



Condominium Law Q&A

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CORRECTION: A recent column mistakenly stated that a director appointed to fill a vacancy on the Board of a Condominium serves until the next annual meeting. My mistake. I forgot that the Condominium Act was amended to provide that the appointed director serves out the full unexpired term of the seat being filled. Thanks to all the readers who brought this matter to my attention.

Question – To clarify our condominium screening process, a note given to prospective buyers and tenants says all applicants must pay a screening fee which is to be submitted with their application. First, what constitutes a screening? As a screener, I maintain that I receive the application prior to the screening interview to do a background check. Am I right following this procedure? Some board members say a background check is not necessary because they feel the board has no recourse other than to buy a unit if the buyer that has a sales contract is rejected or if a tenant who has been rejected signed a lease before screening. Is the board in jeopardy for a civil action if we accept a screening fee and do not investigate each applicant? Or, should the wording be “Application Fee” and not “Screening Fee,” if the board is uncomfortable with running background checks and their consequences. I personally want the checks done for my family’s and my own comfort, as well as for all the other residents who rely on the association for their security. Please advise. B.M., Lake Worth

Answer – Most declarations of condominium, covenants, conditions and restrictions of planned

developments, and by-laws of cooperatives, give boards of directors and/or unit owners some degree of screening rights for prospective unit owners and tenants. These rights, which must be contained within the respective governing documents to be valid and enforceable, vary from simply gathering background information on the prospective owners, to pre-emptive rights, also known as rights of first refusal. Most boards assume that they have the absolute right to approve or disapprove a buyer or tenant, but such is not the case. Rights of approval generally run afoul of the unlawful alienation of property rights and are not looked upon favorably by the courts. The right of first refusal gives the association and/or unit owners the right to acquire the unit on the same terms and conditions as those offered to a third party. Prior to a contract for sale or lease of a unit becoming effective, the unit owner selling or leasing the unit must give the association written notice of his or her intent, along with a copy of the proposed sale or lease, and such other information as is lawfully requested by the board. The board generally has a defined timeframe in which it must act to either approve the transfer or exercise the option. If the board fails to act within said timeframe, the unit owner is free to sell or lease the unit. Now, here comes the tricky part. The right of first refusal is deemed to be a “bifurcated” process. That is, prior to the association having to decide whether it wishes to exercise the right of first refusal, the application on its face must evidence the fact that the applicant is “facially qualified.” What this means is that the applicant(s) meets all qualifications for unit ownership. For example, if

the covenants say that no pets are allowed, and the application states that the prospective owners have a dog, the board can reject the application without having to buy the unit. Or, for example, if the covenants limit occupancy to 2 persons per bedroom, and the application evidences the fact that there will be six individuals living in a two bedroom unit, the board can reject the application without having to purchase the unit. A more difficult question, and one which has yet to be ruled on by the courts, is whether an applicant can be rejected based upon the lack of financial worthiness. Can the board establish financial criteria to qualify for unit

ownership? Most experts say "yes," but what the thresholds are no one knows for sure. A classic debate is when a lender approves a loan on a unit, yet the board rejects the application because the applicant fails to meet the association's standards. One final note: rights of first refusal are wrought with potential abuse if used for discrimination purposes. Needless to say, any exercise of the right motivated by race, religion, sex, national origin, handicap and familial status, (Also, sexual orientation in certain counties, such as Miami-Dade, Broward and Palm Beach.) is both wrong and actionable.

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