. *See* Part V.B.1, *infra*, for a discussion of plaintiff's financial qualifications.

49. 610 F.2d 1032 (2d Cir. 1979).

50. The plaintiff brought the action under the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631, and the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 and 1982. The plaintiff's claim under § 1982 was dismissed because he failed to plead or prove that he was a U.S. citizen as required by the statute.

51. *Robinson*, 610 F.2d at 1040.

52. *Id.* at 1034-36.

53. *See* Smith v. Anchor Bldg. Corp., 536 F.2d 231, 233 (8th Cir. 1976) (citing Williams v. Matthews Co., 499 F.2d 819 (11th Cir. 1973), *cert. denied*, 419 U.S. 1021 (1974)):

ingly, the court placed great weight on plaintiff's objective qualifications to purchase the apartment. The court defined "qualified" to mean "financially qualified" within the context of establishing a *prima facie* case.[54] It did not consider any of the more subjective factors, such as the plaintiff's prospective compatibility with other shareholders, in assessing whether he was qualified. Instead, the court relied solely on plaintiff's finances.

To determine whether a defendant's justification for a rejection is a pretext for discrimination, *Robinson* instructs courts to "carefully scrutinize suggested reasons which are not objective in nature."[55] Courts are to look for explanations that are "subtle" and "synthetic," and they should also be "especially chary of permitting a [cooperative] to prevent, on the basis of easily fabricated subjective factors, a sale of housing by a willing seller to an objectively acceptable buyer."[56] The court stated that it would be especially relevant to determine whether such proffered reasons would have been sufficient to reject a white applicant.[57]

Finally, the court stated that even if some or all of defendant's reasons are genuine, "race need not be the sole motivating factor in a denial that has a discriminatory effect in order for the plaintiff to succeed in a Title VIII claim."[58] In fact, a court must hold that

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> [W]here a black rental applicant meets the objective requirements of a landlord, and the rental would likely have been consummated were he or she a white applicant, a prima facie inference of discrimination arises as a matter of law. If the inference is not satisfactorily explained away, discrimination is established.

54. The plaintiff in *Robinson* produced circumstantial evidence in support of the discrimination claim. When a plaintiff relies on circumstantial evidence a *prima facie* case must be established to build an inference of discrimination. The elements of the *prima facie* case are:

1. plaintiff is a member of a protected class;
2. plaintiff applied for and was qualified to rent or purchase the housing;
3. plaintiff was rejected; and
4. the housing opportunity remained available.

Robinson, 610 F.2d at 1038 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

55. *Id.* at 1040.

56. *Id.* at 1043.

57. *Id.*

58. *Id.* at 1042. In other words, Title VIII is violated if race is even one of the motivating factors. *Id.* (citing *Williams*, 499 F.2d at 826; United States v. Pelzer Realty Co., 484 F.2d 438, 443 (5th Cir.), *cert. denied*, 416 U.S. 936 (1974); Smith v. Sol D. Adler Realty Co., 436 F.2d 344, 349-50 (7th Cir. 1970); Wang v. Lake Maxinhall Estates, Inc., 531 F.2d 832, 836, n.12 (7th Cir. 1976); *Bishop*, 431 F.Supp. at 37; Village of Arlington Heights v. Metropolitan Housing Corp., 429 U.S. at 265-66). For further analysis of the defendant's burden as set forth in *Robinson*, see Richard Siegler, *Apartment Transfers*, N.Y. L.J., Jan. 3, 1990, at 1, 3.

"racial motivation did not play any role in the decision" to find for defendant.[59]

B. Objective Factors as Justification for Rejections by Co-ops

As noted above, the honest assertion of objective factors is the surest defense for cooperatives facing discrimination charges. While there is no finite set of objective factors to be culled from co-op discrimination cases, in *Murphy v. 253 Garth Tenants Corp.*,[60] the Southern District of New York provided a general list of objective factors including the following:

a) financial responsibility;
b) the legality of the proposed use; and
c) nature of the occupancy.[61]

The court noted that "[b]y contrast, reasons based on the landlord's supposed needs, dislikes, personal taste, sensibility, or convenience generally result in judicial disapproval."[62] A review of the relevant case law reveals that the applicants' financial responsibility is very often at the crux of the dispute.

1. Plaintiff's Financial Qualifications

The financial status of an applicant is of utmost concern to a cooperative because of the financial interdependence of co-op shareholders.[63] Thus, the demonstration of a sound financial condition almost always opens the door for an applicant. However, even cooperative decisions based on a candidate's financial qualifications can be tainted with unlawful bias. Courts recognize that un-

59. *Robinson*, 610 F.2d at 1048.

60. 579 F. Supp. 1150 (S.D.N.Y. 1983). These factors were listed in the context of determining what would constitute an unreasonable withholding of consent to transfer cooperative shares pursuant to the cooperative's by-laws.

61. *Id.* at 1156 (citing Kruger v. Page Management Co., Inc., 105 Misc. 2d 14, 23, 432 N.Y.S.2d 295, 302 (N.Y. Sup. Ct. 1980).

While the factors listed in *Murphy* may provide some insight, the characterization of at least one of the factors as objective is questionable. The "identity" or "business character" of an applicant, which was also tested by the court, may be more subjective than objective, particularly to the extent that such a determination depends on the "suitability" of the applicant as indicated by the court. This kind of factor is precisely the type that the *Robinson* court viewed with skepticism and subjected to rigorous scrutiny.

62. *Murphy*, 579 F. Supp. at 1156 (citing *Kruger*, 105 Misc. 2d at 23, 432 N.Y.S.2d at 302; Lapidus v. Melohn Properties, No. 6917/82, slip op. at 2 (N.Y. Sup. Ct. Apr. 27, 1982); and Solow Management v. Kirchener, N.Y. L.J., Aug. 13, 1982, at 14 (N.Y. Civ. Ct. 1982).

63. *See supra* part III-A (discussing the financial interdependence between cooperative shareholders).

founded suspicions and shifting standards based on negative stereotypes may tip the scales of a board's decision-making process against a minority applicant.

Some courts have responded by looking beyond a board's proffered reasons, even when objective in nature, to ensure that discrimination was not a factor in establishing criteria, applying standards, or making decisions. The following cases demonstrate the spectrum of approaches courts have taken in assessing the role unlawful bias played in a co-op's decision to reject an applicant. As demonstrated, the approaches range from rubber-stamping the cooperative's assessment, to undertaking a *de novo* review of the decision.

a. Overturning a Co-op's Rejection of an Applicant

In the well-known case of *Rogers v. 66-36 Yellowstone Blvd. Cooperative Owners, Inc.*,[64] the court flatly rejected the co-op board's asserted financial reasons for denying the plaintiff's application. In *Rogers*, the black plaintiff's application to purchase a $49,250 apartment was rejected on the grounds that she did not meet the board's financial qualifications despite her teaching salary and net worth in excess of $500,000.[65]

The defendant's articulated concern was the "source" of plaintiff's wealth, i.e., "how could she—on a teacher's pay—accumulate such assets."[66] Although not explicitly discussed in these terms, the basis for defendant's rejection seems to have been the board's disbelief that a black woman like the plaintiff could have accumulated such wealth legitimately. The jury rejected this defense and concluded that the board's suspicion about the source of plaintiff's wealth was motivated at least in part by her race. The Court ruled that the jury verdict was consistent with the evidence.

