

MEMORANDUM

TO: REF Attorneys & Paralegals

DATE: 6/13/86

FROM: Nancy Kramer
Mary Sabatini DiStephan *MSD*

Revised

9/12/89

RE: Vacant Apartments

A sponsor of a conversion plan is under no obligation to offer tenants the opportunity to purchase any vacant apartments. Frequently, however, they do make such apartments available to tenants. (A common provision allows tenants to purchase the number of shares allocated to the apartments in which they reside at the insider price and any additional shares at the outsider price.) Any offer that is made must be made to all tenants equally.

Our office becomes involved in offers to sell vacant apartments to tenants in three different circumstances. The first is when two or more tenants wish to subscribe for a single apartment. In order to avoid discriminatory inducement problems, we look for the establishment of an objective system of determining which of two or more tenants will get the right to purchase the apartment they all want. A method that has been successful, and that we encourage sponsors to use, is the establishment of a lottery (to be held only if two or more tenants want any one apartment) after the 30-day exclusive purchase period has expired. It is helpful to have the tenants' association run or participate in running such a lottery.

The second issue of concern is if a system of offering vacant apartments encroaches on the 90-day exclusive purchase period. We have refused to allow sponsors to condition the right to subscribe for a vacant apartment on the obligation to buy the tenant's own apartment if the vacant one goes to someone else. In other words, a sponsor cannot make it a condition of entering a lottery that a tenant will buy his or her own apartment if the tenant loses the lottery. We have also required that any lottery be finished well before the expiration of the 90-day period, so that tenants who try for, but do not obtain, vacant apartments, will have adequate time to decide whether to purchase their own apartments. Furthermore, we have not permitted sponsors to offer a lower purchase price for the vacant apartment to tenants who agree voluntarily to purchase their own apartments if they lose the lottery.

The final (so far) issue pertains to tenants who obtain the right to purchase a vacant apartment and give up their current rent stabilized apartment to move into the vacant as an interim lessee. An interim lease is a rent-stabilized lease with one key additional fact -- a cross-default provision. Problems are caused if (1) the purchaser defaults or (2) the plan does not become effective or (3) a material and adverse amendment is accepted for filing and triggers a right of rescission which the tenant exercises. If the purchaser defaults, the cross-default provision is triggered, and the purchaser is subject to eviction. The other two examples are qualitatively different in that the purchaser has not caused them to happen. In both instances, the subscription or purchase agreement is cancelled but the tenant must be allowed to stay on as a rent-stabilized tenant in the new apartment or in the prior apartment. Essentially, the sponsor must return the tenant/purchaser to the position he or she was in prior to contract or subscription because of the equitable nature of "rescission". Thus a tenant who had a rent-controlled or rent-stabilized apartment must be given the same. Also, the tenant is entitled to all expenses incurred as a result: moving costs, attorneys' fees, mortgage expenses.

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