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Debating THE BIG

**Do we need a co-op and
condo ombudsman?**



Debating THE BIG

A PROPOSED BILL IN THE NEW YORK STATE Senate, aimed at reining in the power of co-op and condo boards, would create the position of ombudsman. The proposal is drawing fire from leading advocacy groups and getting support from a number of disgruntled owners.

THIS PAST MAY, State Senator Liz Krueger, a Democrat from Manhattan, proposed legislation that would create an “Office of the Cooperative and Condominium Ombudsman.” Its aim? Educating co-op shareholders, condo unit-owners, boards, property managers, and other professionals about their legal rights and responsibilities. It would also monitor board elections; mediate disputes; and conduct public hearings. The ombudsman would have the power to subpoena witnesses and question them under oath and could also require any books or papers relevant to any dispute. The ombudsman would be appointed by the state attorney general and be paid an as-yet-undetermined salary. The money for that and related office expenses would come from an annual fee of \$6 charged to every co-op and condo unit in the state.

Why this bill and why now? “This office addresses a lot of housing issues,” explains Katie Kincaid, Krueger’s communications director. “Something that comes up a lot is that residents of co-ops and condos have questions and concerns when they feel they’re not being treated fairly by their board and/or management. Right now there’s nobody checking co-op and condo boards. The only course of action is legal action, which can be very costly for individuals, boards, and, ultimately, all shareholders and unit-owners. The thought behind this bill is to have some sort of middle man to help with the mediation of disputes.”

What follows is a debate between those who are for it and those who are against it. Questions were sent out to each of the participants and selections from their responses follow.

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Look Who's Talking

AGAINST THE BILL



Gregory J. Carlson is executive director of the Federation of New York Housing Cooperatives & Condominiums and president of Carlson Realty.



Bob Friedrich is president of Glen Oaks Village, a self-managed cooperative residential housing development located in northeastern Queens, spread out over 110 acres. It consists of 2,904 garden-style apartments in 134 buildings.



Stuart Saft, a partner in Dewey LeBoeuf, has practiced cooperative law for 40 years. He is chairman of the Council of New York Cooperatives & Condominiums.



Warren Schreiber is the president of the Bay Terrace Cooperative Section I, a 200-unit co-op in eastern Queens.



Phyllis H. Weisberg is a member of the law firm of Kurzman Karelsen & Frank, where she has been specializing in co-op and condo law for over 30 years.

FOR THE BILL



Robert Dannin, a member of the Alliance of Condo & Co-op Owners (ACCO), serves as a co-op board member at a 105-unit prewar building in Carnegie Hill.



Kevin McConnell, a partner in Himmelstein, McConnell, Gribben, Donoghue & Joseph, concentrates on tenants' rights and co-op and condo law.



Larry Simms founded Condo/Co-op Strategies to advise boards. He was a board member for many years at a 165-unit Murray Hill high-rise condo. He is president of the ACCO.



Dianne Stromfeld is a real estate broker and a past board member of North Shore Towers, a 1,844-unit co-op in Floral Park. She is a member of the ACCO.



Stephen Vernon is board president of Nagle Apartments, a 111-unit, three-building co-op in Inwood.

Is there something about the current system of co-op/condo governance that doesn't work that necessitates this bill?



Saft The underlying premise of the bill is incorrect. It assumes that the current system does not work when, in fact, it is the one unregulated form of housing that is working without government interference. There is no avalanche of litigation between co-ops/condos and residents. Before the government imposes itself on the private housing market, shouldn't there be statistics about complaints to state and city agencies? Shouldn't there be huge amounts of litigation backed up in the courts? There are far more landlord/tenant disputes related to rental housing, so why isn't Senator Krueger proposing an ombudsman for rental housing? She held a seminar on co-op and condo issues six months ago and had two landlord-tenant lawyers speak, but no co-op/condo lawyers. This seems to be a solution for a problem that doesn't exist.

