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WEISNER REVISITED: A REAPPRAISAL OF A CO-OP’S POWER TO ARBITRARILY PROHIBIT THE TRANSFER OF ITS SHARES

I. Introduction

The statute which prohibits discrimination in co-operatives because of race, color, religion, national origin or ancestry is not involved in this case. Absent the application of these statutory standards . . . there is no reason why the owners of the co-operative apartment house could not decide for themselves with whom they wish to share their elevators, their common halls and facilities, their stockholders’ meetings, their management problems and responsibilities and their homes.¹

With its decision in Weisner v. 791 Park Avenue Corp.² the New York Court of Appeals firmly established that absent discriminatory practices prohibited by law,³ a cooperative housing corporation⁴

³. There are several statutes which prohibit discrimination in the sale of cooperative interests:
   A cooperative housing corporation may not withhold its consent to the sale or proposed sale of an ownership interest due to the race, creed, national origin or sex of the purchaser. N.Y. Civ. Rights Law § 19-a(1) (McKinney 1976).
   It is unlawful “[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.” Fair Housing Act of 1968, § 804, 42 U.S.C. § 3604(a) (1982). For purposes of the statute, the word “dwelling” applies to cooperative apartment buildings. Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1036 (2d Cir. 1979).
   In addition to the above-mentioned criteria, the New York State Human Rights Law prohibits the denial of or withholding from any person or group a housing accommodation based on the age, disability or marital status of the purchaser. N.Y. Exec. Law § 296(5)(a)(1) (McKinney Supp. 1986). An aggrieved party has the option of filing a complaint with the New York State Division of Human Rights, or bringing an action in state court. Id. § 297(9) (McKinney 1982). If he chooses the former, he may not bring an action in state court unless the human rights division dismisses the complaint on the ground of administrative convenience. Id. If he brings an action, he may not later resort to the administrative remedies provided by statute. Id. §§ 297(9), 300.

Whether section 19-a and section 296 both apply to cooperative housing corporations is unclear in New York. Section 19-a of the Civil Rights Law was enacted to “expressly prohibit real estate cooperatives, their shareholders and their management from withholding consent to the sale of certificates of stock . . . by reason

In Emil v. Dewey, 66 A.D.2d 758, 411 N.Y.S.2d 865 (1st Dep't 1978) (mem.), the court dismissed the plaintiff's complaint, which alleged that his purchase of a cooperative apartment had been denied on account of his marital status, a discriminatory act under section 296 of the Executive Law. The plaintiff intended to reside in the apartment with a woman and her daughter. Since section 19-a of the Civil Rights Law does not prohibit discrimination based on marital status, the court held that the complaint failed to state a cause of action against the cooperative. 66 A.D.2d at 758-59, 411 N.Y.S.2d at 865. The New York Court of Appeals affirmed the dismissal, on the ground that the plaintiff had violated the administrative scheme of the Executive Law, but it did not express any opinion as to the applicability of the statute to cooperatives. 49 N.Y.2d at 969, 406 N.E.2d at 887. Thus, the question remains as to whether the additional prohibitions contained in the Executive Law apply to cooperatives. See Emil v. Dewey, 66 A.D.2d at 758, 411 N.Y.S.2d at 865 (Kupferman, J.P., dissenting in part); Margolies, Increasing Number of Cooperatives Produces High Volume of Litigation, N.Y.L.J., June 6, 1984, at 24, col. 2 [hereinafter cited as Margolies]; Wise, Co-op Tyranny—How the Boards of Directors Rule the Roost, NEW YORK MAGAZINE, April 22, 1985, at 45, col. 2 [hereinafter cited as Co-op Tyranny]. But see Rogers v. 66-36 Yellowstone Boulevard Coop. Owners, Inc., 599 F. Supp. 79, 80 n.2 (E.D.N.Y. 1984) (plaintiff charging cooperative apartment building with racial discrimination in disapproving apartment purchase recovered under 42 U.S.C. §§ 1981, 1982, 3612 and New York State Executive Law § 296); Ikegami v. 40 West 24th St. Corp., No. 84 Civ. 3990 (S.D.N.Y. July 16, 1984) (available on LEXIS, Genfed library, Dist file) (unmarried plaintiffs alleged that their application to purchase an apartment was rejected due to their race and marital status; claims were brought under federal fair housing laws and New York State Executive Law § 296); Murphy v. 253 Garth Tenants Corp., 579 F. Supp. 1150, 1155 (S.D.N.Y. 1983) (court, in ruling on plaintiffs' pendent state claim, considered all discriminatory grounds enumerated in section 296 and applied them to cooperative housing corporation); Bachman v. State Div. of Human Rights, 104 A.D.2d 111, 114, 481 N.Y.S.2d 858, 860 (1st Dep't 1984) (court applied both section 19-a of the Civil Rights Law and section 296(2-a) of the Executive Law to publicly-assisted cooperative housing corporation; thus, it is "unlawful for [the cooperative] to discriminate solely because of the age, sex or marital status of the applicant").

A New York court, relying on the appellate division's decision in Emil v. Dewey, recently dismissed a cause of action, holding that the Civil Rights Law controls over the Executive Law. Pardy v. Fountainhead Owners Corp., N.Y.L.J., Oct. 2, 1985, at 14, col. 4 (Sup. Ct. Westchester County). The plaintiff alleged that her purchase application was rejected by the cooperative's board of directors solely on the basis of the age of her daughter, who was five and one half years old. Id. The action was dismissed because it alleged discrimination based on age, which
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is behavior prohibited under the Executive Law, but permissible under the Civil Rights Law. The legislative history of the bill outlawing age discrimination under the Executive Law suggests that this provision applies to rental housing only. 1983 McKinney's Sess. Laws at 2792 (Memorandum of Governor Cuomo).

Clearly, a residential cooperative housing corporation fits within the definition of "housing accommodation" to which section 296 applies: "The term 'housing accommodation' includes any building, structure, or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied, as the home, residence or sleeping place of one or more human beings." N.Y. EXEC. LAW § 292(10) (McKinney 1982).

Whether or not the New York State Legislature had originally intended that the Executive Law apply to cooperatives, it has recently taken steps to explicitly extend that statute's coverage to such dwellings. A. 6824, a bill introduced in the 1985 legislative session, provides that all of the provisions relating to discrimination in section 296 of the Executive Law be made applicable to both cooperative and condominium apartments. A. 6824, 208th Sess. (1985), STATE OF NEW YORK LEGISLATIVE DIGEST A585-86 (1985). It would repeal section 19-a of the Civil Rights Law. The bill was passed by the Assembly, and forwarded to the Senate for approval. Id. This is not the first time that such legislation has been introduced in the Legislature. See A. 694-d, 207th Sess. (1984), NEW YORK STATE LEGISLATIVE RECORD AND INDEX A41 (1984); Co-op Tyranny, supra, at 45, col. 3. However, the bill died in the state senate on January 8, 1986, and has once again been sent back to the Assembly. A. 6824, 209th Sess. (1986). STATE OF NEW YORK LEGISLATIVE DIGEST A414 (1986).

In addition, the 1985 legislative session moved to restrict a cooperative's ability to withhold its consent to a transfer of its units on other grounds. See A. 571, 208th Sess. (1985), STATE OF NEW YORK LEGISLATIVE DIGEST A50 (1985) (discrimination based on affectional or sexual preference); A. 848, 208th Sess. (1985), STATE OF NEW YORK LEGISLATIVE DIGEST A73 (1985) (discrimination based on lawful source of income); A. 854, 208th Sess. (1985), STATE OF NEW YORK LEGISLATIVE DIGEST A74 (1985) (requiring a cooperative to provide an applicant with the reason for his rejection); A. 1010, 208th Sess. (1985), STATE OF NEW YORK LEGISLATIVE DIGEST A87 (1985) (discrimination based on occupation); A. 4026, 208th Sess. (1985), STATE OF NEW YORK LEGISLATIVE DIGEST A344 (1985) (discrimination based on disability) (amending section 19-a of the Civil Rights Law); A. 7045, 208th Sess. (1985), STATE OF NEW YORK LEGISLATIVE DIGEST A610 (1985) (discrimination based on sexual orientation); Brooks, Co-ops Warned on Rejections, N.Y. Times, Nov. 11, 1984, § 8 (Real Estate), at 12, col. 2 [hereinafter cited as Co-ops Warned on Rejections]. These bills were all passed by the Assembly, but died in the Senate on January 8, 1986. They have all been redelivered to the Assembly. See 209th Sess. (1986), STATE OF NEW YORK LEGISLATIVE DIGEST A37, A56, A57, A66, A249, A414, A427 (1986).

It is interesting to note that these restrictions would be enacted as additional discriminatory practices under section 296 of the Executive Law, not the Civil Rights Law. See Assembly Bills, supra. Should all the proposed legislation but A. 6824 be enacted into law, the applicability of these provisions to cooperatives would be highly questionable in light of the decision in Emil v. Dewey. This could occur even though the bill requiring a written reason for rejecting an applicant was expressly drafted to combat discriminatory practices by cooperatives. Telephone Interview with Mr. Dan Conviser, legislative assistant to Assemblyman Alexander Grannis (Nov. 4, 1985).

The Administrative Code of the City of New York contains provisions which are virtually identical to the New York State Human Rights Law. Chapter 1,
section B1-7.0(5)(a) prohibits the denial or withholding of a housing accommodation due to the race, creed, color, national origin, sex or marital status of a person. New York, N.Y. Admin. Code ch. I, § B1-7.0(5)(a) (1976). Since there is no comparable provision to section 19-a of the Civil Rights Law in the Administrative Code, it is arguable that aggrieved parties may have an actionable complaint under this section if they are discriminated against based on their marital status. Cf. Emil v. Dewey, 66 A.D.2d at 759, 411 N.Y.S.2d at 865 (Justice Kupferman notes that plaintiff alleged discriminatory behavior in violation of section B1-7.0(5)(a).


4. For the purposes of this Note, the term “cooperative” refers to a cooperative apartment building. “A cooperative apartment is a multi-unit dwelling in which, as a general rule, each resident has (1) an interest in the entity owning the building evidenced by his stock subscription or share, and (2) a proprietary lease entitling him to occupy a particular apartment within the building.” Sanders v. Tropicana, 31 N.C. App. 276, 280, 229 S.E.2d 304, 307 (1976).


The defendant cooperative housing corporation in Vinnik had been formed to acquire the Hotel Pierre so that its tenant-shareholders could use the Pierre’s rooms and suites for residential purposes. Id. at 685, 463 N.Y.S.2d at 10. However, the Pierre continued to operate as a hotel after the purchase by the corporation. While some shareholders chose to use the Pierre as their residence, others sublet their rooms to the management of the hotel, who in turn rented them to guests in the ordinary course of the hotel’s business. The Pierre continued to solicit as much business as possible in order to maximize profits. When the defendant’s board of directors refused to consent to the sale of their interests, the plaintiff tenant-shareholders sought an injunction directing the board to approve the transfers. Id. at 685, 463 N.Y.S.2d at 11.

It has been stated that the purchasers of a cooperative apartment are concerned primarily with the purchase of a home. Penthouse Properties, Inc. v. 1158 Fifth Ave., Inc., 256 A.D. 685, 691, 11 N.Y.S.2d 417, 422 (1st Dep’t 1939) (see infra notes 42-56 and accompanying text for a discussion of the Penthouse Properties decision). However, the tenant-shareholders in Vinnik were found by the court to have a dual objective: providing residences and profitably running a public hotel. 94 A.D.2d at 686, 463 N.Y.S.2d at 11. Thus, the issue was raised as to whether Weisner should apply to the defendant, since the relationship between the shareholders of a cooperative commercial corporation and those of a cooperative housing corporation may in fact warrant different treatment regarding the ability of the board of directors to withhold consent to a transfer. Id. See infra notes 42-56 and accompanying text for a discussion of the considerations involved in the special relationship between tenant-shareholders in a cooperative housing corporation.

This residential/commercial distinction has been previously applied in New York in...
may arbitrarily prohibit the transfer of a tenant-shareholder's interest. This issue had been left unanswered by an earlier appellate division decision, where that court, in upholding the validity of share transfer restrictions on cooperative stock, had explicitly reserved judgment on this question. However, it became clear after the context of a landlord's power to arbitrarily withhold his consent to an attempted assignment or sublease by a tenant. See Kruger v. Page Management Co., 105 Misc. 2d 14, 20, 432 N.Y.S.2d 295, 300 (1980), appeal dismissed, 80 A.D.2d 525 (1st Dep't 1981); N.Y. REAL PROP. LAW § 226-b(1) (McKinney Supp. 1984-1985); Comment, The Approval Clause in a Lease: Toward a Standard of Reasonableness, 17 U.S.F.L. REV. 681, 688-89 (1983). In the case of a commercial tenant, when the lease contains an express covenant prohibiting assignments or subleasing without prior consent, the landlord may arbitrarily withhold consent for any or no reason. Arlu Assocs. v. Rosner, 14 A.D.2d 272, 220 N.Y.S.2d 288 (1st Dep't 1961), aff'd, 12 N.Y.2d 693, 185 N.E.2d 913, 233 N.Y.S.2d 477 (1962). However, the landlord may generally withhold consent to an assignment or sublease of a residential lease only on reasonable grounds. N.Y. REAL PROP. LAW § 226-b(1) (McKinney Supp. 1984-1985).


