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Memorandum

To: Cooperative and Condominium Directors and Managers

From: BPBMV Cooperative/Condominium Practice Group

Subject: Condominium Boards' Right to Restrict Sales

Date: August 9, 2005

A recent court decision has generated a considerable amount of confusion among some condominium boards and condominium unit owners regarding the power of condominiums to regulate the sale of units in a manner similar to cooperatives. We hope that this memorandum will help to clarify matters.

The decision, *Demchick v. 90 East End Avenue Condominium*, 18 A.D.3d 383, 796 N.Y.S.2d 62 (1st Dep't 2005), was issued on May 31, 2005 by the Appellate Division for the First Department (which covers Manhattan and the Bronx). The condominium at issue sought, through the amendment of its by-laws, to limit the sale of certain small studio units for use in conjunction with other apartments in the building. (The units had previously been marketed as servants' quarters, and they were, at the time of the suit, used for either servants' quarters or for storage.) Mr. Demchick sued the condominium and claimed that the amendment was an unreasonable "restraint on alienation." The Appellate Division determined, however, that the restriction was not an unreasonable restraint, and it ruled for the condominium.

The legal issue at stake in the case, *i.e.*, permissible restraints on alienation, lies at the heart of the overriding legal restriction on the power of condominium boards to regulate sales and leases. Unlike a cooperative apartment, a condominium unit is "real property" for which the unit owner is issued a deed. Under common law which is hundreds of years old, real property cannot be subject to unreasonable restraints on alienation. Although the New York courts have determined that a condominium's right of first refusal on the sale of a unit is not an unreasonable restraint, it has always been assumed that more stringent restraints might well run afoul of the rule and be invalid.

The *Demchick* decision has led some commentators to presume that the courts will now permit condominium boards to impose considerable restrictions on condominium unit sales and has fanned a fear for some, and a hope for others, that condominiums can now behave like cooperatives in restricting the sale and leasing of units. Although one cannot predict with certainty how courts will rule in the future, *Demchick* is not as earth-shaking as some believe, and it seems unwise to give it such a broad meaning. In fact, condominiums have always had some power to restrict sales or leases, provided that such restrictions are not unreasonable. Six years ago, in *Four Brothers Homes at Heartland Condominium II v. Gerbino*, 262 A.D.2d 279, 691 N.Y.S.2d 114 (2d Dep't 1999), for example, the court upheld certain by-laws prohibiting the leasing of units. Although not tested through litigation, most commentators have also felt for some time that flip taxes are permissible in a condominium, so long as they are reasonable in amount. In *Demchick*, the court found, on the facts before it, that it was reasonable for the condominium to preserve the nature of the studio units as servants' quarters or storage units for the other unit owners. The condominium did not restrict unit owners from selling their units, and it sought no approval rights for sales. Moreover, the restriction was enacted by the unit owners, not imposed by the board.

Undoubtedly, there will be some condominiums that will view *Demchick* as support for enacting a broad range of restrictions on the sale and leasing of units. We encourage boards to act carefully in this area. If you would like to discuss any restrictions you have been considering, please contact us.

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[*Under attorney practice rules, we are required to state that this memorandum is "Attorney Advertising"*]