In *Rogers*, the indisputable fact that plaintiff could objectively afford a relatively modest housing unit, given her salary and assets, raised a red flag warranting closer scrutiny of the board's decision. The closer scrutiny revealed "flagrant racial discrimination" and prevented the board from hiding racial bias behind a seemingly objective consideration.[67]

Rogers instructs that if an applicant clearly is able to absorb the purchase price and future flow of expenses, a co-op's unsubstanti-

64. 599 F. Supp. 79 (E.D.N.Y. 1984).
65. *Id.* at 80.
66. *Id.*
67. *Id.* at 83.

ated skepticism about the source of an applicant's wealth will be subject to searching scrutiny. If such skepticism is unsupported by a valid rationale, the likely result will be a decision for the plaintiff. It is important to note that the record in *Rogers* revealed no evidence supporting a finding that plaintiff acquired her wealth through illegal means or that the assets were not lawfully hers. In fact, plaintiff explained her good fortune, noting that she had bought real estate when prices and interest rates were low. Defendants, however, dismissed this explanation without substantiation. This supported a finding that the rejection was based on suspicions sparked by plaintiff's race.

Rives v. 164 23rd St. Jackson Heights, Inc.[68] also illustrates how rigorous judicial scrutiny of a cooperative's assessment of an applicant's finances can uncover discrimination. In *Rives*, the New York City Commission on Human Rights found respondent's argument that a Hispanic applicant was not "financially qualified" to be a pretext for their unlawful bias.[69]

The tribunal disagreed with the board's assessment of the complainant's finances and undertook its own analysis of the following facts. Complainant wished to purchase a $145,400 unit, agreeing by contract to put down $75,400 and to finance $70,000 through a mortgage.[70] The complainant's average annual income as an architect had been $51,800 over the course of three years.[71] In addition, he had liquid savings of approximately $108,000.[72] Applying general banking standards and the board's own requirements, the tribunal held that complainant "was financially qualified to purchase the apartment for the agreed on price."[73] Thus, the tribunal in *Rives* did not defer to the cooperative's assessment of the purchaser's finances, but instead undertook a *de novo* review.

Board members testified to an array of finance-related factors for rejecting complainant's application. Their reasons, however, were rejected by the tribunal in light of the complainant's strong financial qualifications and the unlawful bias exhibited by the

68. Compl. No. H-92-0115, Rec. Dec. & Ord. (July 31, 1995), *adopted as modified*, Dec. & Ord. (N.Y.C.C.H.R. Sept. 28, 1995).

69. *Id.* at 13.

70. *Id.* at 6.

71. *See id.* at 14.

72. *Id.*

73. *Id.* at 13 (Complainant offered to make a down payment that exceeded 50% of the purchase price, while the Board required only 25% at the time. *Id.* at 14. Also, the tribunal stated that the Complainant's annual co-op related expenses would not exceed 20% of his annual income—well below the general banking standard of 28%. *Id.*).

board president. As in *Rogers*, unsubstantiated suspicion over the source of the applicant's accumulated wealth played a role in the rejection. In *Rives*, the board president's demeanor and testimony at the hearing led the tribunal to conclude that she voted to reject complainant because of her unfounded concerns that the Hispanic male complainant's liquid assets of over $100,000 were derived from involvement in the drug trade.[74] Thus, the tribunal found that the rejection for financial reasons was unsound speculation fueled by bias.

In *Shoyinka v. 120 25th Street Jackson Heights, Inc.*,[75] the tribunal itself undertook a rigorous analysis of complainant's finances. In *Shoyinka*, the complainant was a white woman alleging that she had been rejected unlawfully by the respondent cooperative because her children were black. The tribunal rejected the cooperative's defense that complainant was financially unqualified, based in part on an unusual and disturbing admission that at least one board member had rejected complainant based on her children's race. The board member explained her first vote to reject at her deposition:

> [Plaintiff] came in by herself and sat down, and she started talking. It wasn't but a few minutes till one of the board members came in with the children. We were so shocked. They were colored, but we didn't say anything about it. So when it came to vote, we voted against her at that time . . . . They were colored children and we knew nothing about it, and that seemed strange to us. So we voted against her the very first time.
>
> We have no colored people at all, no. We don't even have a colored superintendent . . . . We have a white garbage man, and we don't have any colored people at all, no . . . . That would be the only place we could have them, as a superintendent, take out the garbage and look after things . . . .[76]

Acknowledging that this direct evidence of unlawful bias was sufficient to support a finding of discrimination, the tribunal chose to undertake its own assessment of complainant's finances and concluded that she could handle the $70,000 purchase price, $402 monthly maintenance costs and a 50% down payment.[77] The tribunal supported its conclusion with a finding that the complainant

74. *Rives*, Rec. Dec. & Ord. at 18.

75. Compl. No. FH-139061687-DH, Rec. Dec. & Ord. (Sept. 22, 1989), *adopted*, Dec. & Ord. (N.Y.C.C.H.R. Dec. 21, 1989).

76. *Id.* at 31-32.

77. *Id.* at 10.

had an annual salary of $24,317, various bank and annuity accounts worth $46,000, several IRAs worth $10,000, and was awaiting the transfer of $20,000 to her accounts.[78] The tribunal noted that the combined costs of her maintenance fees and mortgage would only be slightly higher than her current rent, which she had no difficulty paying.

All board members who testified at the administrative hearing cited complainant's finances as the reason for the rejection. The tribunal discounted the respondents' testimony, however, stating that "there was a unique and consistent inability to correctly recount anything about complainant Shoyinka's finances or the co-op standards which caused them to exercise a rare vote of disapproval."[79] In short, the board's muddled explanation of its decision resulted in the loss of its credibility before the tribunal.[80]

Similarly, the court in *Irizarry v. 120 W. 70th Owners Corp.*[81] discredited the defendant cooperative's finance-based rejection of the plaintiffs. In *Irizarry*, the plaintiffs, a Hispanic male and white woman engaged to be married, submitted a joint application to purchase shares for a $276,000 unit.[82] Plaintiffs were rejected by the co-op board despite their compliance with the sale contract which required them to put 10% of the purchase price in escrow and to secure a 60% mortgage commitment.[83]

Plaintiffs asked for reconsideration, confirming their plans to get married and emphasizing that one plaintiff had just acquired over $255,000 from the sale of a building.[84] Plaintiffs also offered to place an additional $50,000 in escrow to assure performance of their obligations under the primary leasehold agreement, or in the alternative, to pay an additional $50,000 in cash toward the purchase price, thus reducing the mortgage.[85] The board simply

78. *Id.*

79. *Id.* at 8.