7. When used in the context of this Note, the term "arbitrary" refers to the unreasonable withholding of consent, in light of the "economic and social purposes of cooperative ownership," to a sale of a cooperative unit by a tenant-shareholder. This is the test adopted by other jurisdictions examining the validity of alienation restraints on cooperative units. See infra notes 71-73 and accompanying text.

8. The tenant-shareholder owns a block of shares corresponding to the value of, and allocated to, the apartment he will occupy from the corporation holding title to the building. The shares entitle the shareholder to a long-term apartment proprietary lease. His rights as a tenant are initiated by the capital investment made in the shares of the cooperative corporation. State Tax Comm'n v. Shor, 43 N.Y.2d 151, 156, 371 N.E.2d 523, 526, 400 N.Y.S.2d 805, 807 (1977); COOPERATIVE HOUSING LAW, supra note 6, § 2.02(4)(a), at 2-16; Note, Legal Characterization of the Individual's Interest in a Cooperative Apartment: Realty or Personalty?, 73 COLUM. L. REV. 250, 250 (1973) [hereinafter cited as Realty or Personalty?].


10. Id. at 692, 11 N.Y.S.2d at 423. Penthouse Properties is the seminal case in New York upholding the validity of transfer restrictions on a tenant-shareholder's interest. For a discussion of this decision, see infra notes 42-56 and accompanying text.

11. 256 A.D. at 692, 11 N.Y.S.2d at 423.
Weisner that the board of directors or the other tenant-shareholders could withhold consent to any transfer, for any or no reason.

12. The certificate of incorporation and by-laws typically provide that there can be no transfer of shares or lease by a tenant-shareholder without the consent of the directors or a specified portion of the tenant-shareholders. Realty or Personality?, supra note 8, at 258; Survey of Legal Aspects, supra note 6, at 310-11. For a situation where the purchaser was approved by the tenant-shareholders after being turned down by the board, see Ebner v. 91st St. Tenants Corp., 126 Misc. 2d 108, 481 N.Y.S.2d 198 (1984).

13. When used in the context of this Note, the term “transfer” refers to the voluntary alienation of a tenant-shareholder’s entire interest in the corporation. The right of the tenant-shareholder to sublet his apartment is not addressed in this Note. However, it should be noted that this right is also subject to the same transfer restrictions as the assignment of cooperative interests. Alexy v. Kennedy House, Inc., 507 F. Supp. 690, 699-700 (E.D. Pa. 1981); see Mowatt v. 1540 Lake Shore Drive Corp., 385 F.2d 135, 137 (7th Cir. 1967) (court, in applying Illinois law found in Gale v. York Center Community Coop., Inc., 21 Ill. 2d 86, 171 N.E.2d 30 (1960), held that board of directors’ consent to proposed sublease or assignment can be withheld only on some “reasonable basis in light of the significant needs and purposes of the cooperative arrangement”); Kohler v. Snow Village, Inc., 16 Ohio App. 3d 350, 475 N.E.2d 1298 (1984) (corporate policy forbidding subletting reasonable in order to carry out cooperative purpose); see also Zuckerman v. 33072 Owners Corp., 97 A.D.2d 736, 737, 468 N.Y.S.2d 639, 641 (1st Dep’t 1983) (cooperative shareholders do not have absolute right to sublet subject only to board approval of prospective sublessee); Tsimis v. Rudnick, Brett, Wyckoff, Inc., 59 A.D.2d 871, 399 N.Y.S.2d 239 (1st Dep’t 1977), aff’d, 45 N.Y.2d 976, 385 N.E.2d 628, 412 N.Y.S.2d 891 (1978) (no absolute right to sublet subject to only board approval); Sanders v. Tropicana, 31 N.C. App. 276, 284, 229 S.E.2d 304, 309 (1976) (intention of proposed assignee to sublet his apartment is reasonable basis on which to reject purchase application, in light of co-op’s policy limiting occupancy to owners). But see Logan v. 3750 North Lake Shore Drive, Inc., 17 Ill. App. 3d 584, 590, 308 N.E.2d 278, 282-83 (1974) (plaintiff tenant-shareholder’s claim that attempted sublease was refused without any consideration of proposed sublessee’s qualifications, but based on long-established policy of the building to deny such requests, sufficient to establish prima facie case of arbitrary and unreasonable withholding of consent by defendant’s board of directors; defendant was precluded from raising on appeal that nature of cooperative ownership required policy limiting occupancy to owners); Crossman v. Pease & Elliman, Inc., 29 A.D.2d 4, 7, 284 N.Y.S.2d 751, 754 (1st Dep’t 1967), aff’d, 26 N.Y.2d 855, 258 N.E.2d 95, 309 N.Y.S.2d 600 (1970) (pursuant to provision in purchase contract, tenant-shareholder had absolute right to sublet, subject only to board approval of social desirability and financial responsibility of prospective subtenants; policy of denying subleases was neither provided for in the proprietary lease, “nor is it one of the general conditions which provide a basis for approval of restriction on the right to sublease”)

Although a co-op may require that it consent to any transfer, it may not prohibit the transfer of a tenant-shareholder’s interest that occurs by operation of law. See, e.g., House v. Lalor, 119 Misc. 2d 193, 198, 462 N.Y.S.2d 772, 776 (1983) (co-op may not prevent title transfer to creditor who properly executes on property; however, it still has right to approve creditor or transferee of creditor before either takes occupancy).

14. Generally, New York courts will not inquire into the reasonableness of a
At a time when the New York courts continue to follow Weisner’s mandate,¹⁵ the cooperative form of home ownership is flourishing in New York.¹⁶ The number of offering plans submitted for conversion to cooperative housing units increased tenfold in New York State from 1976 to 1981.¹⁷ According to a recent study, New York cooperative’s rejection of an applicant in the absence of allegations charging statutorily prohibited discrimination. See infra note 15 and accompanying text. A noteworthy exception to this rule can be found in Frymer v. Bell, 99 A.D.2d 91, 472 N.Y.S.2d 622 (1st Dep’t 1984).

In Frymer, the plaintiff had exercised her option to purchase a proprietary lease for her apartment in connection with her building’s plan for cooperative conversion. In addition, she contracted with a fellow tenant to purchase the latter’s apartment upon the conversion for her grandchildren’s use. Id. at 92, 472 N.Y.S.2d at 623. The plaintiff was assigned the second proprietary lease on the date the conversion plan became effective, notwithstanding the fact that the transaction required approval of the corporation’s board of directors or tenant-shareholders. Id.

When the board was finally elected, it refused to approve the transfer of the second apartment to the plaintiff because she had failed to pay a “flip tax” on the sale. Id. The board members also asserted that even if this tax had been paid, they would have disapproved the purchase on several other grounds, including the fact that the plaintiff had been illegally subletting the apartment to her grandchildren prior to board approval. Id. While the lower court had found the flip tax to be illegal, it ruled that the board’s decision, “‘regardless of how illogical or irrational,’” must be upheld insofar as it is not proscribed by law. Id.

After finding the cooperative’s other claims to be without merit, the appellate division addressed the board’s contention that the application would have been denied based on the illegal sublet. The court summarily dismissed this claim, noting that “the record contained no derogatory data, financial or otherwise, about these grandchildren who had previously been living with [the plaintiff] in her own apartment.” Id. at 97, 472 N.Y.S.2d at 626. Only after the plaintiff had indicated that she would not pay the transfer fee did the board indicate that it would withhold consent to the transfer, and the court found the stated reasons for rejection to be mere pretext. Id. In essence, the court had ruled that the cooperative could not reasonably withhold its consent to a transfer of the apartment based on the qualifications of the grandchildren.


¹⁶. See generally Johnson, From Brooklyn to Jersey, an Abundance of Units, N.Y. Times, Oct. 6, 1985, § 12 (Real Estate Report on Co-ops and Condominiums), at 34, col. 1 (discussing why this will be the “biggest year for the production of new apartments since the early 1960’s”).

City is the national leader in cooperative housing, containing 95% of such units located in the United States.\(^{18}\)

This trend toward cooperative ownership is occurring at a time when there is a critical shortage of adequate, affordable rental housing in New York City.\(^{19}\) In fact, it is the concern of some writers and legislators that the ever-increasing number of conversions to cooperative housing is, in itself, contributing to this problem.\(^{20}\) As competition for new units intensifies, cooperative boards are subjecting prospective tenant-shareholders to increasing scrutiny before they approve a transfer of any apartment.\(^{21}\) As the stock of available rental housing decreases even further and the number of cooperative residences continues to rise, the ability of the board or the remaining tenant-shareholders to arbitrarily prohibit the transfer of cooperative apartments will undoubtedly have an increasing effect on the availability of apartment housing in New York City.\(^{22}\)

In light of these developments, there is presently a movement in

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\(^{19}\) A survey conducted by the New York City Census Bureau found that only 2.04 percent of the city's housing stock was vacant in 1984, compared with a figure of 2.13 percent in 1981 and 2.95 percent in 1978. A five percent vacancy rate is considered desirable in an urban setting. See Failure of Homeless Plan Reflects Housing Crisis, N.Y. Times, Feb. 19, 1985, at B5, col. 1 [hereinafter cited as Housing Crisis]; deCourcy Hinds, Adapting to the High Cost of Housing, N.Y. Times, Feb. 3, 1985, § 8 (Real Estate), at 1, col. 1.

\(^{20}\) See Carmody, Hard to Find, Harder to Afford: A Decent Manhattan Apartment, N.Y. Times, July 19, 1984, at B1, col. 5; Housing Crisis, supra note 19, at B5, col. 1. But see Cooperative Conversion, supra note 17, at 1103 (referring to HUD Study stating that during the 1970's, only 0.72 percent of available occupied rental housing stock in New York City was lost due to condominium and cooperative conversions).

\(^{21}\) See generally Wedemeyer, Co-ops Tighten Standards for Buyers, N.Y. Times, July 8, 1984, § 8 (Real Estate), at 1, col. 1 (describing admissions policies and extensive procedures applicants are subjected to by co-op boards) [hereinafter cited as Co-ops Tighten Standards]; Lifton, What Boards Should Ask, N.Y. Times, Oct. 6, 1985, § 12 (Real Estate Report on Co-ops and Condominiums), at 64, col. 3 [hereinafter cited as Lifton]. See infra notes 183-86 and accompanying text for a discussion of the negative impact of these detailed procedures on the investigatory practices of human rights agencies.

\(^{22}\) See Johnson, The 'Lumpy' Co-op Market Gets Tougher to Track as It Grows, N.Y. Times, April 28, 1985, § 8 (Real Estate), at 14, col. 1 (relating findings of Census Bureau that private co-ops and condominiums made up nearly 77 percent of vacant New York City housing units for sale in 1984); Co-op Tyranny, supra note 3, at 36, col. 3 (statement of Mr. Harvey Fisher, member of the New York City Human Rights Commission, that "[i]n every borough, every stable
the New York State Legislature to limit the exercise of discretion by the board of directors or tenant-shareholders of a cooperative in denying admission to a prospective purchaser. There have been bills introduced in and passed by the New York State Assembly which would expand the discriminatory practices prohibited by the state's Human Rights Law. These bills would prohibit discrimination by cooperatives on the basis of affectional or sexual preference, lawful source of income, occupation, disability or an individual's having or intending to have children. Although the state senate recently declined to act on these bills, they have all been sent back to the Assembly for further consideration.

This Note will examine the propriety of imposing further restraints on a New York cooperative's ability to prohibit the transfer of its shares. Initially, this Note reviews the history of New York case law delegating broad discretion to a cooperative in selecting its shareholders. In particular, the New York courts' legal characterization of a tenant-shareholder's interest is analyzed, as this is the ultimate justification for the far-reaching restraints placed on the right of alienation of such interests. This Note then discusses the policies behind the decisions of other jurisdictions which impose a reasonableness standard on the board in prohibiting transfers, and compares them to the underlying rationale of Weisner. Finally, this Note concludes by recommending that the current bills under consideration by the state legislature, which expand the definition

relatively affordable neighborhood is undergoing tremendous conversion, and that includes working class communities").

23. See Co-ops Warned On Rejections, supra note 3, at 12, col. 2 (statement of State Assemblyman Alexander B. Grannis, co-sponsor of bill which would require co-ops to give reason for rejecting an applicant, that proposed legislation was reaction to proliferation of co-ops as basic form of housing).
24. See infra notes 26-30 and accompanying text.
32. See infra notes 42-69 and accompanying text.
33. See supra note 8.
34. See infra notes 42-48 and accompanying text.
35. See infra notes 70-89 and accompanying text.
36. See supra notes 26-30 and accompanying text.
of prohibited discriminatory practices by cooperatives, be altered to provide greater recognition to two competing interests: the tenant-shareholder’s right of alienation over his apartment and the cooperative’s privilege of selecting its own members. This could be accomplished by giving statutory recognition to the “reasonableness” standard used by the courts of other jurisdictions when evaluating the validity of alienation restraints on cooperative apartments. This legislation would, in effect, require that a cooperative exercise a right of first refusal when it withholds consent to a transfer of an apartment on unreasonable, yet constitutionally permissible grounds. In addition, this Note urges that legislation be adopted which would require cooperatives to inform applicants of the reason for their refusal to approve apartment purchases.

