

## Q & A

THE NEW YORK TIMES, SUNDAY, DECEMBER 12, 2010

### Special Privileges On Unsold Shares

**Q** May a holder of unsold shares in a co-op leave his shares to an heir or beneficiary? I'm told that those who have this designation have privileges that other shareholders don't.

A Kenneth Jacobs, a co-op and condo lawyer with offices in Manhattan and Yonkers, says that a holder of unsold shares can typically leave his or her shares to an heir or beneficiary without the approval of the co-op board. According to Mr. Jacobs, "holder of unsold shares" is a special designation afforded mostly to sponsors who retain shares to an apartment that has not been sold. It can also apply to anyone who receives such shares from the sponsor for investment purposes and whom the sponsor has designated as a holder of unsold shares — as long as he or she does not occupy the apartment. The designation generally allows the owner to sell, sublet or transfer the unit without board approval. Mr. Jacobs says some courts have ruled that after the building is converted, the holder-of-unsold-shares status is determined solely by the co-op's governing documents, which may modify some of the above requirements. "So the proprietary lease and certificate of incorporation for this co-op must be examined," he said.

JAY ROMANO

## Q & A

THE NEW YORK TIMES, SUNDAY, DECEMBER 27, 2009

### A Manager, 3 Co-ops And Apparent Conflict

*Q I live in a 600-unit complex in Rockland County that is made up of three separate co-op corporations. The managing agent of all the buildings is also the president of the board of one of the corporations. Should the board president of one co-op be the managing agent of three co-op buildings that are basically in competition with each other?*

A Kenneth Jacobs, a co-op and condo lawyer with offices in Manhattan and Yonkers, says that because co-op boards tend to rely heavily on their presidents to communicate building issues to the managing agent, it may be imprudent for a president of one building to be the manager of his and other "competing" buildings.

Because different buildings have different needs, Mr. Jacobs added, it is possible that a person serving as a member of a board while managing his and other "competing" co-ops, might make decisions favoring his own building.

"This creates the appearance of impropriety and should be avoided," Mr. Jacobs said.

JAY ROMANO

THE NEW YORK TIMES, SUNDAY, OCTOBER 18, 2009

### Coping With Abuse From a Neighbor

**Q** Recently, we called the superintendent of our co-op because the upstairs neighbor was making an unusual amount of noise. When the super knocked on his door, the man screamed and cursed at him. When the super came to our apartment, the man followed him, yelling, cursing and throwing things at us. The super did nothing, and our board president hung up on us when we called him, saying it was not his problem. We ended up calling the police because we felt threatened. What can we do in this kind of situation?

**A** A co-op shareholder always has the right to take direct action against his neighbor, especially if he feels physically threatened," said Kenneth Jacobs, a co-op and condo lawyer with offices in Yonkers and Manhattan. "He can start an action for nuisance or even contact the police and obtain an order of protection."

Mr. Jacobs added that the co-op has an obligation to investigate shareholders' "quality of life" complaints in good faith, but it does not have police powers and cannot be responsible for around-the-clock security.

He said the writer should advise a staff member while an incident is occurring. If the problem is confirmed, the board must notify the offender of the problem and take reasonable action to enforce its rules.

If the offender fails to comply with the co-op's demands, or if the breach is such that it cannot be cured, like an assault, the co-op can take steps to terminate the offending shareholder's lease.

JAY ROMANO

## Q & A

THE NEW YORK TIMES, SUNDAY, SEPTEMBER 20, 2009

### **A Contract, And an Assessment**

**Q** I recently signed a contract on a co-op, was approved for a mortgage, and was interviewed by the co-op board. At the interview, I found out there is going to be a buildingwide assessment that will increase monthly maintenance by \$150. Can I get out of the contract?

**A** Maybe, said Kenneth Jacobs, a co-op and condominium lawyer with offices in Yonkers and Manhattan. "The standard co-op contract of sale includes a representation by the seller that it has no actual knowledge of and has received no written notice of any assessments not stated in the contract," Mr. Jacobs said.

So, if the seller is a board member and knew of the impending assessment, or if the board had already notified shareholders of the assessment, the writer probably can cancel the contract.

Mr. Jacobs said that even if the assessment became known only after the contract was signed, the board itself might re-examine the buyer's application and revoke its approval of the sale.