80. The tribunal also pointed to the financial qualifications of those previously accepted applicants, who had submitted applications with "no more impressive finances" than complainant. The fact that previously accepted white applicants had roughly equivalent financial data supported plaintiff's claims that they were victims of discrimination. *Id.*

81. No. 86 Civ. 3503, 1986 WL 8073 (S.D.N.Y. July 15, 1986).

82. *Id.* at *1-2. Plaintiffs were engaged when they submitted their application. Mr. Irizarry is of Puerto Rican descent.

83. *Id.* at *2-3.

84. *Id.* at *3.

85. *Id.* The letter to the board containing the terms also outlined some of plaintiff Mauceri's projected future earnings as an actress. Mr. Irizarry was a sergeant in the New York City Police Department. *Id.*

confirmed their prior rejection, again citing to plaintiffs' failure to meet financial qualifications.

After finding that the plaintiffs had established a *prima facie* case of discrimination, the court rejected the cooperative's defense. Without further analysis or review of related facts beyond those set forth above, the court concluded "that there is no doubt that plaintiffs qualify financially to purchase the unit in question and that this financial ability was demonstrated in the application documents . . . no reasonable explanation [exists] for plaintiffs' rejection . . . ."[86] Thus, the court found that the defendant's rationale was a pretext for national origin discrimination and ordered the defendant to approve plaintiffs' application.[87]

The *Irizarry* court gave little deference to the cooperative's determination that plaintiffs were financially unqualified. It flatly rejected defendant's view of plaintiffs' finances without undertaking its own analysis to demonstrate precisely how plaintiffs were qualified. The court may have taken this dismissive approach in part because plaintiffs' financial qualifications were strong enough on their face to make a detailed analysis unnecessary. *Irrizarry* underscores the willingness of some courts to reject a cooperative's decision-making, even when objective factors are relied upon.

In at least one instance, a court has assessed plaintiff's financial qualifications where there was no original assessment by the cooperative. In *Pinchback v. Armistead Homes Corp.*,[88] the plaintiff decided not to submit an application to the defendant cooperative after a real estate agent informed her that it was defendant's policy not to accept blacks. The court, after finding the plaintiff qualified, held for plaintiff, invoking the futile gesture theory.[89] The defendants had made no financial assessment of the plaintiff's finances because the plaintiff had never applied. However, the court assessed the plaintiff's financial qualifications because to succeed under the futile gesture theory, a party must be qualified.

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86. *Irizarry*, 1986 WL 8073 at *6.

87. *Id.* at *7.

88. 689 F. Supp. 541 (D. Md. 1988), *aff'd in part, vacated in part*, 907 F.2d 1447 (4th Cir. 1990).

89. In elaborating on the futile gesture theory, the *Pinchback* court quoted liberally from the Supreme Court's decision in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). "When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application." *Pinchback*, 689 F. Supp. at 552.

The court's financial analysis consisted of comparing the purchase price and down payment requirement to the plaintiff's future income stream. The plaintiff demonstrated a monthly income, when combined with her husband's income, of more than four times the projected mortgage payment.[90] The court did not discuss the plaintiff's savings or debt with respect to the plaintiff's ability to make the down payment, but noted that a friend of the plaintiff had offered financial assistance.[91] After this rather cursory review, the court found the plaintiff to be qualified.

The willingness of the courts and tribunals in *Rogers*, *Rives*, *Shoyinka*, *Irizarry*, and *Pinchback* to undertake a *de novo* review of plaintiff's finances and reach conclusions contrary to those of cooperative boards demonstrates that the discrimination exception to the *Levandusky* rule is not hollow. It establishes that at least some courts will attempt to smoke out unlawful discrimination from behind the screen of a plaintiff's allegedly deficient financial qualifications.

b. Judicial Deference to Cooperative Decisions

In some cases courts have deferred to co-op boards after undertaking a more limited analysis of plaintiff's finances. For example, in *Concord Village Owners, Inc. v. City of New York Commission on Human Rights*,[92] the Appellate Division of the Supreme Court of New York deferred to the cooperative's assessment of complainant's finances in a decision which overturned the findings of the Commission on Human Rights.

The court's limited deference in this case seems to have been triggered by complainants' own admission of their financial ineligibility and by the administrative law judge's finding of the same. Complainants, an unmarried couple who alleged discrimination based on their marital status, admitted that they lacked the funds necessary to close the deal when they appeared before the co-op's admission committee.[93] Complainants planned to make up the several-thousand-dollar shortfall by the time of closing through means such as making an early withdrawal from a pension fund, obtaining a loan from a parent, and saving future paychecks.[94] In addition to

90. *Id.* at 549-50.
91. *Id.*
92. 199 A.D.2d 388, 605 N.Y.S.2d 314 (2d Dep't 1993).
93. *Id.* at 389, 605 N.Y.S.2d at 316.
94. *Id.*

their being undercapitalized, complainants' income was dependant on short-term government grants.

The cooperative did not accept complainants' plan and remained skeptical of their future ability to pay co-op related expenses. The court accepted the board's skepticism as a sound basis for rejection and described complainants' plan to meet the financial demands of the transaction as speculative. The court, however, did not accept defendant's reasoning without some analysis. On the contrary, it discussed each element of the rejection and even compared complainants' application with that of other applicants. After its analysis, the court concluded that the cooperative need not accept an applicant's predictions of income sources when that applicant does not have the ability to cover the purchase price and expenses at the time of the application.[95]

The court was correct to scrutinize the cooperative's rationale because an applicant's ability to meet future expenses can almost never be determined with objective certainty. In agreeing that complainants were unqualified, the court ultimately deferred to the board's decision finding that defendant's assertion that complainants' future finances were uncertain was substantiated.

By contrast, in *Ikegami v. 40 W. 24th St. Corp.*,[96] the court accepted wholesale the defendant co-op's negative assessment of the plaintiffs' finances. With little analysis, the court denied plaintiffs' claim that they were rejected based on their race and marital status, and concurred with the board's conclusion that they were not able to meet objective financial requirements.[97]

In support of its conclusion, the court essentially regurgitated the testimony of board members in summary fashion. It stated that various board members were concerned because co-op related expenses would consume more than 30% of the purchaser's gross income. In addition, plaintiffs were obligated to pay a mortgage on a country home, and the $50,000 cash down payment did not appear to be readily available to them.[98] Rather than subjecting defendants' conclusions to scrutiny, the court emphasized the defendants' credibility and the heterogeneous composition of the cooperative building's residents. The court concluded that plaintiffs' rejection

95. *Id.*

96. No. 84 Civ. 3990, 1984 WL 633 (S.D.N.Y. July 16, 1984).

97. *Id.* at *1.