II. The History Of Judicial Decision In New York

A. Penthouse Properties, Inc. v. 1158 Fifth Avenue, Inc.

In 1939, a New York court ruled for the first time on the validity of share transfer restrictions on cooperative stock. This case, Penthouse Properties, Inc. v. 1158 Fifth Avenue, Inc., presented a classic confrontation between two well established policies: (1) the ability of an owner to transfer corporate stock, which is considered personalty, and therefore may only be subject to reasonable restraints on alienation; and (2) a landlord’s ability to arbitrarily withhold consent to an assignment or sublease by a tenant.

The Penthouse Properties court found that the proprietary lease was the primary interest of a tenant-shareholder when purchasing an apartment. The stock merely afforded the practical means of

37. See infra notes 76-89 and accompanying text.
38. See infra notes 90-103 and accompanying text.
39. See infra notes 71-73 and accompanying text.
40. See infra note 91 and accompanying text.
41. See infra notes 169-98 and accompanying text.
42. Penthouse Properties, Inc. v. 1158 Fifth Ave., Inc., 256 A.D. 685, 690, 11 N.Y.S.2d 417, 421 (1st Dep't 1939).
43. Id.
44. Id. at 690-91, 11 N.Y.S.2d at 422.
45. Id. (citing with approval Ogden v. Riverview Holding Corp., 134 Misc. 149, 234 N.Y.S. 678, aff'd, 226 A.D. 882, 235 N.Y.S. 850 (1st Dep't 1929)). This rule has been altered in New York State through statutory intervention. See N.Y. REAL PROP. LAW § 226-b (McKinney Supp. 1984-1985); infra notes 161-62 and accompanying text.
46. 256 A.D. at 692, 11 N.Y.S.2d at 423. Since the proprietary lease is deemed to be the dominant element of cooperative ownership, the characterization of the
combining an ownership interest with a method for proportionately sharing the assessments and taxes.\textsuperscript{47} Since the lease was the predominant element of cooperative ownership, the stock was not affected by the general rule which prohibits unreasonable restraints on the sale of stock in corporations organized for profit.\textsuperscript{48}

The court went to great lengths to distinguish the "special nature" of cooperative ownership from other forms of home ownership. Although the tenant-shareholders in a cooperative do not "own" their apartments,\textsuperscript{49} when they purchase an apartment they are interested in the purchase of a home.\textsuperscript{50} In fact, they acquire many of the advantages traditionally associated with actual home ownership.\textsuperscript{51} However, unlike the typical homeowner, the amount of a tenant-shareholder's monthly expenses will depend upon the financial well-being of his fellow shareholders.\textsuperscript{52} If one apartment owner defaults on his share of the monthly charges,\textsuperscript{53} the remaining share-
holders must make up the deficiency.\textsuperscript{54} This degree of financial interdependence among the tenant-shareholders is frequently referred to in court decisions as the “economic purpose” of the cooperative,\textsuperscript{55} and is the reason the financial status of prospective purchasers is of such vital concern to a cooperative’s members.

The second factor used by the \textit{Penthouse Properties} court to justify the imposition of share transfer restraints is the interest of the tenant-shareholders in establishing a community of homes.\textsuperscript{56} Indeed, the privilege of selecting one’s neighbors was the driving force behind the initial popularity of cooperatives at the early stages of their development,\textsuperscript{57} and continues to be one of the major factors behind their appeal.\textsuperscript{58} The right of tenant-shareholders to protect their investment by controlling membership in the building has received judicial recognition.\textsuperscript{59} This “social purpose” of the cooperative has come under increasing public scrutiny lately as financially capable purchasers are left wondering why their applications were rejected by the board.\textsuperscript{60}

The \textit{Penthouse Properties} court expressly refrained from deciding whether the consent of the directors or shareholders could be withheld

\textsuperscript{54} See id. at 776 (noting that tenant-shareholders will lose their apartments in a foreclosure, whether personally delinquent or not, if total assessment collections do not cover mortgage payments); \textit{Co-operative Apartment Housing}, supra note 52, at 1411.

\textsuperscript{55} See, e.g., Mowatt v. 1540 Lake Shore Drive Corp., 385 F.2d 135, 137 (7th Cir. 1967).

\textsuperscript{56} \textit{Penthouse Properties}, 256 A.D. at 692, 11 N.Y.S.2d at 423.

\textsuperscript{57} See Note, \textit{Cooperative Apartments-A Legal Hybrid}, 13 U. FLA. L. REV. 123, 124-25 (1960) [hereinafter cited as \textit{A Legal Hybrid}]; \textit{Cooperative Conversion}, supra note 17, at 1096; \textit{Co-op Tyranny}, supra note 3, at 38, col. 1 (statement of Gayle Banks, director of New York City real estate brokerage and management firm, that co-ops were “designed to maintain social exclusivity and financial soundness”).

\textsuperscript{58} See Knox, \textit{Why Condos are Edging Co-ops}, N.Y. Times, April 14, 1985, § 8 (Real Estate), at 14, col. 4 (while condominiums have now surpassed co-ops in the number of new units being built due to buyer preference, many individuals still purchase co-ops due to greater control they may exercise over their environment); Kohler v. Snow Village, Inc., 16 Ohio App. 3d 350, 357, 475 N.E.2d 1298, 1306 (1984) (tenant-shareholder has advantage over ordinary tenant in that he can control membership in building).

\textsuperscript{59} See infra notes 71-73 and accompanying text.

\textsuperscript{60} See \textit{Co-ops Tighten Standards}, supra note 21, at 9, col. 1.; Lifton, supra note 21, at 67, col. 2 (referring to the rejections of former President Nixon and Madonna by co-ops); \textit{Co-op Tyranny}, supra note 3, at 45, col. 3 (“should a financially sound applicant be prevented from buying an apartment because he is a lawyer, or because he has children, or because he showed insufficient cultural interests?”).
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arbitrarily. It did point out, however, that if a restraint on alienation of the cooperative stock could be imposed at all, "it is a restraint which is reasonable and appropriate to the lawful purposes to be attained." This portion of the opinion has been cited by other courts "for the proposition that only reasonable restraints on the alienation of cooperative stock may be imposed, a position that was subsequently rejected by the New York State Court of Appeals in Weisner." 

B. Weisner v. 791 Park Avenue Corp.

In Weisner, the plaintiff had entered into a contract to purchase an apartment from one Gilbert, a tenant-shareholder of the defendant corporation. After the board of directors had refused to consent to the transfer and had given no reason for doing so, the plaintiff brought an action against Gilbert and the corporation for specific performance of the sales contract.

The complaint alleged that the treasurer of the cooperative had personal animus against the plaintiff's brother and had improperly used his influence on the other members of the board to negotiate another transfer wherein he would receive a brokerage fee. Taking these allegations as true, it is difficult to imagine a situation where the tenant-shareholder's right of alienation could receive so little recognition. Yet the court, noting that the requisite approval of the board or the other tenant-shareholders had not been obtained and that any allegation of statutorily prohibited discrimination was absent, dismissed the complaint for failure to state a cause of action.

62. Id.
66. Id.
67. 6 N.Y.2d at 434, 160 N.E.2d at 724, 190 N.Y.S.2d at 75.
68. The court referred to refusals based on "race, color, religion, national origin or ancestry." Id.
69. Id. at 435, 160 N.E.2d at 724, 190 N.Y.S.2d at 76.
III. The Tenant-Shareholder and the Cooperative: Divergent Interests

While the vast majority of cooperative apartments are located in New York City,\(^7\) the validity of cooperative share transfer restrictions has been litigated in several other jurisdictions.\(^7\) When faced with the same issue, these courts have reached a result contrary to that of the Weisner court: in the absence of statutorily prohibited discrimination, they have imposed a standard of reasonableness upon the board in prohibiting the transfer of a tenant-shareholder’s interest.\(^7\) While none of these courts found the board’s decision to be arbitrary and capricious,\(^7\) they recognize that the unchecked ability

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70. HUD STUDY, supra note 18, at XI-1.
72. Strauss, 157 Cal. App. 3d at 815-16, 204 Cal. Rptr. at 233; Jones, 189 Conn. at 654-55, 458 A.2d at 358; Gale, 21 Ill. 2d at 92-93, 171 N.E.2d at 33; Logan, 17 Ill. App. 3d at 589, 308 N.E.2d at 282; Mowatt, 385 F.2d at 137; Sanders, 31 N.C. App. at 281, 229 S.E.2d at 307; Kohler, 16 Ohio App. 3d at 355, 475 N.E.2d at 1304; cf. Murphy v. 253 Garth Tenants Corp., 579 F. Supp. 1150, 1155 (S.D.N.Y. 1984) (despite broad discretion granted under Weisner, New York cooperative subjected to reasonableness standard when provision in by-laws stated that consent to transfer could not be unreasonably withheld); Alexy v. Kennedy House, Inc., 507 F. Supp. 690 (E.D. Pa. 1981) (provision in by-laws of non-profit cooperative apartment house giving corporation option to repurchase shares, if member decides to leave, according to “transfer value formula” found to be reasonable restriction); Hanigan v. Wheeler, 504 P.2d 972, 975 (Ariz. Ct. App. 1972) (rule of reasonableness in testing alienation restraints adopted in Arizona, citing with approval Gale and Penthouse Properties); Sunshine Villa Apartments, Inc. v. Snyder, 335 So. 2d 841, 842 (Fla. Dist. Ct. App. 1976) (reasonableness of board of directors in withholding consent to transfer of cooperative interest would have been addressed by appellate court had issue not been rendered moot), appeal dismissed, 345 So. 2d 427 (Fla. 1977).
73. See Jones, 189 Conn. at 657, 458 A.2d at 359-60 (tenant-shareholders sought to purchase second apartment in co-op which was connected to their present residence one floor below by common stairway used by all tenant-shareholders; purchase rejected on ground it would interfere with common use by other tenants); Mowatt, 385 F.2d at 137-38 (rejections based upon insolvency, association with people of disreputable character and noisiness of proposed sublessees and assignees); Sanders,
of the board to prohibit transfers for any reason is an unreasonable restraint on the tenant-shareholder's right of alienation. They further agree that such unbridled discretion vested in the board would be contrary to the public policy encouraging the free alienation of property.

A. The "Ownership" Interest Of Tenant-Shareholders

Several commentators have cited what they perceive to be fallacious reasoning used by some courts in attempting to classify the nature of a tenant-shareholder's interest. By attempting to "pigeonhole" the interest as either realty or personalty, commentators suggest

31 N.C. App. at 284, 229 S.E.2d at 309 (rejection of applicant who intended to sublet apartment before taking occupancy reasonable in light of corporate policy limiting occupancy to owners); Kohler, 16 Ohio App. 3d at 357, 475 N.E.2d at 1305-06 (practice of denying subleases as matter of corporate policy reasonably necessary to carry out cooperative purpose); see also Strauss, 157 Cal. App. 3d at 816 n.7, 204 Cal. Rptr. at 233 n.7 (reasonableness of share transfer restrictions not addressed by court, since cooperative corporation was not party to action); cf. Murphy, 579 F. Supp. at 1155-56 (co-op's contention that plaintiff's application was rejected due to her unresponsiveness and vagueness during interview found to be insufficient in light of by-law provision stating consent would not be unreasonably withheld). But see Logan, 111 App. 3d at 590, 308 N.E.2d at 283 (rejection of proposed sublessee without evaluation of his personal qualifications found to be unreasonable).

74. See, e.g., Jones, 189 Conn. at 654, 458 A.2d at 358; Mowatt, 385 F.2d at 137; see also RESTATEMENT OF PROPERTY § 406, Comment i, § 410, Comment g (1944); Weisner, 7 A.D.2d at 86, 180 N.Y.S.2d at 744 (Frank, J., dissenting) (suggesting that cooperative corporation may owe greater duty to tenant-shareholder than to prospective purchaser when evaluating transfers of apartments).

75. See Jones, 189 Conn. at 654-55, 458 A.2d at 359; see also Kruger v. Page Management Co., 105 Misc. 2d 14, 19, 432 N.Y.S.2d 295, 300 (1980) (restrictions in leases prohibiting subleases or assignments are "restraints on the free alienation of land and tend to prevent full utilization of the land, which is contrary to the best interests of society"), appeal dismissed, 80 A.D.2d 525 (1st Dep't 1981); Manning, The Development of Restraints on Alienation Since Gray, 48 HARV. L. REV. 373, 401-06 (1935) ("[i]f public interest is served by the free alienation of property, it is against that interest to enforce the capricious whims of an owner of property." Id. at 406).

76. Powell, supra note 6, ¶ 633.16, at 829; COOPERATIVE HOUSING LAW, supra note 6, § 1.03, at 1-7 to 1-8; Bratt, supra note 49, at 780-82; Rohan, Cooperative Housing: An Appraisal Of Residential Controls And Enforcement Procedures, 18 STAN. L. REV. 1323, 1337 (1966) [hereinafter cited as Residential Controls]; Realty or Personality?, supra note 6, at 260-64; A Legal Hybrid, supra note 57, at 128.

77. See, e.g., In re Estate of Pitts, 218 Cal. 184, 22 P.2d 694 (1933). If a tenant-shareholder's interest is classified as real property, its alienability should be unfettered. Bratt, supra note 49, at 784.

that these courts are improperly classifying a property interest which does not fit conveniently into either category. The courts of several jurisdictions have been quick to recognize the sui generis nature of the cooperative interest. They note that a tenant-shareholder’s interest is a unique form of property, and should not be classified as either realty or personalty. Many courts recognize the self-perception of tenant-shareholders as “owners” of their apartments, and the reluctance of society to place restraints on an owner’s right to alienate his property. Since the cooperative has a strong interest in the economic and social characteristics of a tenant-shareholder, restraints may be imposed on the alienation of his interest. However, due to the tenant-shareholder’s true status as an “owner,” only reasonable restraints, for example, those that “serve the reasonable protection of the financial and social integrity of the cooperative as a whole,” will be upheld.