JAY ROMANO

## Q & A

THE NEW YORK TIMES, SUNDAY, JULY 5, 2009

### **Challenging The Incumbents**

*Q I was nominated as a candidate for the board of our building by some shareholders. I asked the management company to put my name on the ballot before distributing the proxies. It didn't; only the names of the current board members are on the proxies. Is this legal?*

A "The board generally determines the election procedures, including nominations," said Kenneth Jacobs, a co-op and condominium lawyer with offices in Manhattan and Yonkers.

Proxies are usually sent out with the notice of the annual meeting, he said, and ballots are given out at the meeting itself. "Frequently, proxies will only contain the names of incumbents who are running for re-election and additional nominations can only be made at the annual meeting," Mr. Jacobs said.

"So both the proxies and the printed ballots will contain the names of the incumbents, but voters must write in the names of additional nominees. This may put challengers at a disadvantage, but it is not illegal."

JAY ROMANO

## Q & A

THE NEW YORK TIMES, SUNDAY, FEBRUARY 22, 2009

### **After Energy Costs Have Gone Down**

*Q I live in a Bronxville co-op, and we have had our maintenance fees increased twice in the past two years to account for the drastic increase in energy costs. With energy costs having recently reached five-year lows, shouldn't my board decrease the maintenance obligations? It seems as though boards rarely ever consider decreasing maintenance fees, and that doesn't seem fair, particularly during a recession.*

**A** "Co-ops have the legal right to decrease maintenance charges, but in practice rarely do," said Kenneth Jacobs, a real estate lawyer with offices in Yonkers and Manhattan.

Mr. Jacobs says that even if energy costs have gone down, other operating-cost increases usually eat up the savings.

"Surplus funds are generally funneled to the building's reserve fund or used to reduce next year's maintenance increase," he said. And in a recession, boards consider it even more important to build up a cushion against increased shareholder defaults.

The writer should also remember that board members pay maintenance, too, so the board usually wants to keep charges as low as possible. The pain the writer feels is shared equally by them.

## Q&A

THE NEW YORK TIMES, SUNDAY, DECEMBER 21, 2008

### **A Standoff Between Co-op and Cable**

*Q The cable wires to my condo unit are too old to maintain a digital feed. The cable company wants a letter from the board permitting access to the common property to repair my cable. The board wants a letter from the company indemnifying the board from liability in case of an accident. Neither side will budge, and I will soon be without television or Internet access. What are my rights?*

**A** "Under state law, a cable-television company has a right of access to private property in order to repair and maintain its facilities," said Kenneth Jacobs, a real estate lawyer with an office in Manhattan. But, he added, the law provides that the condo can require the cable company to indemnify the landlord against injury or property damage.

If service is interrupted because of the condominium's denial of access, the homeowner should ask the state's Public Service Commission to intervene. The commission will determine what demands each party can reasonably make. The commission's help line for complaints is 1-800-342-3377.

## Q & A

THE NEW YORK TIMES, SUNDAY, MAY 11, 2008

### **Can the Sponsor Vote For His Ex-Wife?**

**Q** *The ex-wife of the sponsor of our Queens co-op recently purchased an apartment in our building and wants to serve on the board. The sponsor is no longer eligible to designate a board member.*

*Can the sponsor vote his shares in support of his "ex" if he is paying her, let's say, alimony or child support?*

**A** "The bylaws determine whether the sponsor can vote its shares for nonsponsor candidates in elections of directors," said Kenneth Jacobs, a co-op and condominium lawyer with offices in Yonkers and Manhattan.

Sometimes, Mr. Jacobs said, the bylaws contain restrictions that may bar the sponsor from casting votes for any shareholder other than a sponsor affiliate.

"If the bylaws merely state that the sponsor will not exercise 'voting control' over the board after a certain period of time — a more common provision — then under current case law the sponsor has the right to vote his shares for anyone as long as his votes do not result in a board majority composed of principals, business associates and members of the immediate family of the sponsor," Mr. Jacobs said.

"The ex-wife no longer seems to qualify as a principal, business associate or family member of the sponsor," he said. "In that case, she should be treated like any other candidate and the sponsor should be able to vote for her unless the bylaws specifically prohibit it."

## Q & A

THE NEW YORK TIMES, SUNDAY, OCTOBER 14, 2007

### **Board Allows an Owner To Fence Part of Lawn**

**Q** I live in an 850-unit garden-type co-op that has a number of duplexes with front and rear doors. There are lawns in front and in the rear, all of which are common areas. Recently, the board of directors gave permission for a shareholder to enclose the lawn at the rear of his duplex with a fence. Did the board overstep its authority?