98. *Id.*

was grounded in the good-faith belief of the defendant concerning plaintiffs' finances.[99] Thus, plaintiffs' claim failed.

As illustrated by the next two decisions, courts are more likely to be deferential to cooperative decisions based on financial criteria that are fixed and objective rather than general conclusions about an applicant's finances. When a cooperative's standards are quantifiable, courts are apt to consider simply whether a purchaser met the specific criteria.[100] It is unlikely that a court would undertake an independent analysis of the reasonableness of the financial standard or its application. This is a reasonable approach given the difficulty of considering an applicant's membership in a protected class when applying a set, uniform standard such as a minimum salary requirement. It is also consistent with the general rule of deference set by *Levandusky*.

For example, in *Jimenez v. Southridge Cooperative Section I, Inc.*,[101] the cooperative asserted that plaintiff, who alleged discrimination based on race, color and national origin, failed to meet two of its criteria: first, continuous employment by the same employer for a one-year period; and second, a minimum of $30,000 in assets.[102] The court accepted the cooperative's rationale for rejecting the plaintiff's application. Plaintiff admitted that his financial qualifications as listed in his first application were insufficient, but submitted an amended second application which, in his view, demonstrated that he was financially qualified.

The court essentially ignored plaintiff's amended application. After reviewing only the factual evidence of plaintiff's employment history, the court accepted defendant's disputed contention that the plaintiff had not been with his current employer for one year as justification for rejecting the plaintiff's application. The court did not comment on the relevancy of the one-year criteria to an applicant's fitness. Instead, it noted plaintiff's acknowledgment that he was bound by the original application's terms disqualifying applicants who withheld material information.

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99. *Id.*

100. *See generally* Siegler, *Refutation*, *supra* note 30, at 3.

101. 626 F. Supp. 732 (E.D.N.Y. 1985). The decision concerned plaintiff's request for a preliminary injunction.

102. *Id.* at 734. The court also noted as a third reason that the defendant favored a competing applicant.

In *Zea v. Einschlag*,[103] the New York City Commission on Human Rights also deferred to the cooperative's standards for determining whether a prospective purchaser was qualified. At issue was the co-op's minimum income requirement for applicants, which excluded income from a second full- or part-time job from the calculation.[104] Complainant, a divorced mother, challenged her rejection by arguing that the co-op should have included the child-support payments she received each month in determining whether she met the minimum income requirement.

The tribunal accepted the co-op's conclusion that the plaintiff was not financially qualified, thus implicitly accepting the co-op's standards regarding minimum income and rejecting any arguments that such standards had a disparate impact upon a protected class. In fact, the tribunal strongly defended the cooperative's decision to assess the applicant's finances as it did, displaying a level of deference surpassing previously discussed decisions. The fact that the standards were quantifiable and fixed contributed greatly to the tribunal's deference.

In sum, the cases discussed above illustrate the varying levels of scrutiny applied by courts when considering a cooperative purchaser's financial qualifications. Some courts look to a few simple benchmarks that may not reveal the entirety of plaintiff's financial picture.[105] Other courts are more rigorous and thorough, and employ objective, widely accepted standards for assessing a party's financial condition.

The variety of approaches concerning plaintiff's finances is matched by the disparity in deference shown by courts to co-op boards. As demonstrated, some courts willingly disagree with the cooperative's assessment, demonstrating little or no deference to the cooperative's potential expertise in determining who is financially able to purchase shares. Other courts barely question the cooperative's analysis, perhaps implicitly taking heed of the *Levandusky* rule[106] of deference to board decisions. Although the va-

103. Compl. No. 557120690-DN, Rec. Dec. & Ord. (Apr. 26, 1993), *vacated and remanded*, Dec. & Ord. (N.Y.C.C.H.R. Sept. 30, 1993), Rec. Dec. & Ord. on Remand (Nov. 23, 1993), *adopted*, Dec. & Ord. (N.Y.C.C.H.R. May 26, 1994).

104. *Id.* at 5.

105. In Sassower v. Field, 752 F. Supp. 1182 (S.D.N.Y. 1990), the court found plaintiffs qualified based on the simple fact that they had received a mortgage commitment. Such a superficial inquiry, though generally revealing of an applicant's financial standing, is a poor substitute for a more thorough consideration of the cooperative's assessment or a *de novo* type review.

106. *See supra* part III-B for a discussion of *Levandusky*.

riation can lead to inconsistent and therefore unpredictable results, each court's approach seems to have been triggered by the reasonableness of the cooperative's decision and the objectivity of the criteria applied.

2. *Prior Acceptance of Other Protected Class Members as a Defense*

In some cases, defendant cooperatives have cited the presence of other protected class members who have already been accepted as a defense to an allegation of discrimination. Their rationale is that a cooperative's acceptance of protected class members in the past is evidence that it does not discriminate. The presence of protected class members in a cooperative usually can be determined with objective certainty, but whether this translates into a general non-discrimination policy is more difficult to assess. Thus, it is not surprising that courts have taken differing views of this defense.

In *Ikegami v. 40 W. 24th Street Corp.*,[107] the court held that the racial and ethnic make-up of the cooperative as a whole was "not without significance," in evaluating plaintiffs' claim that they were discriminated against based on the fact that one plaintiff was Japanese and that they were an unmarried couple.[108] The court noted that the current shareholders included a Japanese man and unmarried couples and that "[a] more heterogeneous group is difficult to imagine."[109] The court described the residents as a group including "persons of all races, creeds and colors, as well as married and unmarried couples, both heterosexual and homosexual . . . a Japanese man, a Filipino woman living with a Caucasian man, an Israeli, and a Puerto Rican."[110] The court rejected the plaintiffs' discrimination claims based on the totality of the evidence, citing the diversity within the cooperative as a factor.[111]

In *Kirkpatrick v. 60 Sutton Corp.*,[112] the cooperative presented evidence that there were homosexuals and same-sex couples living in the cooperative as proof that they would not exclude gays or persons with AIDS. The New York City Commission on Human Rights considered evidence of the cooperative's prior acceptance

107. No. 84 Civ. 3990, 1984 WL 633 (S.D.N.Y. 1984).
108. *Id.* at *1.
109. *Id.*
110. *Id.*
111. *Id.* at *1-2.
112. Compl. No. FH-164032991-DN, Rec. Dec. & Ord. (Oct. 30, 1992), *adopted as modified*, Dec. & Ord. (N.Y.C.C.H.R. Dec. 21, 1992), *appeal withdrawn*, 622 N.Y.S.2d 409 (N.Y. App. Div. 1st Dep't 1994).

of persons from the complainant's minority group as "some proof in Respondent's favor," but it was not enough to prevent a finding for the complainant. The court noted that the gay Complainant did not have to prove that all homosexuals were rejected based on their status, but "need only prove that his application was held to a higher standard based on membership in a protected class."[113] Thus, the tribunal underscored the importance of an individualized review in discrimination cases.