This analysis is not based on any landlord-tenant concept, or

79. See articles cited supra note 76; see also Plaza Rd. Coop., Inc. v. Finn, 201 N.J. Super. 174, 175, 492 A.2d 1072, 1072 (App. Div. 1985) ("cooperative is frequently described as a building in which each 'tenant' 'owns' an apartment, an obvious contradiction in terms").


81. See cases cited supra note 80; see also Bratt, supra note 49, at 782; Realty or Personalty?, supra note 8, at 256-58.

82. Kohler, 16 Ohio App. 3d at 354, 475 N.E.2d at 1302; Jones, 189 Conn. at 654, 458 A.2d at 358; see also Tudor Arms Apartments v. Shaffer, 191 Md. 342, 62 A.2d 346 (1948); Realty Or Personality?, supra note 8, at 260, 288; Bratt, supra note 49, at 775-76; 1971 McKinney's Sess. Laws at 2404 (Memorandum of State Executive Department) ("[f]or the city dweller in particular, the co-op is a vehicle for obtaining an ownership interest i.e. his apartment"); Co-op Tyranny, supra note 3, at 41, col. 2 (statement of Marc J. Luxemberg, president of Council of New York Cooperatives, that "the bottom line [behind cooperative admissions requirements] is that people want control over their own homes").

83. Jones, 189 Conn. at 654, 458 A.2d at 358.

84. See supra notes 42-59 and accompanying text.

85. Jones, 189 Conn. at 654, 458 A.2d at 358; see Mowatt, 385 F.2d at 137; Bratt, supra note 49, at 785.

86. It has often been stated by the courts that the cooperative and tenant-shareholder stand in a mere landlord-tenant relationship regarding residential controls over the property. See California Coastal Comm’n v. Quanta Inv. Corp., 113 Cal App. 3d 579, 597, 170 Cal. Rptr. 263, 272 (1981); Berman v. Watergate West, Inc., 391 A.2d 1351 (D.C. 1978); 1901 Wyoming Ave. Coop. Ass’n v. Lee, 345 A.2d 456, 458 n.2 (D.C. 1975). This is based on the fact that the tenant-shareholder does not “own” the apartment, but merely owns stock in the corporation, and holds a long-term proprietary lease. See supra note 8. Since the tenant-shareholder...
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realty-personalty distinction, but on the only viable method of dealing with a tenant-shareholder’s interest—the recognition that the primary purpose of the cooperative form of housing is to afford, has delegated control over the property to the corporation, courts have viewed the board of directors as the “landlord” of the building. Powell, supra note 6, ¶ 633.16, at 829.

However, for the purpose of restricting a tenant-shareholder’s ability to transfer his unit, the landlord-tenant analogy is clearly inapplicable. Commentators correctly contend that the tenant-shareholder should not be viewed as an ordinary lessee since he possesses many rights not available to the tenant in a rental situation. See, e.g., Powell, supra, ¶ 633.16, at 829. Several of the courts which have imposed a reasonableness standard on the board of directors recognize this fact, since their jurisdictions continue to adhere to the common law view that a landlord is free to arbitrarily withhold consent to an assignment or sublease of a residential lease. Compare Strauss v. Summerhayes, 157 Cal. App. 3d 806, 204 Cal. Rptr. 227 (1984); Jones v. O’Connell, 189 Conn. 648, 458 A.2d 355 (1983); Sunshine Villa Apartments, Inc. v. Snyder, 335 So. 2d 841, 842 (Fla. Dist. Ct. App. 1976), appeal dismissed, 345 So. 2d 427 (Fla. 1977); Sanders v. Tropicana, 31 N.C. App. 229 S.E.2d 304 (1976); Kohler v. Snow Village, Inc., 16 Ohio App. 3d 350, 475 N.E.2d 1298 (1984) with Kendall v. Ernest Pestana, Inc., 40 Cal. 3d 837, 839 n.1, 220 Cal. Rptr. 818, 820 n.1 (1985) (in holding that lessor may only reasonably withhold consent to assignment or sublease, court expressly limited holding to commercial leases); Robinson v. Weitz, 171 Conn. 545, 549, 370 A.2d 1066, 1068 (1976) (landlord may arbitrarily withhold consent to assignment or sublease); Fernandez v. Vasquez, 397 So. 2d 1171, 1174 n.8 (Fla. Dist. Ct. App. 1981) (reasonable withholding of consent limited to commercial leases); Isbey v. Crews, 55 N.C. App. 47, 50, 284 S.E.2d 534, 537 (1981) (holding that landlord could arbitrarily withhold consent; Sanders distinguished due to presence of corporate stock in cooperative organization); F & L Center Co. v. Cunningham Drug Stores, Inc., 19 Ohio App. 3d 72, 482 N.E.2d 1296 (1984) (landlord in commercial tenancy may arbitrarily withhold consent).

The purpose of cooperative housing is to afford the closest approximation to actual-home ownership in an urban setting. See infra note 88 and accompanying text. The law already treats the tenant-shareholder as “owner” of his residence in certain respects. See generally Bratt, supra note 49, at 761-90. There is no logical reason for not extending this view of the tenant-shareholder as an “owner” when evaluating restraints on the alienation of his interest. Powell, supra, ¶ 633.16, at 829; see Bratt, supra, at 761 (author advocates the application of homestead exemption to cooperative apartments; courts refusing to do so have utilized “technical mechanical distinctions, rather than a broader, more purpose-oriented approach in definition thereby ignoring the policy consideration at the very heart of homestead exemption statutes—protection of a debtor’s home”). The tenant-shareholder should be treated more along the lines of a condominium unit owner for this analysis. See infra note 87.

87. While the nature of a tenant-shareholder’s interest has not received uniform treatment, courts and scholars generally agree that it is not an interest in real property. Bratt, supra note 49, at 780. This is in marked contrast to the condominium unit owner’s interest, which is recognized as real property. I P. Rohan & M. Reskin, Condominium Law and Practice § 1.01 (1985). While the two property rights differ in their classification, the ability of cooperative boards of directors and condominium homeowner associations to restrain the transfer of membership interests rests on identical aims: “first, to reduce the risk of financial interdependence
in an urban setting, the closest thing to actual home ownership. Denying the appropriate recognition to this ownership interest is improper, and this is precisely why only reasonable restraints on the alienation of cooperative apartments should be enforced.

by excluding the economically unreliable; and second, to promote the project's inner harmony by striving for compatible members." Berger, Condominium: Shelter on a Statutory Foundation, 63 COLUM. L. REV. 983, 1018 (1963).

Despite these similar concerns, the New York condominium has much less discretion in restraining the transfer of a unit owner's interest. While it may not discriminate on the same statutorily prohibited grounds applicable to cooperatives, N.Y. REAL PROP. LAW § 339-v(2)(a) (McKinney 1968), it is otherwise forced to exercise a pre-emptive right of first refusal to control membership in an owner's association. An unconditional power to reject purchasers of units would be viewed as an unreasonable restraint on an owner's right to alienate real property. Browder, Restraints on the Alienation of Condominium Units (The Right of First Refusal), 1970 U. ILL. L.F. 231, 232.

It is unrealistic to treat the condominium unit owner and tenant-shareholder differently in this respect. As one commentator has questioned: "[a]re the investment and social positions of cooperative dwellers really inferior to those of condominium owners in a similar project?" Powell, supra note 6, ¶ 633.16, at 830; see also Residential Controls, supra note 76, at 1336-37 (proprietary lessee's interest should be equated with condominium unit owner in evaluating residential restrictions); Realty or Personality?, supra note 8, at 264 (rules of personality or reality should be applied to situations whenever either one furthers purpose of cooperative ownership to greater degree); Bratt, supra note 49, at 782 (same); Powell, supra, ¶ 633.4[1], at 826.1 n.1 (predicting that one day "courts may treat all forms of residential communities alike in their restrictions on an owner's right to sell or lease").

88. COOPERATIVE HOUSING LAW, supra note 6, at § 2.01(5) (quoting H. Lesar, LANDLORD AND TENANT § 3.10, at 200 (1957)); Kohler, 16 Ohio App. 3d at 354, 475 N.E.2d at 1302; Bratt, supra note 49, at 775-76 (quoting Mixon, Apartment Ownership in Texas: Cooperative and Condominium, 1 Hous. L. Rev. 226, 227 (1964)); Realty or Personality?, supra note 8, at 260.

89. Bratt, supra note 49, at 785; see cases cited supra note 72; see also Rosenberry, The Application of the Federal and State Constitutions to Condominiums, Cooperatives and Planned Developments, 19 REAL PROP. PROB. & TR. J. 1, 30-31 (1984) (advising that appropriate test to apply to provisions restricting freedoms of tenant-shareholder is that of reasonable restraint on alienation or common law "rule of reasonableness") [hereinafter cited as Rosenberry]; Note, Federal Assistance in Financing Middle-Income Cooperative Apartments, 68 YALE L.J. 542, 611 (1959) (once FHA has passed on financial responsibility of prospective purchaser, "cooperative should have to show that a rejected applicant has a definite history of poorly maintaining property or failing to get along with his neighbors") [hereinafter cited as Federal Assistance].

It may be said that since the tenant-shareholder purchased his interest in the corporation with knowledge of these resale restrictions, he should be estopped from enjoining their enforcement now. Alexy v. Kennedy House, Inc., 507 F. Supp. at 700; Rosenberry, supra, at 28. In return for the ability to protect his investment and select his own neighbors, the tenant-shareholder has impliedly agreed to surrender some of the rights he would ordinarily possess regarding control of his unit. However, proponents of this argument ignore the fact that the courts protect the tenant-shareholder from the enforcement of oppressive and arbitrary "house rules," even
B. The Cooperative Interest

Some commentators undoubtedly would suggest that it is improper to force a cooperative to accept an assignee of a tenant-shareholder, even if its withholding of consent to the transfer is unreasonable. While no one will question the propriety of prohibiting a cooperative from denying consent to a transfer on constitutionally suspect grounds, some may question the propriety of using various other classifications. Constitutional scrutiny of various forms of private discrimination is almost always unavailable to a rejected purchaser.

though the tenant-shareholder has vested power in the board of directors to manage his home. See Garrison Apartments, Inc. v. Sabourin, 113 Misc. 2d 674, 449 N.Y.S.2d 629 (N.Y.C. Civ. Ct. N.Y. County 1982) (while cooperative rulemaking involves subordination of ownership rights and privileges, standard of review is based upon reasonableness of rule or regulation); Bratt, supra, at 778; see also Residential Controls, supra note 76, at 1336 (fact that proprietary lessee has agreed to abide by any and all house rules is only one factor to be weighed when assessing rule's validity).

90. See Platovsky v. 17 East 96th Owners Corp., N.Y.L.J., May 21, 1986, at 11, col. 3 (Sup. Ct. N.Y. County) (tenant-shareholder applying for second apartment lacks standing to sue co-op after rejected purchase); Weisner, 6 N.Y.2d at 434, 160 N.E.2d at 724, 190 N.Y.S.2d at 75-76 (stating that tenant-shareholder's obligation to sell is typically made "subject" to approval of board of directors, and he therefore has no duty to secure their consent); see also Strauss, 157 Cal. App. 3d at 815-16, 204 Cal. Rptr. at 233 (plaintiff did not have standing to enforce membership transfer restrictions as third party beneficiary or tenant-shareholder's successor in interest).

91. These grounds include race, color, religion, sex and national origin. See generally J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 585-818 (2d ed. 1983).

92. Is it possible for an applicant to apply fourteenth amendment protections to the cooperative admissions process? Any successful attempt to do so would necessarily involve a judicial finding of "state action" by the cooperative's board of directors. The unsuccessful plaintiff in Girard v. 94th St. & Fifth Ave. Corp., 530 F.2d 66 (2d Cir.), cert. denied, 425 U.S. 974 (1976), alleging sex discrimination, sought to have the board's decision denying her purchase analyzed as state action under the Shelley doctrine (Shelley v. Kraemer, 334 U.S. 1 (1948)). See generally Rosenberry, supra note 74, at 1-31 (author discusses Girard and the various theories of state action, recommending that federal and state constitutional safeguards not be applied to government systems of common interest developments); cf. Calhoun, The Thirteenth and Fourteenth Amendments: Constitutional Authority for Federal Legislation Against Private Discrimination, 61 MINN. L. REV. 313, 342-43 (1977) (suggesting the Girard court failed to sufficiently distinguish facts so as to merit a different outcome than that in Shelley) [hereinafter cited as Calhoun]; Powell, supra note 6, ¶ 633.15, at 826.9 n.10 (noting that when tenant-shareholder negotiates sale, and corporation withholds consent on constitutionally impermissible grounds, judicial action may implicate Shelley doctrine).