**A** Generally, a co-op board has the right to incorporate space not previously covered by a proprietary lease into an apartment, said Kenneth Jacobs, a co-op lawyer with offices in Yonkers and Manhattan. In most cases, he said, the board will allocate additional shares for the space and will receive payment based on fair market value.

If the board did not demand compensation and did not allocate additional shares (which would result in higher maintenance), it could be considered negligent.

In addition, if it acted in bad faith, it could be liable for a breach of fiduciary duty, which could subject board members to personal liability.

Q & A

## Can a Co-op Regulate Children's Playtime?

**Q** My family lives in a co-op at the end of a dead-end street. In the warmer weather, with parental supervision, the children (including my daughter) play outside our building. Some of the other residents in our co-op are unhappy with the noise the children make and are trying to stop them from playing outside the building.

One resident has proposed stopping playtime at 7 p.m. I know a co-op can make whatever house rules it wants, but can it ban children from playing on a public street?

**A** "Most proprietary leases include house rules prohibiting disturbing noises in the building," said Kenneth Jacobs, a co-op lawyer with offices in Yonkers and Manhattan. "And most prohibit residents from doing anything that would interfere with the comfort or convenience of other residents."

But since the children are playing on a public street, Mr. Jacobs said, such a rule would probably not apply. "The board might argue that it has the general authority to prohibit an-

noying behavior that affects other building occupants regardless where it occurs," Mr. Jacobs said. "But setting the boundaries of such authority would be difficult."

He noted that if the shareholders pass an amendment to the proprietary lease prohibiting their children from playing outside the building during certain hours, such an amendment might be enforced as a private contract between the co-op and its owners. "But I would not be confident of such a result," Mr. Jacobs said.

JAY ROMANO

Q & A

## Barring Owners From Meetings

*Q My condominium does not allow residents to attend board meetings. I understand why a board would not want residents present when common-charge arrears are discussed, but our board says residents may not attend any board meetings at all.*

*The condo's attorney said that attorney-client privilege prevents the board from allowing this. Can this be true? I know people in other condo communities who are allowed to attend board meetings.*

A "There is no legal requirement for a condo board to allow unit owners to attend board meetings," said Kenneth Jacobs, a co-op and condo lawyer with offices in Yonkers and Manhattan. "And there is no 'attorney-client privilege' that would require matters discussed in a board meeting to remain confidential unless the condo's attorney were present, and that rarely occurs."

Mr. Jacobs contends that there may be sound reasons for barring nonboard members from meetings. "The privacy of unit owners must be protected," he said, "And many topics come up besides arrears that could inadvertently embarrass a unit owner." In addition, he said, board members must be free to express their personal views without worrying whether those views might antagonize their neighbors.

Mr. Jacobs noted that some boards do allow unit owners to attend meetings before the board goes into executive session. "Usually, though, the topics addressed at that portion of the meeting are carefully chosen to avoid privacy concerns or sensitive building issues," he said. While most boards allow owners to review meeting minutes, he added, they are typically heavily edited to avoid privacy concerns.

## Q & A

*Q I live in a town-house development in Westchester County. Each owner owns his or her own home and lot, and there is a homeowners' association that owns and maintains some common areas. Is there any way the association can impose a "flip tax" or a move-in charge to raise additional revenue?*

**A** Kenneth R. Jacobs, a co-op and condo lawyer with offices in Yonkers and Manhattan, said that under the state's Not-for-Profit Corporation Law, a homeowners' association may be given the power under its certificate of incorporation or bylaws to charge dues and assessments, to impose fines and reasonable penalties and to charge initiation fees.

"An initiation fee is like a flip tax but payable by the incoming member," Mr. Jacobs said. "So the letter writer should examine the association's certificate of incorporation and bylaws to see what authority the board has been granted."

If those documents do not give the board the authority to impose such a fee, it may be able to amend the by-

laws to provide the necessary authority.

Mr. Jacobs added that a homeowners' association also has the authority to charge fees for services — coordinating move-ins and move-outs, for example, or issuing new membership certificates, but the fees should be reasonable for the service provided.

## Q & A

### Special Assessments In Condominiums

*Q I live in a condominium development in Westchester County. My condo management has sent me notice of a one-time assessment of approximately \$5,000 to reroof my unit. The board never budgeted for replacing the roofs even though the units are 20 years old.*

*What are our obligations to pay this cost whether or not a unit owner can afford the assessment? ... Ren Rothfuss, Somers, N.Y.*

A Kenneth Jacobs, a real estate lawyer with offices in Yonkers and Manhattan, said condominium boards generally have the power to assess unit owners as needed to pay the costs of operating and maintaining the condominium.