In *Robinson v. 12 Lofts Realty, Inc.*,[114] the Second Circuit also implicitly underscored the importance of an individualized review. In *Robinson*, the defendant cooperative offered evidence that some blacks had been subtenants or guests in the building in the past. In a footnote, the court stated that this evidence had "some relevance" concerning the defendant's motivation. However, the defendant's "willingness to have Blacks in the building on short-term bases does not dispose of the contention that the corporation was motivated by racial considerations in acting to prevent a sale" to the black plaintiff.[115]

In *Rives v. 164 23rd Street Jackson Heights, Inc.*,[116] the New York City Commission on Human Rights held that the prior acceptance of a Latina was not a "proper backdrop of comparison for determining whether Respondents are inclined to discriminate against [the Complainant, a single Latino male]."[117] The tribunal stated that the prior acceptance of a Latina established that the cooperative's bias manifested itself only under certain circumstances.[118]

The middle ground tread by courts in weighing this defense is warranted given the complicated state of race relations and the often inconclusive nature of the defense. Anecdotal evidence establishes that certain buildings may accept a limited number of protected class members, but stop at a set point for fear of "tipping the balance." Given this problem, an individualized determination of the relevance of such a defense to a discrimination claim is critical.[119]

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113. *Id.* at 28.

114. 610 F.2d 1032 (2d Cir. 1979).

115. *Id.* at 1039 n.12.

116. Compl. No. H-92-0115, Rec. Dec. & Ord. (July 31, 1995), *adopted as modified*, Dec. & Ord. (N.Y.C.C.H.R. Sept. 28, 1995).

117. *Id.* at 22 n.13.

118. *Id.*

119. For further analysis of the "Other Minorities" defense, *see* Siegler, *Refutation*, *supra* note 30, at 3 (discussion of unnamed case).

C. Subjective Factors as Justification for Rejections by Cooperatives

Weisner and *Levandusky* bestowed on cooperative boards the authority to reject prospective purchasers for virtually any subjective, non-discriminatory reason. Based on this authority, cooperative boards may consider subjective factors such as their needs, dislikes, and personal tastes when evaluating applicants.

However, cooperative boards must be aware that the assertion of a subjective factor as a defense to a discrimination claim almost always triggers a rigorous judicial review.[120] *Robinson v. 12 Lofts Realty, Inc.*[121] and its progeny advocate careful scrutiny of subjective factors because they are easy to use as a smoke screen for unlawful bias. As recognized by the *Robinson* court, without such safeguards, "*[a]ny* defendant can respond to a discriminatory effect with a claim of some subjective preference or prerogative and . . . prevail in virtually every case."[122] Legal commentators, tend to agree. For example, Professor Kushner states:

> Subjective conclusions, . . . including when the applicant's personality was not what the seller was "looking for," or was argumentative, caustic, sarcastic, acerbic, disagreeable, abrasive, or non-congenial, when the applicant would not "fit in," was arrogant, abusive, obnoxious, extremely aggressive, uncooperative, irritable, belligerent, a potential troublemaker, or wore unclean clothing producing an offensive odor, will be suspect. Similarly, that the applicant "didn't get along with the seller," "got a little smart," had a bad attitude, constantly harassed, or was heard by another to use profanity, and other hearsay accusations, are likely to be rejected.[123]

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120. JAMES A. KUSHNER, FAIR HOUSING: DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT, AND REVITALIZATION 293-94 (2d ed. 1995).

121. 610 F.2d 1032 (2d. Cir. 1979).

122. *Id.* at 1040 (quoting Elliot M. Mineberg, Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 HARV. C.R.-C.L. L. REV. 128, 182 (1976)(emphasis in original). *See* KUSHNER, *supra* note 120, at 293 ("The Court will carefully scrutinize any reason which is not objective in nature, for subjective explanations are generally viewed with considerable skepticism.")(citations omitted); Christopher P. McCormick, Note, *Business Necessity In Title VIII: Importing An Employment Discrimination Doctrine into the Fair Housing Act*, 54 FORDHAM L. REV. 563, 583 (1986)("Subjective considerations may influence the seller's decision. In view of the congressional determination that race cannot be a factor in housing transactions, however, such considerations deserve careful judicial scrutiny.")(citations omitted).

123. KUSHNER, *supra* note 120, at 293-94 (citations omitted).

Despite probing judicial scrutiny, cooperatives can successfully rely on subjective factors if two criteria are met. First, the factor should be relevant to the applicant's fitness as a purchaser or tenant.[124] In other words, the criteria should be a reasonable measure of the applicant's ability to be a successful owner or tenant.[125] Second, the defendant cooperative must *credibly* assert that the subjective factors were the actual motivation for the decision.[126] As the cooperative's case is usually presented through the testimony of its board members, it is important that their testimony be credible and consistent.

1. *Successful Assertion of Subjective Factor Defenses by Cooperatives*

In *Murphy v. 253 Garth Tenants Corp.*,[127] the court considered whether a subjective rationale for rejecting a cooperative applicant could defeat a *prima facie* case of discrimination.[128] The court answered its query affirmatively, stating that a co-op can succeed based on the assertion of subjective factors when those factors are presented in an honest and consistent fashion.

In *Murphy*, the plaintiffs alleged discrimination based on their gender and Irish background. The defendant cooperative asserted that it employed three criteria to judge the fitness of all applicants, including the plaintiffs in this case: (1) whether the applicant in-

124. *Robinson*, 610 F.2d at 1041 ("[T]he logical relevance of the factor to the rejection [of the applicant] is of significance. If the factor (objective or subjective) lacks relevance to the applicant's fitness in the housing context, it becomes suspect."); Bishop v. Pecsok, 431 F. Supp. 34, 37 (N.D. Ohio 1976)("Objective criteria cannot have the effect of excluding blacks from housing unless the criteria are demonstrably a reasonable measure of the applicant's ability to be a 'successful tenant.'"); KUSHNER, *supra* note 120, at 195-96 ("The factors must not lack relevance to the applicant's fitness as a purchaser or tenant; the criteria must be reasonable measures of the applicant's ability to be a successful owner or tenant.").