A rejected purchaser claiming to be the victim of arbitrary class discrimination could also allege a violation of the thirteenth amendment. The Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3631 (1982), has been recognized as a valid exercise of congressional power under the thirteenth amendment to reach private discrim-
The desire of individuals to be free from arbitrary class discrimination, however, must be weighed against one of the principal advantages of cooperative housing: the "privilege of selecting neighbors." This advantage is not enjoyed by mere tenants who reside in multi-unit dwellings similar to cooperative apartment buildings. Indeed, as it was expressed by the court in *Penthouse Properties*, "in a very real sense the tenant stockholders enter into a relation not unlike a partnership, though expressed in corporate form." Foisting the purchaser on the remaining tenant-shareholders when the cooperative withholds consent for unreasonable, albeit non-suspect classifications, would be a violation of this principle. This remedy would be available under the proposed legislation, as rejected purchasers could obtain injunctive relief after a denial of consent.
based on their sexual preference, lawful source of income, occupation, disability and other factors.98

When a transfer of a tenant-shareholder’s interest is prohibited through the invocation of arbitrary classifications, the evil to be remedied is the failure to recognize his legitimate right, as owner of the property, “to enjoy reasonable access to a resale market.”99 However, if the cooperative does not discriminate on constitutionally suspect grounds,100 it is inconsistent with the social purpose of cooperative ownership101 to force the admission of a new tenant-

Law to cooperatives, see A. 6824, supra note 30, a rejected purchaser could get an injunction mandating that the cooperative transfer title to an apartment to him under circumstances which fail to adequately recognize the social purpose of cooperative ownership. See supra notes 56-60 and accompanying text.

98. See supra notes 26-30 and accompanying text.

Section 8 of Assembly bill 571 provides that section 296 of the Executive Law be amended to include affectional or sexual preference as a protected class. “The term ‘affectional or sexual preference’ means having or manifesting an emotional or physical attachment to another consenting person or persons of either gender or having or manifesting a preference for such attachment.”

While sexual preference has not yet been recognized as a “suspect classification” under the equal protection clause of the fourteenth amendment, National Gay Task Force v. Board of Educ., 729 F.2d 1270, 1273 (10th Cir. 1984), aff’d by an equally divided Court, 105 S. Ct. 1858 (1985), commentators have argued that homosexuals are deserving of such protection. See generally Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification, 98 HARV. L. REV. 1285 (1985).

101. Any contention that the cooperative owes a contractual duty to the prospective purchaser is clearly at odds with current authorities. See supra note 90. However, some writers have commented on the recognition of housing access as a constitutional right. Payne, The Condominium as a “Business Enterprise” Under Civil Rights Legislation, 12 REAL EST. L.J. 266, 270-71 (1983) [hereinafter cited as Payne I]; Payne, Starting Over—Mount Laurel II, 12 REAL EST. L.J. 85, 93-94 (1983). Indeed, this argument seems superficially appealing in light of the current housing shortage in New York, supra note 19, and high selectivity exercised by many cooperative boards in screening residents. Lifton, supra note 21, at 67, col. 2. The argument may be made that due to the unavailability of comparable, affordable rental housing in New York City, a cooperative’s power to arbitrarily deny a person access to housing impinges on this right. Such a conclusion may be reached through the application of a “public accommodations” concept to the
shareholder. Therefore, the "special nature" of cooperative ownership requires that a different remedy be fashioned to account for the situation where a purchaser is denied admission based on unreasonable grounds.

IV. Defining the Reasonableness of a Cooperative's Rejection

The courts of other jurisdictions have focused on the tenant-shareholder's right of alienation in imposing a standard of reasonableness on the cooperative's evaluation of prospective purchasers, but have failed to clearly define what constitutes an acceptable reason for rejecting an applicant. They merely state that the restraint on the right of alienation must be exercised in light of the reasonable economic and social needs of the cooperative. The realization of these accepted goals of cooperative ownership must be balanced against the interference with the tenant-shareholder's access to the resale market. At present, federal, state and city statutes prohibit a cooperative from discriminating on the basis of race, creed, national origin and sex. If a cooperative can offer reasons for a rejection other than those grounds listed above, it may arbitrarily prohibit the transfer of any apartment. Thus, a board is free to reject a purchaser because he is a homosexual, a lawyer, a famous entertainer, a former housing field, a strategy utilized by the Supreme Court of California in construing that state's civil rights legislation. See infra notes 131-40 and accompanying text; Payne I, supra, at 270-71. But see Lindsey v. Normet, 405 U.S. 56, 74 (1972) ("[w]e do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality").

102. See supra notes 56-59 and accompanying text.
103. See infra notes 161-68 and accompanying text.
104. Cf. A Legal Hybrid, supra note 57, at 131, 133 (recognizing that the decision of the Appellate Division, First Department in Weisner, subjecting cooperative restrictions to reasonableness standard, failed to define "reasonable;" Weisner, 7 A.D.2d at 85, 180 N.Y.S.2d at 744 (Frank, J., dissenting) (suggesting business judgment rule limits judicial review of board decisions regarding transfer of cooperative interests).
105. See, e.g., Mowatt v. 1540 Lake Shore Drive Corp., 385 F.2d at 137.
107. See supra note 3.
108. See supra note 100.
110. See San Remo Co-op Board Rejects Madonna's Bid, N.Y. Times, July 19, 1985, at B3, col. 1; Margolies, supra note 3, at 20, col. 1 (noting suit brought
President,\textsuperscript{111} or for any number of other reasons.\textsuperscript{112}

Clearly, there are many valid reasons for rejecting prospective purchasers. The financial condition or instability of a prospective purchaser is of prime concern to the cooperative, due to the financial interdependence of the tenant-shareholders.\textsuperscript{113} The financial condition of a prospective purchaser also provides objective criteria which can be examined by the appropriate authorities to ensure that the cooperative is not using the "financial inability" of the purchaser to disguise discriminatory attitudes.\textsuperscript{114}

Beyond an applicant's objective fitness to meet his financial obligations as a shareholder, what other criteria can be said to protect

by tenant-shareholder in response to board rejection of potential sale to Sammy Davis, Jr.).

\textsuperscript{111} See McFadden, \textit{Nixon May Move Back to City}, N.Y. Times, Jan. 20, 1984, at B3, col. 5 [hereinafter cited as \textit{Nixon May Move}]. Initially, the board of directors of the cooperative had planned to approve the sale by telephone conference call. However, a temporary restraining order was issued on application of a tenant-shareholder, Jacob Kaplan, since telephone meetings were not permitted under the corporation's by-laws. \textit{Id.} After the board agreed to hold a face-to-face meeting, the tenant-shareholder dropped his suit to bar Mr. Nixon's admittance into the building. \textit{Nixon Co-op Bid to be Reviewed}, N.Y. Times, Jan. 21, 1984, at A25, col. 2 [hereinafter cited as \textit{Nixon Co-op Bid}].

Although Mr. Nixon's purchase application was finally approved by vote of the board and a special vote of the tenant-shareholders, \textit{Nixon Approved for Co-op}, N.Y. Times, Feb. 7, 1984, at B3, col. 1, Mr. Kaplan continued to voice his concern that Mr. Nixon's presence would affect the peaceful environment of the building. \textit{See infra} note 119.


\textsuperscript{113} See supra notes 52-54 and accompanying text. That the financial interdependence of the tenant-shareholders is of paramount importance when evaluating an applicant is evident from the widespread failures of cooperatives during the Depression. Bratt, supra note 49, at 772 (citing Mixon, \textit{Apartment Ownership in Texas: Cooperative and Condominium}, 1 Hous. L. REV. 226, 229 (1964)). Today, with the rising prices of cooperative apartments in New York, boards are permitting smaller percentages of the purchase price to be secured by borrowing. \textit{Co-ops Tighten Standards, supra} note 21, at 9, col. 2.

\textsuperscript{114} See Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1043 (2d Cir. 1979) (in context of cooperative admissions policies relying on subjective factors, "clever men may easily conceal their motivations," quoting United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974), \textit{cert. denied}, 422 U.S. 1042 (1975)); Rogers v. 66-36 Yellowstone Boulevard Coop. Owners, Inc., 599 F. Supp. 79, 86 (E.D.N.Y. 1984) (prohibiting cooperative from denying minority applicant opportunity to purchase apartment based on source of income unless it can point to "a sound basis for believing that . . . [the] income source will negatively affect his/her ability to buy and maintain an apartment").
the "reasonable social needs"\textsuperscript{115} of the cooperative? If an individual might attract undue public attention to the building,\textsuperscript{116} then the withholding of consent is clearly justified. The same can be said about individuals who are uncooperative in their interviews before the board,\textsuperscript{117} who intend to sublet their apartment,\textsuperscript{118} or who threaten the security of their fellow tenant-shareholders.\textsuperscript{119} However, as discussed below, the board has the power to unreasonably prohibit transfers in situations where the tenant-shareholder's right of alienation demands greater recognition.\textsuperscript{120}

\textsuperscript{115} In order to reject an applicant on purely subjective factors, after the FHA has passed on his financial responsibility, one commentator has suggested that a federally insured cooperative "should have to show that a rejected applicant has a definite history of poorly maintaining property or failing to get along with his neighbors." \textit{Federal Assistance, supra} note 74, at 611.

\textsuperscript{116} See Lifton, \textit{supra} note 21, at 67, col. 2 (public figures may be turned down to protect integrity and security of building, or to avoid public nuisance).

\textsuperscript{117} See, e.g., Murphy v. 253 Garth Tenants Corp., 579 F. Supp. 1150, 1155 (S.D.N.Y. 1983) (vagueness and unresponsiveness during screening interview deemed to be acceptable reason for rejection under federal and state fair housing laws). Such subjective reasons for rejection are common among New York City cooperative boards. See Lifton, \textit{supra} note 21, at 67, col. 2 (reasons for rejection in excluding buyers often "sound like those heard in the admissions committee of an exclusive country club, ranging from 'I heard that she was a pain in the neck in their last building,' to 'They don't give enough to charity' or . . . 'They're really not our kind of people' "). \textit{But cf.} Robinson v. 12 Lofts Realty, Inc., 610 F.2d at 1040 (where plaintiff alleges that cooperative rejected purchase on racially discriminatory grounds, "court must carefully scrutinize suggested reasons that are not objective in nature").

\textsuperscript{118} See \textit{supra} note 13.

\textsuperscript{119} When former President Nixon attempted to purchase an apartment at 760 Park Avenue, a tenant-shareholder sought to block board approval because he feared Mr. Nixon's presence might disturb the tranquility of the building. \textit{Nixon May Move, supra} note 111, at B3, col. 6. The tenant, Jacob Kaplan, expressed concern that Mr. Nixon's arrival would turn the building into a "tourist attraction." \textit{Nixon Co-op Bid, supra} note 111, at A25, col. 1. In a letter to other tenant-shareholders, he openly raised the possibility that "nutty people" might attempt to harm Mr. Nixon, thereby exposing all of the building's residents to potential life-threatening dangers. In addition, he questioned the desirability of having Secret Service men on the premises. \textit{Nixon Approved for Co-op, supra} note 111, at B3, col. 1.

Despite Mr. Kaplan's objections, the building's six member board of directors and twelve tenant-shareholders voted separately to approve the sale to Mr. Nixon. \textit{Id.} Mr. Nixon finally succeeded in purchasing an apartment after twice being denied permission to buy Manhattan cooperative apartments by cooperative boards which had expressed Mr. Kaplan's concerns. \textit{Nixon May Move, supra, at B3, col. 6. Apparently, Mr. Kaplan's dislike of public figures as fellow tenants is shared by other cooperative boards. See supra note 116. The slaying of John Lennon in front of his residence in Manhattan will do nothing to calm these fears.

\textsuperscript{120} See \textit{infra} notes 121-60 and accompanying text.
A. Bad Faith by the Board: The *Weisner* Scenario

If no inquiry into the reasonableness of the board’s decision to reject an applicant is made, a tenant-shareholder’s attempted sale could be voided for purposes wholly unrelated to the applicant’s fitness as a shareholder. Situations are surfacing more frequently, where a tenant-shareholder has been denied permission to sell his apartment based on unreasonable factors. Indeed, some tenant-shareholders may be facing the same type of personal hostility as was alleged in *Weisner*.

While the shareholder who was attempting to sell his apartment was named as a co-defendant in *Weisner*, other individuals in the same position have themselves sued the board because they remained

121. See Lifton, supra note 21, at 67, col. 2; Co-ops Tighten Standards, supra note 21, at 10, col. 3. See generally Co-op Tyranny, supra note 3, reporting the following situations where a board did not approve the tenant-shareholder’s purchaser:

1. Individual who had built up personal fortune of $25 million was rejected on the ground that board members would have preferred “a person with inherited money.” *Co-op Tyranny*, supra note 3, at 38, col. 2.

2. Couple who sought to purchase an $850,000 Manhattan apartment, and offered to pay the entire purchase price in cash, were rejected by the board and given no reason for this decision. When the couple filed a complaint with the New York City Human Rights Commission, the board defended its decision on the ground that the couple hadn’t exhibited sufficient cultural interests, and the husband was too absorbed in his work and was seen as an “entrepreneurial” type. The commission has not yet reached a decision in this case. *Id.* at 38, col. 3.

3. A board initially rejected a buyer with a liquid net worth of over $1 million, who sought to purchase a $270,000 apartment almost entirely in cash. A board member notified the selling tenant-shareholder that the buyer was “too wealthy and would not be interested in the building—that someone with less money would be more dedicated to the building.” After a meeting with the disenchanted tenant-shareholder, the board reconsidered its decision. *Id.* at 44, col. 2.