"While condominium associations typically include ongoing operating costs in the monthly common charges, they usually levy special assessments for nonrecurring capital costs," Mr. Jacobs said, adding that reroofing condominium units would typically fall within the latter category.

He noted, however, that some condominiums' declarations or bylaws impose restrictions on assessments, such as by requiring homeowner approval for assessments for capital costs over a certain amount. "The letter writer should check the governing documents to verify whether unit owner approval is required for such a sizable assessment," Mr. Jacobs said.

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*Address questions to Real Estate Q&A, The New York Times, 229 West 43rd Street, New York, N.Y. 10036, or by e-mail to [realestateqa@nytimes.com](mailto:realestateqa@nytimes.com). Answers can be given only through the column. Please include name, address and daytime telephone. Names of letter writers will be used after printed questions.*

## YOUR HOME

# Court Backs Condos On Sale Restrictions

By JAY ROMANO

A SHORT, five-paragraph ruling rendered by a unanimous appellate court last month has taken many of New York's co-op and condominium lawyers by surprise. Indeed, some of those lawyers say, the decision blurs the differences between co-ops and condos and could be used to change the way condominium apartments are sold and leased.

The decision, issued on May 31 by the Appellate Division, First Department, which covers Manhattan and the Bronx, in the matter of Demchick v. 90 East End Avenue Condominium, upheld an amendment to the condo's bylaws that prohibited sales or leasing of certain apartments to anyone other than current owners. Its decisions are binding on lower courts in those boroughs, and may influence rulings elsewhere.

"In my opinion, the decision is a radical departure from previously prevailing notions of a condo's rights and powers," said Aaron Shmulewitz, a Manhattan co-op and condominium lawyer. "There is no question that this decision opens the door to condos being able to impose conditions for sales and leasing that are more akin to those typically imposed by co-ops."

Scott Greenspun, a Manhattan lawyer who represented the condo, said that the case involved the 43-unit condo at 90 East End Avenue, at 83rd Street, which had been marketed by the sponsor as having many amenities, including a small number of studio apartments that could be used for owners' household help. The bylaws did not impose restrictions on the future sales of the studios, but some owners were advised that the apartments were intended as amenities for existing unit owners and could not be sold to outsiders.

When a unit owner was considering selling a studio to an outsider, the condo adopted an amendment to the bylaws that specifically restricted sales or leasing of the studios to unit owners. Jules Demchick, a real es-

tate developer who owned a four-bedroom and a studio, objected and sued. A lower court agreed with him and struck down the amendment as unreasonable, but the Appellate Division reversed that decision and issued a broad opinion that could have a major impact on condos, ruling that "to preserve the character of the condominium" the association could impose what amounts to a significant restriction on sales or leasing.

Arthur I. Weinstein, a Manhattan lawyer who is vice president of the Council of New York Cooperative and Condominiums, said that the case involves a centuries-old legal principle that prohibits "unreasonable restraints on alienation."

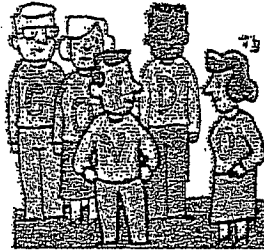
"In other words, you can't sell a piece of real estate to someone with a restriction saying it can never be resold or leased," he said. And, since condos are real estate, that principle has been the primary reason condo owners, unlike co-op shareholders, do not need board

approval for sales. Mr. Weinstein noted that while the courts have sanctioned certain "reasonable" restrictions on condo units, like the board's use of the right of first refusal on sales and leases, the general belief was that a rule that imposed a broad prohibition would not be considered reasonable.

Kenneth Jacobs, a co-op and condominium lawyer in Manhattan and Yonkers, said that the court could have limited its decision to the facts of the case but didn't, and that the decision's impact could be far-reaching. The ruling, he said, could be used by condos to impose a flip tax on the sale of an apartment, or to exercise control over prospective buyers.

"If you can preserve the character of the building by restricting sales of certain apartments to only those who already own in the building, why couldn't you use the same rationale to impose financial conditions on sales as well?" he said.

Mr. Greenspun, the condo's lawyer, said that at this point no appeal has been filed. Calls to Mr. Demchick's lawyer were not returned.