125. KUSHNER, *supra* note 120, at 195-96.

126. *See, e.g.*, *Robinson*, 610 F.2d at 1041. The honesty or sincerity of the defense put forth by a cooperative, whether objective or subjective, is always subject to review. KUSHNER, *supra* note 120, at 193 (citing *Robinson*, 610 F.2d 1032). In Pughsley v. 3750 Lake Shore Drive Cooperative Bldg., 463 F.2d 1055, 1056 (7th Cir. 1972), the court recognized the defendant's "right to refuse approval on any honest basis unrelated to the race of the prospective purchaser or his associates." Professor Kushner states that "[h]ousing may be refused on any honest basis unrelated to race." KUSHNER, *supra* note 120, at 195 (citing Marable v. Walker & Assocs., 644 F.2d 390 (5th Cir. 1981); Madison v. Jeffers, 494 F.2d 114 (4th Cir. 1974)(per curiam); Pughsley v. 3750 Lake Shore Drive Coop. Bldg., 463 F.2d 1055 (7th Cir. 1972). *But cf.* McGraw v. Oliver, 1 Fair Hous-Fair Lending (P-H) ¶ 15,539 (E.D. Va. Dec. 13, 1985)).

127. 579 F. Supp. 1150 (S.D.N.Y. 1983).

128. *Id.* at 1152.

tends to live in the apartment; (2) the applicant's financial capacity; and (3) whether the applicant would be a good, congenial neighbor, who fits in with the image of the cooperative.[129] The cooperative asserted that one plaintiff was unresponsive and vague during the board interview and that this was evidence that plaintiffs would be unsatisfactory neighbors.[130]

The court found the testimony of board members to be credible and defendants prevailed on the discrimination claim. The court, borrowing from *Robinson*, noted that the defendants' explanation was neither "subtle" nor "synthetic,"[131] but was based honestly on their subjective discomfort with plaintiffs.[132] The plaintiffs failed to establish that such explanations were pretextual, thus their discrimination claim failed.[133]

Similar success based on the assertion of subjective justifications was achieved by the respondent in *Porreca v. 133 W. 75th St., Inc.*[134] At the heart of the allegations were comments made by the board president which allegedly reflected a bias against Italian-Americans. At the hearing, the board president admitted that, based on her experience with complainant, she found him to be "unctuous," "unscrupulous," "over-bearing," a "liar and briber," and one "who would suborn an officer."[135] She also admitted saying that if she were a "Mafioso" she "would hire him for a bookkeeper."[136]

Based on the board president's overall credibility, the tribunal found that her comments and beliefs were not revealing of unlawful bias. First, complainant failed to establish that respondents had knowledge that he was of Italian descent prior to their vote.[137] Second, the court found that none of the words used by the board president constituted a *per se* ethnic slur,[138] and that she used the word "mafioso" only in reference to herself and not the complainant.[139] Third, the tribunal found in the record a basis for the board

129. *Id.* at 1154.
130. *Id.*
131. *Id.* at 1155.
132. *Id.*
133. *Murphy*, 579 F. Supp. at 1155. The plaintiffs succeeded, however, in establishing that their rejection was a violation of the co-op's by-laws, which required that consent to transfer not be unreasonably withheld by the board.
134. Compl. No. 51180, Dec. & Ord. (N.Y.C.C.H.R. Apr. 15, 1981).
135. *Id.* at 16, 17, 24.
136. *Id.* at 16.
137. *Id.* at 23.
138. *Id.* at 20.
139. *Id.* at 16.

president's beliefs.[140] For example, the testimony of other shareholders was consistent with her description of complainant. Thus, complainant's claim was defeated by the assertion of a subjective factor as a defense.

In *Hitter v. Rubin*,[141] defendant's motion for summary judgment was granted after the defendant asserted that plaintiff "was dishonest and argumentative," certainly subjective factors.[142] Defendants, however, supported their subjective rationale with objective evidence. In *Hitter*, the plaintiff, who claimed age discrimination, had knowingly lied about her financial worth.[143] The court found defendants' substantiation of their defense sufficient to defeat plaintiff's discrimination claim on their motion for summary judgment.[144]

A lack of credibility defeated the plaintiff's request for a preliminary injunction in *Laurenti v. Water's Edge Habitat, Inc.*[145] In *Laurenti*, the plaintiffs misrepresented the number of potential occupants for the apartment at issue by failing to report them on the application and by not complying with the requirement that all potential occupants attend the board interview.[146] Plaintiffs asserted that defendants discriminated against them based on family status because they rejected their application after learning that plaintiffs had four, not two, children as the cooperative previously believed. The court, however, rejected plaintiffs' claim. The court empha-

140. *Porreca*, Dec. & Ord. at 24.

141. 208 A.D.2d 480, 617 N.Y.S.2d 730 (1st Dep't 1994).

142. *Id.* at 481, 617 N.Y.S.2d at 732.

143. *Id.* at 481, 617 N.Y.S.2d at 731.

144. It is somewhat surprising that the defendants in *Hitter* achieved success on summary judgment given that subjective explanations are always fact-based and very likely to be disputed. The cooperative in Sassower v. Field, 752 F. Supp. 1182 (S.D.N.Y. 1990), did not obtain summary judgment. In *Sassower*, the defendants rebutted plaintiff's *prima facie* case by articulating 14 reasons for plaintiff's rejection. Those reasons included the arrest and general conduct of a relative of the plaintiff, the conduct and attitude of one of the plaintiffs, plaintiffs' flouting of certain house rules, and other rationale best characterized as subjective. *Id.* at 1188. The plaintiffs put forth a variety of arguments asserting that defendants' fourteen arguments were pretextual. The court held that some of the arguments by plaintiffs, including the original timing of defendant's assertions and the plaintiff's willingness to obviate some of the defendant's stated concerns, revealed factual disputes to be decided only after a trial on the merits. *Id.* at 1189-90. Thus, defendant's motion for summary judgment failed. This seems the more likely result for summary judgment motions when a cooperative puts forth subjective defenses given the easily controverted nature of subjective explanations and the summary judgment standard.

145. 837 F. Supp. 507, 512 (E.D.N.Y. 1993).

146. *Id.* at 508. Defendants also asserted that having six occupants, as opposed to the expected four, would have violated the cooperative's by-laws and the village code. *Id.*

sized that it was not the plaintiffs' actual family size that motivated the cooperative, but the plaintiffs' misrepresentation about the size of their family that led to their rejection.[147]

2. Unsuccessful Reliance on Subjective Factors by Cooperatives

When a cooperative board defends its actions with a subjective rationale, the credibility of testifying board members becomes a central issue. In particular, courts will carefully examine the consistency of explanations given by individual board members as justification for rejecting a prospective purchaser.

In *Robinson v. 12 Lofts Realty, Inc.*,[148] board members testified that they voted to reject the plaintiff based on rumors about the plaintiff's proposed use of the apartment and the alleged animosity displayed by the plaintiff during his interview.[149] The court looked disfavorably on the assertion of rumors as the basis for plaintiff's rejection, stating that, on remand, "the [trial] court must bear in mind that rumors are easily started and, although perhaps facially neutral, may easily be advanced with discriminatory intent."[150]

Concerning the defense that plaintiff displayed animosity, the court noted that defendants could have provoked complainant's perceived animosity by repeated and insistent questioning on certain issues. More important, the court found that the board members quite divided on whether plaintiff really was full of animosity, noting that seven of eleven shareholders had voted to accept the plaintiff. Thus the cooperative's reliance on rumors and their inconsistency in other areas undermined their overall credibility.