122. See *id.* at 45, col. 1. A mother and son brought suit alleging that the board’s refusal to approve three financially acceptable purchasers was due to the fact that the son had opposed the board’s plan to implement a security program. More than one year later, the cooperative settled the suit by purchasing the apartment from the tenant-shareholders. *Id.*

123. This occurred in *Jones*, Gale, Logan, Mowatt, Sanders, and Kohler. Indeed, it is doubtful whether a rejected purchaser has standing to sue either the cooperative corporation or the selling tenant-shareholder, in the absence of statutorily prohibited discrimination. See *supra* note 90.

What should be the result when a tenant-shareholder sues the cooperative corporation, not as a seller of an apartment, but as a prospective purchaser? This situation results when a tenant-shareholder seeks to purchase an additional unit in his cooperative apartment building. See *Jones*, 189 Conn. 648, 458 A.2d 355;
liable for the monthly carrying charges until a new purchaser was approved.\footnote{124} While a cause of action against the board might lie for breach of a fiduciary obligation to treat all shareholders equally,\footnote{125}


124. In \textit{Sanders}, 31 N.C. App. 276, 229 S.E.2d 304, the plaintiff tenant-shareholder got married, had a child, and due to the need for greater space purchased a new home. He vacated his apartment late in 1972 and offered it for sale, while continuing to pay the co-op monthly charges. \textit{Id.} at 278, 229 S.E.2d at 306.

In March 1973, plaintiff received an offer for the apartment. The board of directors refused to consent to the sale, since the prospective purchaser intended to sublet rather than occupy the apartment immediately. Plaintiff subsequently sold his apartment in July 1974, but had terminated monthly payments in the co-op after March 1973. The co-op sought to recover the delinquent payments at trial. \textit{Id.}

The plaintiff in \textit{Sanders} was fortunate in that he was able to leave his apartment before the sale was approved. But where the purchase of a new residence is dependent upon the sale of a cooperative apartment a rejection of the buyer can create great difficulty for the seller. \textit{See} Liftin, \textit{supra} note 21, at 67, col. 2; \textit{see also} Weisner v. 791 Park Ave. Corp., 12 Misc. 2d 774, 775, 177 N.Y.S.2d 887, 888 (1958) (analogizing hardships suffered by tenant-shareholder who fails to obtain board approval to those suffered by commercial tenant who is denied consent to assignment, while no longer having any use for the property); \textit{Co-operative Apartment Housing, supra} note 52, at 1418 (recognizing the possible "spectacle of a tenant-owner being forced into insolvency while approval of a sale of his interest was withheld because the other tenants disliked the prospective purchaser").

125. \textit{See}, e.g., Goldstone v. Constable, 84 A.D.2d at 520, 443 N.Y.S.2d at 381; Jones v. O'Connell, 189 Conn. at 659, 458 A.2d at 360; \textit{see also} Schwartz v. Marien, 37 N.Y.2d 487, 491, 335 N.E.2d 334, 337, 373 N.Y.S.2d 122, 126 (1975) ("members of a corporate board of directors . . . owe a fiduciary responsibility to the shareholders in general and to individual shareholders in particular to treat all shareholders fairly and evenly"). A recent decision by the New York Court of Appeals, striking down a "flip tax" imposed by a cooperative board of directors, may have far greater implications regarding the statutory duty to treat all cooperative shareholders equally.

In \textit{Fe Bland v. Two Trees Management Co.}, 66 N.Y.2d 556, 489 N.E.2d 233, 498 N.Y.S.2d 336 (1985), the court struck down a board imposed flip tax as being violative of New York Business Corporation Law section 501(c). \textit{N.Y. Bus. Corp. Law} § 501(c) (McKinney 1963). The fee varied in amount depending upon whether the seller purchased his shares from the sponsor or from a tenant-shareholder on the resale of his apartment. A different fee rate was also applied to individuals who had been owners for five years or more. 66 N.Y.2d at 560-61, 489 N.E.2d at 225, 498 N.Y.S.2d at 338.

Section 501(c) states that "each share shall be equal to every other share of the class." The \textit{Fe Bland} court interpreted the statute to require that "shares of the same class be equal in all respects to every other share of the class." \textit{Id.} at 569, 489 N.E.2d at 230, 498 N.Y.S.2d at 343. Thus, the transfer fee in question clearly
or for a tortious interference with the contract, the plaintiff's burden of proof will be more difficult to meet because the board has no obligation to document its reasons for rejection.

B. The Elimination of Arbitrary Classifications: The California Approach

It has been stated by some New York City real estate brokers that the major obstacle in gaining admission to a cooperative is not the prospective purchaser's appearance during his interview, but having the interview granted. Cooperatives have been said to frown upon certain classes of individuals when evaluating purchase applications. Their reluctance to accept these individuals as tenant-shareholders has nothing to do with any individual characteristics the applicant might possess; rather, the cooperative is concerned

at 569, 489 N.E.2d at 230. Thus, the transfer fee in question clearly violated this provision.

Many of the cases challenging board decisions to reject prospective purchasers have been brought by the selling tenant-shareholder. See supra note 123. What would happen if a tenant-shareholder, angered by the board's decision, sought to invalidate the requirement of board approval as being violative of section 501(c)? The by-laws and proprietary lease typically provide that a tenant-shareholder may not assign or sublease his unit without the prior consent of the board of directors, which may be withheld for any or no reason. See supra note 12. However, a typical proprietary lease includes a clause reserving the sponsor's right to assign or sublease, without board approval, the units corresponding to any unsold shares that he may hold after the closing date. See 2B COOPERATIVE HOUSING LAW, supra note 6, App. D-17, at App—492.1038(40). Any argument that these are in fact two separate classes of stock, and therefore not in violation of section 501(c), would be fatal to the corporation. Section 216(b)(1)(A) of the Internal Revenue Code requires that a cooperative have only one class of stock to receive favorable tax treatment. I.R.C. § 216(b)(1)(A) (1982). Therefore, the different rights afforded to shares of the same class of stock regarding resale could be a violation of B.C.L. section 501(c). Sadowsky, Court Clarifies the Law Regarding Co-op Flip Tax, N.Y.L.J., Mar. 12, 1986, at 23, cols. 3-4. But see Margolies & Weisberg, Flip Tax Decisions Raise Complex Issues for Co-ops, N.Y.L.J., Mar. 12, 1986, at 32, cols. 1-2 (suggesting that the Fe Bland court's failure to address exemption of unsold shares from flip tax, as presented by facts of the case, is judicial recognition of their special status). The co-op prevailed in the first case addressing this issue. See Platovsky v. 17 East 96th Owners Corp., N.Y.L.J., May 21, 1986, at 11, col. 3 (Sup. Ct. N.Y. County).


127. See infra note 184 and accompanying text.

128. See Co-ops Tighten Standards, supra note 21, at 9, col. 5 (describing co-op refusals to show apartments to certain individuals as "a matter of day-to-day business").

129. See id. (identifying opera singers, foreign diplomats, bachelors, single women, unmarried couples, couples of the same sex, individuals in the real estate and garment industries, "shrinks" and criminal attorneys as examples).
with the individual’s status as a member of a certain “class.” The Supreme Court of California, in two recent decisions, has addressed a similar problem, pointing to the undesirable results which follow from the exercise of arbitrary class distinctions in the housing context.

In O’Connor v. Village Green Owners Association and Marina Point, Ltd. v. Wolfson, the court was concerned with the application of the Unruh Act, California’s civil rights legislation, which prohibits discriminatory actions barring access to public accommodations. Marina Point involved a challenge to a landlord’s policy restricting occupancy in his building to adults only, on the grounds that children are “rowdier, noisier, more mischievous and more boisterous than adults.” The court noted that the protections against discrimination afforded by the Unruh Act apply to “all persons,” and are not reserved for restricted categories of prohibited discrimination enumerated in the statute. Thus, the statute did not permit a “business enterprise” to exclude an entire class of individuals from access to its services on the basis of a generalized prediction that the class, “as a whole,” is more likely to commit misconduct than some other classes of the public. The landlord’s policy of restricting occupancy to adults was struck down as violative of the statute.

In O’Connor, the court used the same reasoning to strike down a condominium association’s age-based occupancy restriction.

The policies underlying the Unruh Act’s condemnation of arbitrary

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130. Id.
133. 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (1982).
134. CAL. CIV. CODE § 51 (West 1982 & Supp. 1985) provides that “[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”
135. 30 Cal. 3d at 725, 640 P.2d at 117, 180 Cal. Rptr. at 498.
136. This interpretation of the statute was first enunciated in In re Cox, 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970). At the time of this decision, the Unruh Act prohibited discrimination on the basis of “race, color, religion, ancestry or national origin.” However, the Cox court concluded that the “identification of particular bases of discrimination . . . is illustrative rather than restrictive” and that the Unruh Act prohibited all arbitrary discrimination by business establishments.
137. 30 Cal. 3d at 739, 640 P.2d at 125, 180 Cal. Rptr. at 507.
138. Id. at 745, 640 P.2d at 129, 180 Cal. Rptr. at 511.
139. 33 Cal. 3d at 796-97, 662 P.2d at 431, 191 Cal. Rptr. at 324.
classifications as a means of barring access to rental housing and condominium associations can be applied, by analogy, to cooperatives. Implicit in the California Supreme Court's interpretation of the statute is the right of individuals to be judged on the basis of their personal characteristics, and not by their membership in a certain class. Unlike the *Marina Point* and *O'Connor* decisions, which are based on a "public accommodations" theory, the exercise of arbitrary class discrimination by cooperative boards should be struck down as an unreasonable restraint on a tenant-shareholder's right of alienation. Very often, a prospective purchaser's rejection is based on factors that have no apparent bearing on his ability to be a congenial, peaceful member of the cooperative community.

One area where this analysis should be applied is a cooperative's use of occupation as an arbitrary criterion to deny admittance to a prospective purchaser. There are certain individuals whose occupation itself involves considerations which could affect the peaceful environment of the building. However, may the same reasoning be applied to a real estate broker, or a garment center worker, who is objectively able to meet his obligations as a shareholder yet is turned down because of his occupation? Occupation does not take on the status of a constitutionally protected class, as do the other enumerated classes in the fair housing laws. The practice of certain

140. 30 Cal. 3d at 730-33, 640 P.2d at 120-22, 180 Cal. Rptr. at 502-03.
141. See supra notes 121-22 and accompanying text. When a rejected purchaser alleges statutorily prohibited discrimination, a court will scrutinize a cooperative's stated reasons for rejection. See Robinson v. 12 Lofts Realty, Inc., 610 F.2d at 1041; see also Bishop v. Pecsok, 431 F. Supp. 34, 37 (N.D. Ohio 1976) (landlord's policy of considering applicants' family background, scholastic achievement and status as either graduate or undergraduate student is not a "demonstrably . . . reasonable measure of the applicants' ability to be a 'successful tenant' ").
142. See supra note 129 and accompanying text. The *Marina Point* court itself referred to the absurd results which can follow from allowing discriminatory classifications based on occupation:

Under such an approach, for example, members of entire occupations might find themselves excluded as a class from some places of public accommodation simply because the proprietors could show that, as a statistical matter, members of their occupation were more likely than others to be involved in a disturbance . . . . Entrepreneurs cannot pursue a broad status-based exclusionary policy that operates to deprive innocent individuals of the services of the business enterprise.

30 Cal. 3d at 739, 640 P.2d at 126-27, 180 Cal. Rptr. at 507-08.
143. See supra note 119.
144. At present, cooperatives may not discriminate on the basis of race, color, religion, sex and national origin. These are all suspect classifications under an equal protection analysis. See generally J. Nowak, R. Rotunda, J. Young, Constitutional Law 585-818 (2d ed. 1983).
occupations may, in some instances, put the board on edge in that the members may suspect the applicant will practice his profession in his residence. However, there are remedies available to the cooperative if the applicant does engage in undesirable behavior. The cooperative need not resort to these measures if it requires, as a condition to its approval of the sale, that the applicant not engage in certain specified acts which it deems harmful to the peaceful environment of the building.

Since the use of such arbitrary classifications does not evaluate an applicant on the basis of his personal characteristics, it represents an unreasonable restraint on the tenant-shareholder’s right of alienation. However, if it is not a classification repugnant to the Constitution, such as occupation, it is contrary to the “social purpose” of cooperative housing to force the admission of the prospective purchaser.

C. An Unreasonable Board: Murphy v. 253 Garth Tenants Corp.

In an action to challenge a rejected purchase, a rejected purchaser typically seeks injunctive relief mandating that the board transfer

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145. See, e.g., Ebner v. 91st St. Tenants Corp., 126 Misc. 2d 108, 481 N.Y.S.2d 198 (1984) (board denied consent to transfer on ground that purchaser, a psychiatrist, intended to use apartment primarily for treating patients and only secondarily as a residence; rejection reversed by vote of tenant-shareholders where proprietary lease provided for such action).