Simms That the system is broken is obvious to any objective observer. Stuart [Saft] recently represented



– pro bono – a group of dissident shareholders in a large Queens co-op. The case is extraordinary in that 52 percent of outstanding shares voted for a special meeting to recall the entire board. The board at first ignored the valid petition; when pressed, they scheduled a meeting with a different agenda, which the petitioners were advised to boycott. All board members remain in office.



Carlson The problem is a societal problem; everyone wants someone else to solve the perceived problem. The governance of cooperatives and condominiums is a true democratic process. If you want change it will not happen by the owner just sitting there. Vote.

How would an ombudsman fit into the current board governance structure and decision-making?

Weisberg Not very well. It could undermine co-op/condo governance. Board members have a fiduciary duty to their entities and their constituents to act on behalf of the entity *as a whole*. But that will not necessarily make everyone happy. If the board decides to fix the elevators, for instance, the ground-floor shareholder may feel that was not a wise expenditure, because he/she does not use the elevators. So that courts are not dragged into these sorts of disputes, boards are protected by something called the Business Judgment Rule, which says that, once the board's authority to act is established, and provided the board has not engaged in fraud or self-dealing, a court will not second-guess its decisions. For that same reason, the decisions



should not be second-guessed by the ombudsman's office.



Saft Every time any shareholder, unit-owner, or tenant in a co-op or condo building has an issue, a complaint will be filed with this new ombudsman, and the board will be forced to hire an attorney. Moreover, the ombudsman is going to start issuing regulations that will have costs associated with them. Because of the additional work and regulations, it will also increase management costs, and the shareholders and unit-owners will have to bear these costs.

Stromfeld The argument that this bill will increase a co-op



community's legal fees is unfounded. If anything, legal expenses will decrease because as a government agency, the cost to file a complaint would be minimal. If the agency determined the complaint to be unfounded, attorneys would not be required.

Granted, boards must work in accordance with business corporation law and use good business judgment. However, there is no agency charged with oversight of board actions other than what might be fraudulent or criminal. To prove that, an owner would have to start litigation if wrongdoing is perceived, which is quite costly.

Without an ombudsman, is there a place where apartment owners can go now for authoritative answers to their questions?

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Dannin Education is the most important part of this legislation because even many sitting board members are not fully conversant with the rules, definitions, and procedures of governance. Such ignorance can lead to a dereliction of one's fiduciary responsibility. Take, for example, the voting process. Last year, our co-op president persuaded a majority of the board to defy the shareholders by switching from cumulative to non-cumulative voting. Of the six individuals who approved this amendment to the bylaws, at least three did not fully understand what that meant. Shareholders were furious but could do nothing about it because the corporate counsel sided with the president.



Vernon I would like to see the bill expanded to mandate that the ombudsman's office maintain an information portal, publish informative publications on a regular basis, assist to establish best practices, track complaints received, publish case studies, and make public appearances to educate owners, boards, managers, and other interested parties.

Stromfeld Unfortunately, there is no government agency to turn to. Contrary to what many believe, the attorney general will not provide any assistance or relief except where a sponsor is concerned. The Council of New York Cooperatives and Condominiums and the Federation of New York Housing



Cooperatives and Condominiums are fine organizations, but they exist to serve boards rather than the shareholder/owner. An ombudsman agency would provide owners with an unbiased resource when questions arise.



Carlson The federation gets calls directly from residents on a weekly basis as does the council. I also get calls from the offices of both state and city legislators on behalf of their constituents.

Co-op/condo owners would be taxed to pay for the ombudsman. Is this fair?

Stromfeld Based on my real estate experience, I don't believe that apartment owners would object to \$6 per year in order to have an impartial agency to turn to, rather than spending tens of thousands – and in some communities, hundreds of thousands – of dollars per year in attorney fees.