Tom Bloom

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*Excerpt from*

**NEW YORK TIMES, REAL ESTATE SECTION**  
Sunday October 24, 2004

**THE CONDO BOARD WANTS \$20,000**

*Q My aunt owns a one-bedroom condo in White Plains. She just received a letter from the board requiring her to pay \$20,000, her share of an estimated \$1 million mold-cleanup project. My aunt and her condo neighbors, many of them elderly, have been shown no documentation. Is there a commission in Westchester that regulates condominiums and investigates such matters? ... Gary Golio, Ossining, N.Y.*

**A** Kenneth R. Jacobs, a real estate lawyer with offices in Manhattan and Yonkers, said no governmental agency in New York reviews the propriety of a condo board's actions after the sponsor gives up control.

"The decisions of a board are governed by the business judgment of its members and by the declaration and bylaws of the condominium," he said. Mr. Jacobs added that the letter writer's aunt should check those documents to determine whether the board is restricted from imposing assessment in excess of a certain amount of money without prior approval by the unit owners.

"If such a limit exists, the unit owners can challenge the assessment's legality in court," he said. Otherwise, he said, the board's actions can be challenged only for negligence or breaches of fiduciary duty such as bad faith or conflicts of interests.

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*Excerpt from*

## NEW YORK TIMES, REAL ESTATE SECTION

Sunday July 11, 2004

### A PARKING SPACE IN A CONDO

**Q** *I live in a town house condominium. I have a one-car garage. When I bought the condo I was single, and the garage was adequate. Now I am married, and we have two cars.*

*I wish to pave a small area of my lawn adjacent to my driveway so that we can park one of our cars there. Other units with one-car garages have a paved area on their lawn for parking of another car.*

*The board has refused permission for me to do this and says that the units that have one had their area built by the developer. Can they do this?...Jack Thaw, White Plains.*

**A** Kenneth R. Jacobs, a condominium lawyer in Yonkers, said that the area described by the letter writer would probably be considered a limited common element. And typically, he said, condominium documents provide that any changes to a limited common element are subject to board approval.

At the same time, he said, it is possible that the condominium documents provide that the board may not "unreasonably" withhold its consent.

If this is the case, the letter writer may be able to claim that since other units have extra parking areas, it is unreasonable for the board to withhold consent for his.

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*Excerpt from*

## NEW YORK TIMES, REAL ESTATE SECTION

Sunday May 9, 2004

### LETTING ONE'S SISTER LIVE IN A CO-OP

**Q** *My younger daughter owns shares to a one-bedroom co-op in Yonkers. She moved from the co-op to a different neighborhood, but uses the co-op as a place to do her free-lance writing. My older daughter needs a place to live for a few months, and using her sister's apartment seemed an ideal solution. But the daughter who owns the apartment was told that if she doesn't live there, whether her sister lives there or not, the board could evict her, take her shares, and sell them. Can the board do that? ...Carmella Cammarota, Mount Vernon, N.Y.*

**A** Kenneth Jacobs, a Yonkers co-op lawyer who also has offices in Manhattan, said that whether the owner's sister can live in the apartment alone depends on the specific language in the co-op's proprietary lease. Most leases, he said, provide that the apartment can be occupied by the shareholder and members of the shareholder's family. The courts are split, however, as to whether that provision requires that they live in the apartment at the same time.

So, he said, the older sister's living in the apartment alone might be considered a violation, depending on the court's interpretation of the lease.

Another question is whether the owner of the apartment can be evicted and lose her apartment for not living there herself.

"I can't imagine a board taking that position," Mr. Jacobs said, adding that while a co-op may prohibit a shareholder from subleasing an empty apartment, it cannot force the shareholder to sleep there herself.

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*Excerpt from*

## NEW YORK TIMES, REAL ESTATE SECTION

Sunday April 4, 2004

### FIXING A BASEBOARD IN A CO-OP UNIT

**Q** *My late husband and I bought a co-op apartment in 1985. With the knowledge of the sponsor, we replaced the radiators with baseboard heaters. This winter, the baseboard in my bedroom did not give off any heat. When I called the managing agent, he called in a plumber to fix the problem. The plumber had to come three times before the heat worked, and the managing agent has advised me that I am liable for the cost. My question is: Since the sponsor knew about the replacements, am I still obligated to pay the bill?*  
... Joyce D. Manner, Larchmont, N.Y.