In *Kirkpatrick v. 60 Sutton Corp.*,[151] the cooperative cited the applicant's "hostile demeanor and vague responses about his [other] residences and plans for the apartment" as justification for his rejection.[152] Upon careful scrutiny of this subjective rationale, the tribunal found respondents' testimony to be confusing and unconvincing.[153] The tribunal underscored that one board member described complainant as "extremely hostile, angry and red in the face during the interview," while another board member described

147. *Id.* at 512.
148. 610 F.2d 1032 (2d Cir. 1979).
149. *Id.* at 1036.
150. *Id.* at 1041.
151. Compl. No. FH-164032991-DN, Rec. Dec. & Ord. (Oct. 30, 1992), *adopted as modified*, Dec. & Ord. (N.Y.C.C.H.R. Dec. 21, 1992).
152. *Id.* at 20-21.
153. *Id.* at 21.

him as "polite and soft spoken."[154] Thus, in what the tribunal characterized as a close case, the cooperative's muddled assertions of subjective factors could not overcome complainant's *prima facie* case of discrimination based on his sexual orientation.[155]

In *Rives v. 164 23rd St. Jackson Heights, Inc.*,[156] the Commission on Human Rights found that a number of board members credibly testified about the subjective factors they relied upon in voting to reject the complainant. Although honestly asserted, the tribunal found them to be unsubstantiated by the record. One board member noted that the complainant had not taken a deduction for charitable contributions on his taxes, and thus believed complainant would not make a good neighbor. The determinative factor, however, was the tribunal's finding that the board president did take complainant's national origin into consideration in rejecting his application. Her testimony and the role she played in the decision-making process undermined the defendant's case despite the credible testimony of other board members concerning subjective factors.[157]

In *Rives*, the timing of the board's discussion of its subjective explanations also had an impact on the cooperative's overall credibility. The cooperative board met to list the reasons for denying complainant's application years after the claim was filed and three months prior to trial.[158] This was damaging to the board members' collective credibility.[159]

In sum, the cases demonstrate that for defendants to succeed based on subjective justifications, the collective testimony of board members must be consistent and their individual conclusions should not undermine each other's rationales. Inconsistent and insincere testimony on subjective factors is viewed by the court as an indicator that unlawful bias may have played a role in the decision.

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154. *Id.*

155. *Id.* at 20.

156. Compl. No. H-92-0115, Rec. Dec. & Ord. (July 31, 1995), *adopted as modified*, Dec. & Ord. (N.Y.C.C.H.R. Sept. 28, 1995).

157. *Id.* at 22 (citing Irizarry v. 120 West 70th Owners Corp., No. 86 Civ. 3503, 1986 WL 8073 (S.D.N.Y. July 15, 1986)). The tribunal noted "[e]ven if a trial court credits certain non-discriminatory reasons advanced by a co-op board as genuine, it must remember that race need not be the sole motivating factor for a complainant to succeed." *Id.*

158. *Id.* at 9.

159. *Id.* at 20 n.12. In Sassower v. Field, 752 F. Supp. 1182, 1189 (S.D.N.Y. 1990), the court stated that "the fact that the 14 reasons stated by defendants as supporting their decision were not transmitted to the plaintiffs at the time of rejection, and were first enunciated some time after the plaintiffs challenged the board's decision, contributes to the plaintiffs' claim of pretext."

D. Disparate Treatment of Protected Classes By Cooperatives During the Application Process

Another pitfall for a cooperative in a discrimination case is evidence that it altered the application process or changed the rules in a manner that had an adverse impact on the prospective purchaser. Courts have readily inferred that such alteration or manipulation is revealing of discriminatory animus on the part of the cooperative. The courts' primary concern in such cases is whether cooperatives are objectively and consistently applying uniform qualifications.

In *Kirkpatrick v. 60 Sutton Corp.*,[160] the New York City Commission on Human Rights articulated a standard for weighing allegations that the cooperative altered the application process in a discriminatory manner. A prospective purchaser need only prove that the cooperative's decision "to hold [plaintiff's] application to higher [or different] standards or otherwise cause it to fail, was negatively influenced by his membership in a protected class."[161] In *Kirkpatrick*, the cooperative cited their concern that complainant would not use the apartment as his primary residence as a factor in his rejection. The tribunal found that complainant was held to a higher standard on this factor because many residents were given permission to sublet their apartments and numerous others did not use their apartments as a primary or frequent residence.[162] The tribunal found the differential treatment of the complainant to be revealing of discriminatory animus.

Perhaps the most brazen instance of rigging the application process to prevent entrance of certain minority group members occurred in *Huertas v. East River Housing Corp.*[163] The cooperative's stated policy was to give priority consideration to young people, newlyweds and children of residents.[164] However, the court found these criteria to be inapplicable when a white applicant was competing for an apartment against a black or Hispanic applicant.[165] Blacks and Hispanics who should have been given priority status were routinely passed in favor of whites with non-priority status. The court concluded that the cooperative's selection criteria were not applied in a consistent or uniform fashion:

160. Compl. No. FH-164032991-DN, Rec. Dec. & Ord. (Oct. 30, 1992), *adopted*, Dec. & Ord. (N.Y.C.C.H.R. Dec. 21, 1992).
161. *Id.* at 28.
162. *Id.*
163. 674 F. Supp. 440 (S.D.N.Y. 1987).
164. *Id.* at 444.
165. *Id.* at 445.

> White applicants were universally chosen over blacks and Hispanics, despite more pressing needs made of minority applicants, earlier filing of minority applications, and other factors which should have given minority candidates priority.[166]

The decision in *Huertas* is also replete with examples of how the defendants used false and misleading information to discourage minorities from applying and pursuing their applications. Black and Hispanic applicants were told of long waiting lists, low turnover rates and the possibility of a twenty-year delay before their applications would be reached.[167] However, white applicants frequently received apartments within a short time period. The court also found information about vacant apartments to be tightly controlled:

> Because information concerning equity requirements, vacancies, or criteria used in allocating apartments was not broadcast generally to the public, [current tenants] were an applicant's best ally. All or principally all of the [current tenants] were white; and they evidently served white applicants as both sources of needed information and references to [cooperative management]. Blacks and Hispanics were unable to penetrate this inner circle.[168]

The court held that the cooperative's misinformation campaign was evidence of a "deliberate effort to perpetuate overwhelming white occupancy within the cooperatives,"[169] and violative of Title VIII.[170]

United States v. Youritan Constr. Co.[171] presented similar facts in the landlord-tenant context. In *Youritan*, the defendant engaged in a multi-faceted scheme designed to discourage minority applicants. The scheme included showing applicants the most expensive apartments, giving them incomplete tours of the apartment complex, and misrepresenting the availability of apartments. Also, rental agents were instructed to emphasize the security deposit requirements to minority applicants and tell them that two-week credit checks were required before renting. The court held that the "[f]ailure to provide a black applicant with necessary and current information concerning what he must do to become a tenant dis-

166. *Id.* at 453.
167. *Id.* at 444.
168. *Id.* at 453.
169. *Huertas*, 674 F. Supp. at 453.
170. *Id.* The court referred specifically to § 3604 of Title VIII and cited Havens Realty Corp. v. Coleman, 455 U.S. 363, 374 n.14 (1982).
171. 370 F. Supp. 643 (N.D. Cal. 1973).

courages and impedes his application and results in his exclusion from the apartments because of his race."[172] The *Youritan* court also found that such actions were part of an arbitrary and uncontrolled rental procedure which produced otherwise unexplained racially discriminatory results.