146. A typical proprietary lease will provide that the lease may be terminated by a specified vote of the tenant-shareholders or the board finding another tenant-shareholder’s conduct to be “undesirable.” Margolies, supra note 3, at 19, cols. 1-3; see 2A COOPERATIVE HOUSING LAW, supra note 6, App. D-3, at App—292 and App. D-4, at App—364.198-.199 (illustrative examples in actual cooperative corporation documents); see also Brisbane House, Inc. v. Sims, 122 Misc. 2d 46, 469 N.Y.S.2d 561 (N.Y.C. Civ. Ct. N.Y. County 1983) (co-op may bring holdover proceeding under Real Property Actions and Proceedings Law § 711(1) when it finds tenant-shareholder’s conduct to be “undesirable;” while court must make de novo finding of undesirable conduct sufficient to support eviction, it must take notice of special nature of cooperative occupancy in reaching this determination); Adams Hotel Owners, Inc. v. Wolf, 64 Misc. 2d 614, 316 N.Y.S.2d 696 (App. Term. 1st Dep’t 1969) (same); Jimerson Hous. Co. v. Butler, 102 Misc. 2d 423, 425 N.Y.S.2d 924 (App. Term. 2d Dep’t 1979) (landlord-tenant relationship exists between co-op and its tenant-shareholders to the extent that co-op may maintain non-payment summary proceeding). But see Plaza Road Coop., Inc. v. Finn, 201 N.J. Super. 174, 492 A.2d 1072 (App. Div. 1985) (relationship between cooperative and tenant-shareholder is not one of landlord-tenant, and therefore court had no jurisdiction to hear cooperative summary dispossess action brought under N.J. Stat. Ann. § 2A: 18-61.1 (West Supp. 1985)).

147. See Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1041 (2d Cir. 1979).
the shares and corresponding proprietary lease.\textsuperscript{148} However, even in jurisdictions which hold the board to a reasonableness standard in evaluating purchase applications, plaintiffs have seldom been successful in receiving this drastic remedy.\textsuperscript{149} In most cases the board has been able to offer valid, non-discriminatory reasons for the denial of consent to a proposed transfer.\textsuperscript{150}

\textit{Murphy v. 253 Garth Tenants Corp.}\textsuperscript{151} is the only reported case where the plaintiff has been awarded possession of a New York cooperative apartment after the board denied a purchase application on grounds not prohibited by statute. \textit{Murphy}, a federal district court decision, is an example of the unreasonable withholding of consent to a transfer by a cooperative's board of directors. In \textit{Murphy}, a mother and daughter brought suit against the cooperative and its president, alleging that the defendants had unlawfully\textsuperscript{152} rejected each of their purchase applications on the basis of sex, national origin and possibly their marital status.\textsuperscript{153}

During the trial, three members of the board described the criteria used to evaluate purchase applications: "whether or not the applicant

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\textsuperscript{148} See, e.g., Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032 (2d Cir. 1979).

\textsuperscript{149} See \textit{Murphy v. 253 Garth Tenants Corp.}, 579 F. Supp. 1150 (S.D.N.Y. 1983) (unreasonable withholding of consent under cooperative by-law provision); see also \textit{Robinson}, 610 F.2d 1032 (racial discrimination under federal Fair Housing Act; denial of injunctive relief reversed and case remanded to district court to hear testimony regarding intent of board member in withholding consent to purchase); \textit{Logan}, 385 F.2d at 137 (proof that proposed subtenant was rejected without evaluation of his personal characteristics sufficient to establish prima facie case of arbitrary and capricious action by cooperative board of directors; case remanded to trial court for further consideration).

\textsuperscript{150} See \textit{supra} note 73 and accompanying text.

\textsuperscript{151} 579 F. Supp. 1150 (S.D.N.Y. 1983).

\textsuperscript{152} The plaintiffs asserted their federal claims under the Fair Housing Act of 1968, 42 U.S.C. § 3604(a) (1982), and a pendent state claim under the N.Y. Executive Law, N.Y. EXEC. LAW § 296(5)(a) (McKinney 1982).

\textsuperscript{153} It is unclear as to whether the plaintiffs alleged that the co-op denied them the right to acquire the apartment on the basis of their marital status. In the initial portion of his opinion, the trial judge identified the question of fact to be resolved in the action: whether the co-op had denied the purchase application based on the sex or national origin of the plaintiffs. 579 F. Supp. at 1151-52.

However, the opinion later goes on to state that the co-op's purchase application requested information concerning the plaintiffs' marital status, \textit{id.} at 1153, and that the court found the board members' testimony that their rejection of the plaintiffs was unrelated to their national origin or marital status to be credible. \textit{Id.} at 1154. The court made a point to recognize that later application forms filled out by the plaintiffs omitted the marital status and national origin questions. \textit{Id.} at 1154, 1155.

Therefore, it is uncertain whether the court found the prohibition against marital status discrimination in Executive Law § 296(5)(a) to apply to co-ops. This is an open question in New York. \textit{See supra} note 3.
intends to live in the apartment, the applicant’s financial capacity and whether the applicant would be a good neighbor, congenial and peaceful, fitting in with the image of the Cooperative.”154 The reason the board members gave for the denial of permission to transfer the apartment to either Catherine or Patricia Murphy was Catherine’s unresponsiveness and vagueness during her interview.155 At that time she was uncertain as to what she intended to do with her existing apartment, did not know the persons who had been listed as references, and was uncertain with respect to questions concerning finances, bank accounts and available funds.156

After weighing the above testimony, the court found this evidence to be credible, and dismissed Ms. Murphy’s claims brought under state and federal fair housing laws. However, these were not the only claims brought in this action.

The tenant-shareholders who had contracted to sell their apartment to the Murphys, Michael and Susan Ugliarolo, had joined in the action as plaintiffs. They alleged that the board had unreasonably withheld its consent to the attempted sale, which was prohibited by a provision in the cooperative’s by-laws.157 Thus, the cooperative had bound itself to the Ugliarolos on a much higher standard than

155. Id. at 1155. Catherine and Patricia Murphy, mother and daughter, had separately applied to purchase the same apartment. After her mother’s application was twice denied, Patricia sought board approval to purchase the apartment herself. She offered to provide in writing that her mother would not live in the apartment. However, the board members testified that they believed Catherine would use the apartment, and that in their view, Patricia’s application stood or fell with her mother’s.

They therefore rejected both applications based upon “a subjective evaluation of the unknown kind of tenancy which would result as a consequence of Catherine’s vague and unresponsive answers.” Id. at 1155.
156. Id. at 1153.
157. The relevant provision provided that “[t]he shares may be transferred only after consent of the Board of Directors, which consent shall not be unreasonably withheld.” Id.

The court found the by-laws controlling over a contrary provision contained in the proprietary lease, which provided that the board could withhold consent to an assignment for any or no reason. Id. at 1155-56. Since the capital investment in the shares entitles the tenant-shareholder to the proprietary lease, and the by-laws govern the rights and restraints associated with the shares, the court found the by-law provision to control. Id. at 1156; see also Siegler, Limitations on Transfer Fees, N.Y.L.J., Oct. 2, 1985, at 2, col. 4 (analyzing this portion of the Murphy decision as it relates to the validity of a “flip tax” imposed by a co-op’s board of directors on the sale of shares); Jones v. O’Connell, 189 Conn. at 655, 458 A.2d at 359 (memorandum of offering which limited the authority to disapprove assignments to individuals of unsuitable “character and financial responsibility” controlled over unqualified consent clause in proprietary lease).
was presented by the facts in Weisner. It had subjected itself to the
type of inquiry required by jurisdictions which give greater recog-
nition to the tenant-shareholder’s right of alienation.

The court then referred to the history of New York decisions
interpreting the reasonable withholding of consent.\textsuperscript{158} Such cases have
typically required an evaluation based on the objective suitability of
the proposed transferee.\textsuperscript{159} Since the reasons the board members
supplied (vagueness and unresponsiveness of the applicant) failed to
rise to the standard of objectivity required by these cases, the court
granted the injunction and forced Catherine’s admission into the
cooperative.\textsuperscript{160}

There are several lessons to be learned from the decision in
Murphy. Of primary importance is the court’s holding that a co-
operative’s stated reasons for rejecting an applicant were permissible
under fair housing laws, but were unreasonable in light of the higher
duty owed to the tenant-shareholder’s right of alienation. In addition,
the fact that the applicant was not discriminated against on statutorily
prohibited grounds, yet succeeded in gaining admission to the co-
operative, is a violation of the cooperative’s privilege to select its
own members.

V. Recommendation

A. The Unreasonable Withholding Of Consent

A middle ground must be found to accommodate two competing
interests: the tenant-shareholder’s right of alienation, and the co-
operative’s privilege of selecting its members. A satisfactory answer
can be found by reference to New York Real Property Law, section
226-b,\textsuperscript{161} which deals with the remedies available to a tenant when

\textsuperscript{158} 579 F. Supp. at 1156 (citing Kruger v. Page Management Co., 105 Misc.
2d 14, 432 N.Y.S.2d 295 (1980)).

\textsuperscript{159} Such factors include:
(a) financial responsibility;
(b) the identity or business character of the subtenants, including suitability for
the particular building;
(c) legality of the proposed use; and
(d) nature of the occupancy.

\textsuperscript{160} Murphy, 579 F. Supp. at 1156.

\textsuperscript{161} N.Y. REAL PROP. LAW § 226-b (McKinney Supp. 1984-1985).
a landlord unreasonably withholds his consent to an attempted assignment or sublease. If the landlord unreasonably withholds his consent to an assignment, the tenant’s sole remedy is a release, and he will not be bound to pay rent for the remainder of the lease term. By the same token, the landlord remains free to select a tenant by exercising his unfettered discretion.

162.

1. Unless a greater right to assign is conferred by the lease, a tenant renting a residence may not assign his lease without the written consent of the owner, which consent may be unconditionally withheld without cause provided that the owner shall release the tenant from the lease upon request of the tenant upon thirty days notice if the owner unreasonably withholds consent which release shall be the sole remedy of the tenant. If the owner reasonably withholds consent, there shall be no assignment and the tenant shall not be released from the lease.

2. (a) A tenant renting a residence pursuant to an existing lease in a dwelling having four or more residential units shall have the right to sublease his premises subject to the written consent of the landlord in advance of the subletting. Such consent shall not be unreasonably withheld.

Id.

163. The history of § 226-b’s enactment and subsequent amendments is illustrative of the similar interests which exist between co-ops and landlords in the selection of residents on their property.

The housing shortage in New York City has been a cause for concern since the end of World War II. The vacancy rate among rental apartments has been far below what is deemed to be acceptable in an urban environment. Housing Crisis, supra note 17, at B5, col. 1. As a result of this situation, an unequal bargaining position developed between landlord and tenant, so that a landlord was free to insist that a clause absolutely prohibiting an assignment or sublease without his consent be included in the lease. Kruger v. Page Management Co., 105 Misc. 2d 14, 25-26, 432 N.Y.S.2d 295, 303-04 (1980), appeal dismissed, 80 A.D.2d 525 (1st Dep't 1981). Under the common law, this consent could be withheld for any or no reason. Arlu Assocs. v. Rosner, 14 A.D.2d 272, 220 N.Y.S.2d 288 (1st Dep't 1961), aff'd, 12 N.Y.2d 693, 185 N.E.2d 913, 233 N.Y.S.2d 477 (1962).

However, through statutory intervention, the landlord’s power to arbitrarily prohibit an assignment or sublease was brought under control. This action was “based upon the equitable belief an enlightened society must to some extent protect its members from the harsh effect of an unchecked society.” Kruger, 105 Misc. 2d at 20, 432 N.Y.S.2d at 300.

Real Property Law section 226-b, as originally enacted, provided that a landlord could not unreasonably withhold consent to a tenant’s proposed sublease. 1975 N.Y. Laws ch. 58. Subsequently, similar provisions were added relating to the right to assign residential leases: 1975 N.Y. Laws chs. 148 and 548, and 1976 N.Y. Laws ch. 548. The amended statute came under attack in a series of cases where it was argued that the Legislature never intended to force a landlord to accept an assignee against his wishes, as this would unreasonably infringe upon his right to rent his property to individuals of his own choice. See Bragar v. Berkeley Assocs., 111 Misc. 2d 333, 444 N.Y.S.2d 355 (1981); Equity Props. Corp. v. Bonhomme, 109 Misc. 2d 760, 440 N.Y.S.2d 993 (N.Y.C. Civ. Ct. N.Y. County 1981); Meredith v.
An analogy may be made between the positions of the tenant and the tenant-shareholder. Typically, a tenant-shareholder pays "rent" in the form of maintenance charges, and his pro-rata share of the building's mortgage and taxes.\(^\text{164}\) If a prospective purchaser is rejected by the cooperative the tenant-shareholder remains liable for these charges until a purchaser has been approved.\(^\text{165}\) This is true even if he has already moved to another residence. Unlike a tenant, who might abandon his apartment rather than maintain the costs of two residences,\(^\text{166}\) a tenant-shareholder cannot get up and walk away in as much as his equity is still tied up in the apartment.\(^\text{167}\)

If a cooperative unreasonably withholds its consent to a transfer, the tenant-shareholder's right of alienation must receive some rec-
ognition. If the tenant-shareholder produces a financially capable purchaser, and the board arbitrarily denies the application, the burden should then be shifted to the cooperative to provide a purchaser, at an agreed upon purchase price, within a given statutory period, such as sixty days. The tenant-shareholder should be released from liability for the monthly carrying charges if the board has not produced another purchaser by the end of a thirty day period. At this time, the shares would be placed in trust, where they could not be voted by either party.

In this way, both interests are addressed: the “owner” of the apartment is released from liability for future payments, and the cooperative is not forced to take someone into the “partnership” against its will. Once the initial thirty day period expires, the cooperative has an additional thirty days to either provide another purchaser willing to match the rejected purchaser’s offer, or purchase the apartment from the tenant-shareholder directly. If it fails to do either, the cooperative is deemed to have consented to the tenant-shareholder’s initial sale.