**A** **Kenneth R. Jacobs**, a co-op lawyer with offices in Yonkers and Manhattan, said that in most cases, a co-op corporation is responsible for repairing and maintaining the heating system in a building only up to the point where it exits from the walls into an apartment. Moreover, Mr. Jacobs said, most proprietary leases provide that a shareholder who replaces a fixture or system that the co-op would otherwise repair takes over responsibility for fixing and maintaining that installation.

"So the writer would be responsible for fixing problems with the baseboard system," he said, adding that the fact that the sponsor knew about the alteration does not change the writer's obligations under the proprietary lease. "The sponsor's knowledge might be used to show that the corporation consented to the alteration, but it does not mean that the co-op agreed to be responsible for it after the work was completed."

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# QUESTIONS & ANSWERS

## Use of the STAR Abatement

**Q** Our co-op owners were just notified that the board has decided to appropriate the New York state School Tax Relief (STAR) tax abatement due to us for 2001/2002 and 2002/2003 as an assessment to do work on the building. Is this legal? We are also getting a maintenance increase as of April 1st.

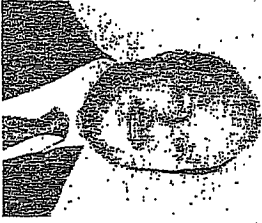
I applied last August for the Senior Citizen Homeowners' Exemption (SCHE) property tax exemption, for which I qualify on all counts—over 65 years, income below maximum level, etc. I understand that if I get this relief I automatically qualify for the "enhanced STAR" exemption. Although I mailed the applications last August, I've had no response, nor has my managing agent heard anything from the city.

Please give me any advice on this matter—especially about the board's confiscation of our two STAR refunds and calling them assessments.

—Manhattan Shareholder

**A** According to Attorney Kenneth Jacobs, a partner at Smith, Buss & Jacobs, LLP, with offices in New York City

and Yonkers, "The STAR exemption program, as applied to cooperatives, provides that the assessor will credit the individual exemption against the taxes assessed against the building. After receiving the exemption, the cooperative corporation is to credit the reduction in real property taxes attributable to each eligible shareholder against the share of the co-op's taxes otherwise chargeable to the shareholder.



"Only shareholders of the cooperative who use the unit as their primary residence are eligible for STAR. Based on information previously furnished by the co-op, the municipality usually credits the rebate and provides a list of eligible shareholders to the cooperative, together with the credit allocable to each.

"Many cooperatives elect not to return any money to their shareholders. Instead they take a "shortcut" by assessing all shareholders roughly the

amount of the credit, and apply the STAR credits due to individual shareholders against the assessment. Since all shareholders must be assessed equally based on their share ownership, though, this leads to some inequities. For example, a shareholder that does not use the unit as his primary residence will have to go out-of-pocket again to pay the amount of the assessment rather than having a credit applied. On the opposite end, if a shareholder is entitled to an "Enhanced STAR" credit (which exceeds the typical STAR credit), they may still be entitled to a credit even after applying the assessment.

"You probably fall in the latter category now, even if you didn't in 2001/02 or 2002/03. Therefore you should ask management to verify the amount of the credit that you are entitled to and the proportional share of the assessment. If they don't match, you should get an additional credit. The bottom line is that the credit and the assessment should be applied separately in order to avoid inadvertent overpayments by shareholders.

"I also note that many cooperatives are caught short in maintenance due to the STAR credit and other municipal real estate tax rebates. They take only their net real estate taxes into account in setting their budgets. Therefore, when it comes time to return money to individual shareholders they scramble for funds and have to impose the additional assessment."

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*Excerpt from*

**NEW YORK TIMES, REAL ESTATE SECTION**  
Sunday August 3, 2003

**RULES ON ELECTING BOARD MEMBERS**

**Q** *I live in a co-op building in Westchester County. We recently had our annual meeting to elect board members. The current board announced at the meeting that if someone works for the co-op, or is related to someone who works for the co-op, he or she cannot sit on the board. Can the board do this without changing the bylaws? ... Mark E. Cummings, Bronxville, N.Y.*

**A** Kenneth R. Jacobs, a co-op lawyer with offices in Yonkers and Manhattan, said that the rules establishing qualifications for board candidates are more than administrative policies that can be arbitrarily changed by the board. "Most bylaws expressly state who may serve on the board," Mr. Jacobs said. "And to impose additional qualifications would require a change in the bylaws." But, he said, while some bylaws permit amendment only by shareholder vote, others allow amendment by a vote by the board.

As a result, he said, the letter writer should determine the situation in his co-op. If a shareholder vote is required, he said, then the board has exceeded its authority.