Thus, it is quite apparent that the inconsistent use of application standards, especially as pertains to financial qualifications, will serve to undermine a cooperative's asserted legitimate, non-discriminatory reason for a rejection.[173]

The courts also have frowned upon evidence that a cooperative put new rules or procedures into place specifically for the applicant at issue. In *Shoyinka v. 120 25th Street Jackson Heights, Inc.*,[174] the tribunal noted that despite their standard practice of voting by a show of hands, the co-op board switched to a secret ballot for complainants' application. This differential treatment was highlighted when the board voted on a white applicant by a show of hands at the same meeting.[175] The cooperative also significantly altered the composition of the board of directors just in time for a second vote on complainant's application after the first vote ended in a tie.[176] The tribunal noted that such activities had not occurred during the pendency of applications submitted by whites, and concluded that the cooperative purposefully altered prior practices to create insurmountable hurdles for the complainant.[177]

Even more stunning and revelatory changes were made to the application process with the goal of blocking the plaintiff's application in *Robinson v. 12 Lofts Realty, Inc.*[178] In *Robinson*, the cooperative changed the informal application procedures applied to previous applicants and, tellingly, did not apply those procedures to other purchasers with applications pending at the same time as plaintiff's.[179] The changes included the formation of a screening

172. *Id.* at 648, (citing United States v. West Peachtree Tenth Corp., 437 F.2d 221 (5th Cir. 1971); United States v. Reddoch, No. 6541-71-P, (S.D. Ala., Jan. 27, 1972), *aff'd*, 467 F.2d 897 (5th Cir. 1972)).

173. Professor Kushner also lists the uneven application of rules as a red flag and cites to numerous cases in which housing providers other than cooperatives manipulated the application process to the detriment of the housing seeker. KUSHNER, *supra* note 120, at 202 n.263.

174. Compl. No. FH-139061687-DH, Rec. Dec. & Ord. (Sept. 22, 1989), *adopted*, Dec. & Ord. (N.Y.C.C.H.R. Dec. 21, 1989).

175. *Id.* at 37.

176. *Id.*

177. *Id.*

178. 610 F.2d 1032 (2d. Cir. 1979).

179. *Id.* at 1033-34, 1039.

committee which was to meet with the prospective purchaser, conduct a background check and report to the shareholders-at-large before a final vote. The board also voted to increase the percentage of votes needed to approve a share transfer from 51% to 66%.[180] The increase to 66% occurred during the same meeting and just before the vote on plaintiff's application.[181] The court held that the "sequence of events brings a conclusion of discriminatory motive well within the realm of legitimate inference."[182]

VI. Recommendations for Prospective Purchasers and Cooperatives

The unique structure of cooperative ownership and self-governance enables shareholders to carefully craft and maintain their living environment. This includes the cooperative board's power to select who gets into the cooperative. Statistical data and anecdotal evidence support claims that some cooperatives wield their selection power in an unlawfully discriminatory manner. The courts and civil rights agencies will not hesitate to scrutinize cooperative decision-making when discrimination is alleged, despite the general rule of judicial deference to cooperative decision-making as set forth in *Levandusky*.[183] The resolution of such claims often turns on whether the cooperative relied on objective or subjective factors in rejecting the applicant and whether the court finds that the cooperative's defense was sincerely and consistently presented.

What can cooperatives do to avoid discrimination claims? An obvious but infrequently invoked measure is to take steps to prevent the prejudices of cooperative shareholders from having an impact upon the selection process. All shareholders should be well versed in fair-housing laws and understand the ramifications of breaking them. The cooperative may want to consider diversity or sensitivity training in an attempt to root out deep-seated prejudices.

The cooperative also should take steps to formalize the application process, including the establishment of objective criteria to evaluate applicants. The cooperative should document each step

180. *Id.* at 1034.

181. *Id.* The change in percentage affected the outcome of the vote on plaintiff's application as 7 of 11 shareholders, or 63.7%, voted in favor of the plaintiff, enough to gain acceptance under the prior standard.

182. *Id.* at 1039.

183. 75 N.Y.2d 530, 553 N.E.2d 1317, 554 N.Y.S.2d 807 (1990). *See supra* Part III-B for a discussion of *Levandusky*.

of the application process for all applicants and provide rejected applicants with written explanations at the time of notification. Documenting the process and providing written explanations to rejected applicants will counter charges that the cooperative manufactured their reasons to disguise discriminatory motives only after litigation commenced.

What should applicants do when they suspect that their membership in a protected class[184] influenced their rejection? First, and prior to the decision, the applicant should submit a complete and truthful application to the cooperative. Valid charges of discrimination claims may be easily defeated if an applicant is dishonest, or even sloppy, at any point in the application process. Applicants should keep careful notes during the application process, particularly of the board interview. They should demand an explanation of their rejection from the cooperative, although the cooperative is not obligated to provide one. Besides pleading for reconsideration, which is sometimes granted but rarely results in acceptance, the applicant's road to redress is through legal action. Depending on the desirability of the cooperative unit at issue, it may not remain available for long and therefore the applicant should file for an injunction to prevent the sale of the unit to someone else.

Discrimination cases usually rest on circumstantial evidence and thus are difficult to prove. Cases against cooperatives are no exception. In the absence of an explicitly discriminatory "smoking-gun" statement from a prejudicial shareholder at the board interview, the applicant should attempt to establish that the cooperative's proffered reasons for rejecting the applicant are insincere and inconsistent, and thus simply a facade for discriminatory motives. Especially revealing are comparisons of the applications of previously accepted and rejected candidates. Such evidence may reveal differential treatment of the applicant, if not a pattern and practice of discrimination against certain minority groups.

Cooperative apartment buildings will remain an important part of the New York City housing market into the foreseeable future. Thus, as a community we must take measures to ensure that cooperative housing is equally available to all New Yorkers. This requires cooperatives to take affirmative steps to root out prejudice from their selection procedure and a vigilant civil rights community ready to enforce the law when discrimination becomes evident.

184. *See supra* Table 4 (enumeration of protected classes).