Friedrich The cost of this bill does not stop at the tax collector's door. There will be enormous legal and accounting costs associated with the ombudsman bill. The new co-op/condo tax is pegged at \$6 per shareholder now, but

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will increase exponentially as the state seeks to quench its insatiable appetite for more revenue. This tax will cost co-ops like Glen Oaks Village and North Shore Towers in Queens, \$15,000 to \$20,000 per year. Money that could be better spent elsewhere in the co-op. The absurdity of this bill is that it is not only an unfunded mandate for co-ops but also exacts a new tax on them. It is a double-whammy.

Schreiber But, it doesn't end there. All other associated costs such as reproducing documents, transportation, and having legal counsel present during hearings will be passed on to the owners. It would be remiss of me not to also bring attention to the fact that in Queens we have some co-ops with more than 2,000 units. Those properties would be subject to an ombudsman tax of \$12,000. To put such a large financial burden on co-ops/condos, which in many cases represent the last bastion of middle-class housing in New York is unconscionable.



Simms I've heard an opponent complain in one breath that this bill is an "unfunded mandate," and in the next that the bill's built-in funding is an "unconscionable tax burden." It can't be both. In fact, this bill is

expressly and wholly funded by precisely those people who will benefit from the ombudsman. At 2¢ per day, I have yet to hear an informed owner object. The other opposition claim is that costs will soar. Yet, Nevada imposed a \$3 annual ombudsman fee in 1997...and it's still \$3. Florida's annual fee was set at \$4 in 2004...and it's still \$4. These ombudsmen field tens of thousands of queries and complaints each year, and give classes for many thousands of owners and board members, using just the funds provided. New York can surely do as well.

Weisberg The tax that is being levied is unfair. Most co-ops/condos may elect not to go to mediation – and, therefore, will not receive the benefit or, alternatively, may be coerced to go in a situation that may well interfere with their operations. A number of laws enacted in recent years unfairly single out co-ops and condos from rental housing – without any real basis for doing so. So does this legislation. Why should rental housing not be subject to an ombudsman? What is the distinction? And why should co-ops/condos now be burdened by a new tax to which no other residential housing is subject? If the tax is insufficient to



fund the office, then the tax will be increased. There are already many inequalities in the system. Why increase them?

Should an ombudsman's office arbitrate disputes?

Weisberg The concerns I have should not be viewed as a rejection of alternative dispute resolution. It can have a role to play. But, the legislation is not necessary. There is already a mediation service for co-ops and condos run by the Association of the Bar of the City of New York. The panel consists of individuals who have great experience in co-ops and condos as well as being trained mediators.



McConnell Although there are several mediation services available now particular to co-op/condo matters, they are seriously underutilized and have no real power to get the parties to talk to each other. A call from the ombudsman at the attorney general's office is sure to get the intended result: the parties talking in a supervised forum working to get a resolution at minimal cost.



Is there anything you'd like to add about this legislation that hasn't been discussed?

Simms The Nevada ombudsman office employs "levels of enforcement" in resolving complaints. They start with a simple explanation of each party's rights and responsibilities; the next step is a "letter of instruction." If the parties receiving such a letter agree to follow the relevant laws going forward, the matter is dropped. If the letter of instruction is ineffective, they progress through a series of procedures



and hearings, which can result in fines or removal of board members.

Asked how many complaints are resolved by the instruction stage, the quick answer is: "A lot." Most parties immediately comply once the laws are explained by the governing authority. Penalties are rarely imposed. This is the kind of guiding hand we need in New York...showing people the usually clear-cut course of action, quickly, and with no legal costs.



Saft In 40 years of practicing law, this is the least necessary, most objectionable piece of legislation that I have ever seen. Its premise assumes

that co-op and condo boards that are elected annually by the residents are incompetent or uncaring about their neighbors and themselves, since the board also lives in the building. It is going to interfere with a functioning system in order to satisfy a relative handful of malcontents who are unable to get their neighbors to agree with them on one issue or another. It is being introduced by someone who does not understand or doesn't care to understand this form of housing and, if enacted, will have the unintended consequence of making this form of housing less efficient, more costly, and subject to the whim of another bureaucrat. ■

Ombuds, South and West

What Other States Have Done

Proponents of the ombudsman bill frequently cite Nevada and Florida as two states where such programs were successfully launched. What have they done?