But, he said, since the new policy penalizes a person merely because of a family relationship with a building employee, and was apparently announced only on the night of the annual meeting, there is a good chance that a court would deem the change arbitrary and invalid.

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*Excerpt from*

**NEW YORK TIMES, REAL ESTATE SECTION**  
Sunday March 23, 2003

**A LENDER LOSES A STOCK CERTIFICATE**

*Q I am refinancing my co-op mortgage and have a commitment from a new lender. The lender holding my current mortgage discovered a week before the closing that it has lost my stock certificate and proprietary lease and needs to give me an affidavit so that the co-op board can issue a new certificate. I am exposed to losing my commitment. In addition, there is a cost to obtain the new stock certificate, and there is a requirement that the managing agent attend the closing – at additional cost to me – because I cannot obtain the original stock certificate and the new one will have to be handed over by an agent for the board. What recourse to I have against the current lender? ... Thomas Molnar, Scarsborough, N.Y.*

**A** Kenneth R. Jacobs, a co-op lawyer with offices in Manhattan and Yonkers, said that according to most co-op loan documents, the lender has an obligation to deliver a borrower's stock and lease upon satisfaction of the loan. So, Mr. Jacobs said, the lender may very well be liable to the letter writer for any actual damages incurred because of the lender's inability to comply with the requirement.

"In our experience," Mr. Jacobs said, "lenders who have lost the certificate and lease for a loan will pay any reasonable additional charges the borrower may incur in replacing the original stock and lease."

So, he said, the first thing the letter writer should do is advise the lender of any expenses incurred as a result of the loss of the documents and ask to be reimbursed. "If all else fails, the letter writer can seek compensation from the lender by filing an action in small claims court," Mr. Jacobs said.

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*Excerpt from*

**NEW YORK TIMES, REAL ESTATE SECTION**  
Sunday December 22, 2002

**FORCING A VOTE AT A CONDO MEETING**

**Q** *At the recent annual meeting of our condominium's unit owners, the president of our board refused to let us vote on a nonbinding resolution that had been circulated. The president insisted that we could not vote on any matter not on the agenda, even during the new-business part of the meeting. Is this true? If so, how can the unit owners express their collective opinions? ... William R. Guggisberg, Somers, N.Y.*

**A** Kenneth R. Jacobs, a co-op and condo lawyer with offices in Manhattan and Yonkers, said that the rules regulating the conduct of annual meetings are generally set forth in the bylaws. And while most bylaws provide that unit owners may not vote on any matter at an annual meeting unless the substance of the matter is contained in the notice of meeting, such a restriction typically relates to binding votes only. Permitting or prohibiting nonbinding votes is typically left to the discretion of the chairman of the meeting.

"To avoid chaos at the meeting, the unit owners should respect the role of the chair to control the flow of discussion," he said, adding that while the new-business portion of the meeting can be a forum to raise complaints or address issues of concern, the chairman is not required to allow a nonbinding vote. "Frequently, that is a prudent course, since the issue being considered may not have been properly aired to the unit owners before the meeting," Mr. Jacobs said.

He said that if the unit owners believe that a board member has stifled their voice, they can petition for a special meeting to take a binding vote on a specific issue or to remove the offending member. "The bylaws set out the requirements for taking such actions," Mr. Jacobs said, adding that a petition by unit owners — the number of signatures needed generally ranges from 10 to 33 percent — is usually required.

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*Excerpt from*

**NEW YORK TIMES, REAL ESTATE SECTION**  
Sunday September 1, 2002

**A CONDO BUILDING UNDERBILLS A CHURCH**

**Q** *Our condominium building consists of 32 residential units and a church. We just found out that the condominium board has been approving incorrect building budgets drawn up by the management company. For the last 10 years, the common charges for the church were not computed in accordance with its sharing responsibility as documented in the condominium bylaws. Thus, the church was billed about 50 percent less than it should have been. Moreover, according to the condominium bylaws, the church should have had its own water meter. Two years ago, we found out that it does not have its own meter but is using water from the building that is being paid by the residential owners. The board is now charging the church 20 percent of the total water usage. Can the condominium board reclaim back from the church the charges the church should have paid over the past 10 years? ... Alfred Tai, Holliswood, N. Y.*

**A** Kenneth Jacobs, a co-op lawyer with offices in Manhattan and Yonkers, said that since the condominium documents represent a contract among the unit owners, the church has a contractual obligation to pay its predetermined share of the common charges. And since the condo bylaws anticipated that the church would have its own water meter, it would not be unreasonable for the board to bill the church for such charges in proportion to the church's share of the common charges.