B. A Reason for Rejection

The legislature currently has before it a bill which would require cooperative housing corporations to give a rejected applicant a reason for failing to approve his purchase. This bill, which has been introduced in past sessions, has recently been rejected by the senate. There are several strong policy reasons to justify its passage:

168. A similar device was utilized by a condominium association in Lyons v. King, 397 So. 2d 964 (Fla. App. 1981).
Section three of the bill proposes that section 296(5) of the Executive Law be amended to read as follows:

(a) It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed . . . or any party having the power to approve sales, rentals or leasing . . .

(4) To fail to provide, upon request, a written statement to any person, who was denied the right to make an offer or whose offer to purchase, rent or lease any accommodation covered by this subdivision was rejected, setting forth the reasons for such denial or rejection. Any such request shall be made in writing within thirty days of the denial or rejection and the written statement shall be provided within thirty days of the receipt of the request.

Id. (emphasis added to identify new provisions).
170. Id.
1. The Rogers Decision: True Confessions

A requirement that a cooperative housing corporation give a reason for rejecting minority applicants was reached for the first time in Rogers v. 66-36 Yellowstone Boulevard Cooperative Owners, Inc. Rogers, a black schoolteacher, sued the defendant cooperative corporation under several fair housing provisions, charging Yellowstone with racial discrimination in disapproving her attempted apartment purchase.

The cooperative attempted to refute the plaintiff's allegations by stating that it had rejected her application due to financial considerations. Although Rogers had a net worth in excess of $500,000, the cooperative expressed concern over the source of her wealth: "how could she—on a teacher's pay—accumulate such assets?" Based on this stated justification, it turned down the plaintiff's purchase of a $49,250 apartment.

The jury returned a verdict for Mrs. Rogers, awarding $25,000 in compensatory damages and $1,000 in punitive damages. Of perhaps even greater significance from the cooperative's standpoint was the nature and scope of the injunction fashioned by the court. As part of the plaintiff's relief, the court mandated that the cooperative not reject a minority applicant's attempted purchase because of "unsubstantiated views on that person's finances." In addition, it

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173. 599 F. Supp. at 80.
174. Id. Yellowstone's skepticism was not lessened to any degree by Mrs. Rogers' explanation that her wealth had been accumulated through her real estate dealings. Id.
175. 599 F. Supp. at 86. Before Rogers was decided, members of the New York State Legislature had already taken steps to prohibit all housing accommodations from discriminating against individuals based on their lawful source of income. See A. 9026, 207th Sess. (1984), NEW YORK LEGISLATIVE RECORD AND INDEX A625 (1984). Although this bill was passed by the Assembly, it did not come to a vote.
required the defendant to notify each rejected minority applicant that their application was disapproved and the reason for the rejection. Any subjective, non-financial factor entering into the cooperative's decision was required to "not only have a sound basis but [to] be plainly stated in [an] Applicant Flow Log under the heading 'reason for rejection.' "

While courts typically require cooperatives to state their reasons for rejection in order to rebut a plaintiff's prima facie case of illegal discrimination, this order was the first designed to inform the applicant of the reason for his rejection. While the scope of the Rogers injunction was limited solely to the rejection of minority applicants, public policy requires that similar disclosure be required to protect the interests of all rejected purchasers.

2. Agencies Have A Difficult Task Investigating The Discriminatory Practices of Cooperatives

The New York City Human Rights Commission is empowered to investigate and act upon complaints of discriminatory practices in

in the Senate. Id. The bill was reintroduced in the 1985 session as A. 848, and was once again passed by the Assembly. However, the bill died in the Senate on January 8, 1986, and has since been redelivered to the Assembly. A. 848, 209th Sess. (1986), STATE OF NEW YORK LEGISLATIVE DIGEST A56 (1986).

It is difficult to envision how this bill would affect a cooperative's ability to reject a prospective purchaser in light of its unique financial concerns. See supra notes 52-55 and accompanying text. Does the bill's prohibition of discrimination based on lawful source of income bar a cooperative from disapproving a purchaser because his income flow, which is at present fairly regular, may diminish in the future? In addition, does it affect those cooperatives which tend to seek residents who have built up their equity over a substantial period of time? The bill is unclear on these points, since it simply provides that a person cannot be denied a housing accommodation based on their lawful source of income.

176. 599 F. Supp. at 87.
177. See, e.g., Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1039 (2d Cir. 1979) (once prima facie case of racial discrimination is established, defendant must come forward with evidence to show his actions were not motivated by considerations of race; if the defendant does not come forward with such evidence, the plaintiff will be entitled to relief); Maloff v. City Comm'n on Human Rights, 46 N.Y.2d 908, 387 N.E.2d 1217, 414 N.Y.S.2d 901 (1979) (comparable burden under state and local law).


179. In view of judicial acceptance of the cooperative's power to restrain the alienability of property, it has been suggested that the burden be placed on the corporation to demonstrate the financial or social shortcomings of a prospective purchaser. Federal Assistance, supra note 89, at 611.
New York City. In addition, in order to combat discriminatory behavior, it may initiate its own investigations and file complaints on its own motion. The New York State Human Rights Commission possesses similar powers under state law. Difficulties often arise when investigating the practices of a private corporation, such as a cooperative housing corporation. Although the board of directors is required by law to keep minutes of its meetings, it is not required to state its reason for rejecting an applicant in these documents. There are no laws requiring set criteria to be used by cooperatives in evaluating applicants. It therefore becomes difficult to ascertain whether the admissions criteria are being applied evenly to all applicants, or on a discriminatory basis.

Furthermore, the increasingly long and detailed admissions process makes the use of "checkers" by the Human Rights Commission less practical as an investigatory tool. Typically, a board will require credit reports (which may cost up to $250), application fees and attorney's fees to cover the review of these materials. Some boards may require more specific information, such as personal financial statements. The entire process may take anywhere from thirty to sixty days.

While the New York City Human Rights Commission has received relatively few complaints from rejected purchasers in the past, the number will most likely increase in future years, especially in the aftermath of the Rogers decision.

3. Unequal Treatment of Shareholders

A policy often cited to support the adoption of a "reason for rejection" law is that it will enable the appropriate agencies to more
easily identify discriminatory practices in cooperative admissions processes.\textsuperscript{189} However, the adoption of such legislation will also serve to protect the tenant-shareholder's right of alienation. Several plaintiffs who have challenged the cooperative's refusal to consent to a transfer of their apartment on allegedly arbitrary grounds, have also brought claims of unequal shareholder treatment.\textsuperscript{190} They alleged that the corporation breached its fiduciary obligation to treat all shareholders fairly and equally in its evaluation of the applications of prospective purchasers.\textsuperscript{191}

No plaintiff has succeeded in proving these allegations in the few cases in which such claims have been brought.\textsuperscript{192} Courts addressing this issue have correctly stated that the prospective seller has no right to place his interests ahead of the other tenant-shareholders; the other tenant-shareholders have a continuing interest in the economic and social well-being of the cooperative.\textsuperscript{193} However, such shareholders do have a right to have their attempted sales considered on an equal footing with all other transfers. Without any inquiry into the admissions criteria used by the cooperative, there is little to prevent a reoccurrence of the \textit{Weisner} scenario or similar situations.\textsuperscript{194}

In addition, the requirement that a cooperative give a reason for rejecting a prospective purchaser could in fact lead to a decrease in the number of suits alleging discriminatory practices. Indeed, the application of the prima facie doctrine to the fair housing laws has made it quite easy\textsuperscript{195} for a rejected purchaser to allege facts sufficient to survive a summary judgment motion.\textsuperscript{196} Cases have been brought

\textsuperscript{189} See \textit{Co-op Tyranny}, supra note 3, at 45, col. 3.
\textsuperscript{190} See cases cited supra note 125; see also Greenbaum v. 244 Madison Realty Corp., 129 Misc. 2d 862, 493 N.Y.S.2d 960 (1985) (plaintiff alleged that board acted arbitrarily and capriciously in withholding consent to his sublease, while approving sublet applications of other tenant-shareholders).
\textsuperscript{191} See cases cited supra note 125.
\textsuperscript{192} Id.
\textsuperscript{193} Id.
\textsuperscript{194} See supra notes 121-22 and accompanying text.
\textsuperscript{195} See \textit{Margolies}, supra note 3, at 20, col. 1 (in suit alleging illegal discrimination against purchaser, co-op's lawyer will have to "hope for the best" since plaintiff can easily establish prima facie case).
\textsuperscript{196} See, e.g., Robinson v. 12 Lofts Realty, Inc., 610 F.2d at 1038, stating that plaintiff in claim brought under the Fair Housing Act can establish prima facie case by proving:
\begin{enumerate}
\item that he is Black;
\item that he applied for and was qualified to rent or purchase the housing;
\item that he was rejected; and
\item that the housing opportunity remained available.
\end{enumerate}
in which the alleged discriminatory practices do not have even a remote basis in fact.\textsuperscript{197} While some attorneys have begun advising their cooperative clients to keep adequate written records of their reason for rejecting an applicant\textsuperscript{198} so they are able to rebut any inference of discriminatory practices, the public disclosure of such records could in fact discourage rejected purchasers and tenant-shareholders from bringing an action. If selling tenant-shareholders and rejected purchasers are informed of the cooperative's valid reasons for rejection, the decision to file suit could be altered. In addition, the selling tenant-shareholder will have a greater awareness as to the type of person the board will be willing to accept into the cooperative community.

VI. Conclusion

When a tenant-shareholder seeks to dispose of his interest in a cooperative housing corporation, a conflict arises between two competing interests: (1) the tenant-shareholder's wish to freely dispose of his property; and (2) the right of the remaining tenant-shareholders to use their own discretion in selecting their new neighbor. In light

\textsuperscript{197} See Ikegami v. 40 West 24th St. Corp., No. 84 Civ. 3990 (S.D.N.Y. July 16, 1984) (available on LEXIS, Genfed library, Dist file). In Ikegami, the unmarried plaintiffs, a Japanese woman and Caucasian man, alleged that their purchase application had been denied on the basis of their race and marital status.

Three board members testified that the plaintiffs' application had been denied due to financial considerations, and the court found this testimony to be credible. Furthermore, in describing the make-up of the tenant-shareholders residing in the defendant cooperative corporation, the court revealed the frivolous nature of this action:

The group includes persons of all races, creeds and colors, as well as married and unmarried couples, both heterosexual and homosexual. The shareholders include a Japanese man, a Filipino woman living with a Caucasian man, an Israeli, and a Puerto Rican. In addition, the building has as a tenant a business managed and staffed by Blacks. Several couples are unmarried; indeed, two of the Board members who voted against plaintiffs' application had been living with women to whom they were not married when they first moved into the cooperative.

\textsuperscript{198} Co-ops Warned On Rejections, supra note 3, at 12, col. 3; Siegler, Cooperatives, Condominiums, N.Y.L.J., Feb. 6, 1985, at 2, col. 3.
of the economic and social purposes of cooperative ownership, it
is only when the cooperative rejects a prospective purchaser on a
reasonable basis, that the tenant-shareholder's right of alienation
receives sufficient recognition. To remedy this presently existing
inequity, the following legislation is recommended for passage by
the New York State Legislature. This legislation provides for a
reasonableness standard by which to judge purchaser rejection de-
cisions, rather than adding to specific instances of prohibited conduct
existing under current law. It also provides that the cooperative
corporation provide a rejected purchaser and selling tenant-share-
holder with the reason consent to a sale of a cooperative apartment
was withheld.

Harvey S. Epstein
Appendix

Statutory Right Of Alienation of Cooperative Tenant-Shareholders

1. Unless a greater right to assign is conferred by the proprietary lease or the by-laws, a tenant-shareholder in a residential cooperative housing corporation of four or more dwelling units may not assign his interest without the written consent of the corporation, which consent may be reasonably withheld. If the corporation unreasonably withholds consent, it must upon the request of the tenant-shareholder produce an assignee within 60 days of the rejection. If, at the end of a thirty day period beginning on the denial date an assignee has not been produced, the tenant-shareholder’s liability for the corporation’s monthly assessments shall be terminated, and the corresponding shares allocable to the apartment shall be placed in trust where they may not be voted by either party. If at the end of the sixty day period beginning on the denial date, an assignee has not been produced, the corporation is deemed to have consented to the initial sale.

2. The tenant-shareholder shall follow the application procedures of the cooperative corporation. If the corporation does not consent to the assignment, it shall, within seven days of the denial date, send a notice to both the tenant-shareholder and the applicant stating its reasons therefor. Failure to send such notice shall be deemed a consent to the proposed assignment. If the corporation reasonably withholds consent, there shall be no assignment and the tenant-shareholder shall not be released from his financial obligations as a member of the cooperative. The corporation shall keep a permanent record of its rejected applicants, and the reasons therefor, which record shall be made available to the tenant-shareholders or rejected applicants upon request.

3. Nothing in this section shall be deemed to prevent a cooperative from exercising a right of first refusal, pre-emptive option or transfer value formula in agreeing to repurchase the shares of an out-going tenant-shareholder upon the sale of his interest.

4. Nothing in this section shall be deemed to affect the applicability of any statutory provision prohibiting discriminatory practices by cooperative housing corporations.