The Office of the Ombudsman in Nevada was created by the 1997 legislature. When the first ombudsman took the post in 1998, it was a one-person job, in which the office-holder would be an informal mediator. Today, the office has grown to include 17 staff members with four major functions:

1 Education. Five classes, which had been contracted to outside experts for much of the last decade, are offered every month, now directly through the office. Certain classes requiring professional expertise are still occasionally

contracted out. Last year, Nicholas Haley, who is the education and information officer at the Nevada Office of the Ombudsman, co-authored a 17-chapter manual on the business of an association, complete with a list of government services available to homeowners' associations. The office also sends out brochures and has two videos available explaining further co-op and condo issues.

2 Registering each association in the state. The ombudsman collects information on the 3,000 homeowners' associations for financial records and contact information. Although the office occasionally audits, its ability and capacity for doing so is limited.

3 Mediation. Disputing parties within a homeowners' association can use this service as an informal, non-binding mediation. Fifty percent of the time, these informal mediations come to a resolution. Arbitration services are also offered, but not directly through the office. If disputing parties cannot come to an agreement through the ombudsman's informal mediation, the office offers alternative dispute resolution, helping the parties find arbiters but not working with them.

4 Enforcing the law. The ombudsman has the power to enforce the law against board members, shareholders, unit-owners, and managing agents (who must be licensed in Nevada). The laws include how records are to be kept and meetings and elections are to be run. If, after being contacted, a board member or shareholder does not comply, he/she is brought in front of the compliance commission and fined or required to take a class. In extreme cases, the commission has the power to remove violators from the board. The commission deals with about eight to ten cases a year. It only hears "major" cases, such as ones involving crimes like commingling funds.

The Nevada Office of the Ombudsman is funded through a per-unit fee of \$3 annually. There are 472,000 units within the HOAs of Nevada; the office's yearly budget is \$1.5 million. The charge has not increased since the office's inception.

Unlike other ombudsman offices, the complaints and issues Nevada deals with are not cyclical. It receives over a thousand phone calls each month, the majority of which are requests for information (usually on what constitutes a violation). Some of these queries become official complaints, while others are resolved by the office. If the call does end in an official com-

plaint, either a "Statement of Fact" or an "Intervention Affidavit" is filed; the former is a complaint against a community manager, the latter against any other party involved in HOA matters. Three years ago, the office received nearly 500 affidavits; as of last year, the number was 252. The reduction is attributed to aggressive education efforts: as associations and their members become more informed, they understand what they can and cannot do.

Meanwhile, down south, the **Florida Office of the Ombudsman** was created in December 2004. It is a small, eight-person affair, funded by a per-unit \$4 yearly charge. The money collected from the unit-owners is put into a trust fund; from this fund, the office operates under a budget of under \$550,000 annually. It does not offer any mediation services. "The ombudsman can act as a liaison between disputing parties, but never an official mediator," said Bill Raphan, supervisor at the office.

Activity is cyclical. From October through April, the volume of calls and complaints doubles, because the majority of HOAs are having their annual meetings and putting together budgets. January is the busiest month. The ombudsman's office offers extensive educational programs throughout the state. These are available to board members and unit-owners/shareholders alike, because the end result is an informed organization.

It is perhaps telling that, when the office was first created, the media portrayed it in a very negative light. Many boards were concerned about the ombudsman's office overstepping its boundaries and the Florida media fed these fears. In the first year, almost all of the calls and complaints were from unit-owners. As the office grew, more and more calls came from board members and property managers looking for information and education.

— Kathryn Farrell