If the church refuses to reimburse the condominium for its unpaid water charges and common charges for the 10 years that have passed, Mr. Jacobs said, the condominium association could sue the church for breach of contract. However, he said, since there is a six-year statute of limitations for a breach of contract actions in New York – that is, a plaintiff can go back only six years to recover damages – the most the condominium could recover from the church would be the unpaid charges for the last six years. And while the condominium might also have a claim against the managing agent, that claim would also be limited by the statute of limitations.

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*Excerpt from*

## NEW YORK TIMES, REAL ESTATE SECTION

Sunday May 26, 2002

### REPAIRING WATER DAMAGE IN A CO-OP

**Q** *Several months ago, I repaired significant water damage to my co-op apartment's bathroom ceiling. The leakage apparently came from outside my unit. When evidence of continued leaking appeared, I asked the managing agent to investigate and to require the responsible party to make the necessary repairs. The agent refused, saying that I must deal directly with my upstairs neighbors. Since I have neither the authority nor the expertise to determine who in the six stories above me is responsible for the leak, this approach is destined to fail. Who is responsible for finding out who is responsible and for assuring that a repair is made? ... Douglas L. Beards, Harsdale, N.Y.*

**A** Kenneth R. Jacobs, a co-op lawyer with offices in Yonkers and Manhattan, said that under most proprietary leases, the co-op corporation has the right to enter tenants' apartments to conduct inspections and make repairs. And while there is generally no specific clause in the lease requiring the co-op to investigate the sources of problems, there is usually a practical incentive for doing so.

"If the corporation refuses to investigate the cause of the leak or to repair damage, it has potential liability to the letter writer for breach of its obligation to keep the premises in good repair," Mr. Jacobs said.

He said that if the leak is being caused by the acts of another tenant – such as failing to properly caulk around a bathtub – the other tenant would be responsible for the damage to the letter writer's property.

But if the leak is caused by the failure of a system or structural element owned by the co-op, such as a pipe leaking inside the wall or a leak originating on the roof, then the co-op would be responsible for repairing damage to the plaster or wallboard in the letter writer's apartment.

Mr. Jacobs added that while the co-op would not be legally required to repaint the damaged area after it has been repaired, most boards will do so if the damage was caused by the co-op.

The letter writer, he said, should send a certified letter to the board describing the problem and requesting an inspection to determine the source of the leak. If the board declines to cooperate, Mr. Jacobs said, the letter writer can sue the co-op for failure to keep the premises in good repair and, if the damage is severe enough, can seek an abatement in the maintenance charges based on the co-op's breach of the warranty of habitability.

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*Excerpt from*

## NEW YORK TIMES, REAL ESTATE SECTION

Sunday December 2, 2001

### SUBLETTING FEES IN A CONDOMINIUM

**Q** *I own a condominium unit that I rent to a tenant. In the past, the board has imposed a \$50 a month surcharge on rentals. Recently, however, it adopted new regulations increasing the surcharge to 20 percent of the rent for winter months and 30 percent for summer months. It is also imposing on tenants a fee of \$100 a month for use of the facilities. This is all in addition to the security deposit. Is a condo board entitled to impose such charges? ... Daniela Fahey, Warwick, NY.*

**A** Kenneth Jacobs, a lawyer with offices in Manhattan and Yonkers, said that condominium associations may exercise a measure of control over the leasing of units, but only if the authority to do so has been granted in the condominium's declaration or bylaws. Most condominium association documents, however, do not contain such a provision, he said, but grant the association only a right of first refusal.

Even when such authority has been provided, however, Mr. Jacobs said, the fees charged cannot be penalties but must bear a reasonable relationship to the expenses incurred by the condominium in connection with the transaction. For example, Mr. Jacobs said, in cases involving co-ops, the courts have invalidated sublease charges equal to 30 percent of the rent.

"A court would be likely to apply the same principles to invalidate a high-percentage fee for leasing a condominium unit," he said, adding that a reasonable flat fee, perhaps based on the number of additional occupants, would be more likely to be upheld. The same standard would also apply to fees charged for the use of common facilities, he said.

"Generally, condominium boards have broad rights to regulate the use of common facilities like parking spaces, pools and the like," he said. "And while the association may reasonably claim that it is entitled to an additional fee to cover the extra burden placed on its recreational facilities by tenants, this fee cannot be a penalty but must bear some reasonable relationship to the costs the association is likely to incur."

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