In contrast to cooperative housing corporations, where transfers are governed by personal property rules that give a boardwide discretion to approve transfers, a condominium board has limited control over prospective owners. The condominium is designated by law as real estate; as a result, restraints on the transfer of condominium units are limited. The common control technique is for the bylaws of a condominium to provide a right of first refusal for the board to become the purchaser of proposed unit sales.

Real Property Law (RPL) §339-v(2)(a) provides for the inclusion in condominium bylaws of "provisions governing the alienation, conveyance, sale, leasing, purchase, ownership and occupancy of units, provided, however, that the bylaws shall contain no provision restricting the alienation, conveyance, sale, leasing, purchase, ownership and occupancy of units because of race, creed, color or national origin." Courts have upheld restraints on alienation found in condominium bylaws provided that such restraints are conditioned upon the restrainer's obligation to purchase the property at the fair market value.

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Rationale

The broad rationale for exercise of a right of first refusal by a condominium board of managers is to secure a community of friendly, qualified, congenial residents while protecting the value of their apartments. Generally, a board has no interest in acquiring an individual unit except as a means of preventing a transfer of that unit to a person considered to be undesirable. However, there are reasons why a board of managers might seek to exercise a right of first refusal. For example, the board may desire to either purchase or lease a larger or more convenient apartment for its superintendent or a studio apartment to be used as an office for the condominium unit owners. In addition, if the board finds that the proposed sale terms are favorable for the purchaser, it may decide to purchase the unit and thereafter sell it at a profit with the proceeds to enhance the reserves and the working capital of the condominium. In practice, however, it is a rare occurrence that a board elects to exercise the right especially when the board must furnish the purchase price and not merely disapprove the sale as may be done by a co-op board of directors.

The right of first refusal is a preemptive right, thus the board may not compel an unwilling owner to sell. The bylaws generally require the unit owner or seller to send notice to the condominium board, by certified or registered mail, return receipt requested, together with a copy of a fully executed contract of sale or lease, containing all of the terms of the proposed transfer or lease. In addition, potential buyers must be alerted to the restriction. The notice and submission to the board constitute an offer by the unit owner to sell or lease to the board upon the same terms as are contained in the submitted sale or lease agreement. Typically, the unit owner must also submit any additional applications, information and references the board reasonably requests. Then, the board must elect whether to exercise its right within a specified time period set forth in the bylaws (usually 30 days). In the event the condominium board fails to accept the offer within the designated period, the unit owner is free to consummate the transaction embodied in the contract of sale or lease within a specified time period (usually 60 days).

The board's right of first refusal most commonly has certain expectations and then usually does not apply to a conveyance by (a) a unit owner to any of his adult family members, or a trust for the benefit of them (or, if the unit
owner is not an individual, to a parent or subsidiary entity), (b) the sponsor (with respect to unsold units), (c) the board or (d) parties in title as a result of a foreclosure. However, each succeeding unit owner will be bound by the provisions of the by-laws regarding sales and leasing.  

**Restraints on Alienation**

In general, since 1986, New York case law has upheld the right of first refusal in the context of a condominium sale as not being an invalid restraint on alienation. In *Anderson v. East 72nd Street Condominium*, the Appellate Division, First Department, held that the exercise of a right of first refusal by a condominium board provided for in the by-laws was a valid exercise of power, despite the fact that it comprised a restraint against alienation of the property.

In *Anderson*, the appellate court upheld the lower court's ruling that the validity of the restraint should be tested by the common-law rule against restraints on alienation whereby the reasonableness of the restraint is the determinative factor, rather than the Rule Against Perpetuities. In making this determination, the court stressed the differences in character and effect between an option and a preemptive right to purchase property. An option impairs the value and use of the land, thus clearly violating the purpose of the Rule Against Perpetuities, while a preemptive right, especially with respect to a condominium owner, does not impair the value or use of the land so as to restrain its alienability.

The Court of Appeals delineated the test to be used in determining the validity of a preemptive right, such as the right of first refusal, under the common-law prohibition on unreasonable restraints on alienation in *Metropolitan Transportation Authority v. Bruken Realty Corp.* Whether a restraint will be considered unreasonable is ascertained by the reasonableness of the restraint, determined by its duration, price and purpose. Most significant is the duration of the restraint. The duration is not measured by the life of the preemptive right, but rather by the period during which the right can be exercised once the owner decides to sell. Since a condominium board generally has a maximum of 30 to 45 days in which to exercise its right after notification by the owner, the time limitation given to the board will likely be deemed reasonable. As to price, the board must purchase at the same price and terms as the owner-seller had struck with the intended third-party purchaser, and similar conditions as to duration and price have been upheld as reasonable. The purpose of a right of first refusal is beneficially related to the peculiar characteristics of condominium ownership, whereby in addition to fee ownership of a unit, each condominium owner holds an undivided interest in the common elements. People live in close proximity to each other with an element of economic interdependence in the financial affairs of the entity. As a result, a right of first refusal is one that has been held to serve a valid interest—to ensure the success of the condominium entity; hence, its purpose is proper.

**Strict Compliance**

Despite acceptance of the concept of a right of first refusal, condominium boards should carefully review their by-laws when attempting to exercise a right of first refusal to purchase a condominium unit from a prospective seller. Courts have been prone to require strict compliance by a board in asserting such right.

In *Ng v. Baybridge at Bayside Condominium III*, the board attempted to exercise its right of first refusal to purchase a unit that one of its owners was attempting to sell. The condominium's bylaws, however, required a meeting where the approval of a majority of the unit owners was needed before the board could exercise the right. Due to the board's failure to timely hold the meeting, the court found the attempted exercise of the refusal right to be void.

A similar situation occurred in *Mapp 1998 LLC v. Board of Managers of 200 East 65th Street*. Mapp involved a potential purchaser who, after the condominium board exercised its right of first refusal, sought to have the board's exercise declared void on the grounds that it failed to comply with a bylaw provision that required prior approval by a majority vote of the unit owners. The bylaws provided that the board would not exercise its right of first refusal without the prior approval of a majority of all unit owners. The sponsor of the offering plan held 172 of the condominium's 302 units and had an approximately 57 percent common interest. The plaintiff contended that for the exercise of the right of first refusal to be approved, there had to have been an approval by a majority of the unit owners at a meeting. The defendant pointed to a bylaw provision that permits certain actions, including the exercise of the right of first refusal, to be taken without a meeting provided that the number of unit owners sufficient to approve an action at a meeting consent in writing approving such action. The court decided that the bylaw provisions were lawful and that the written authorizations of 57 percent of the condominium interests was sufficient to exercise the right of first refusal.
The need for a board's strict adherence to its bylaws when exercising its right of first refusal was reiterated in Cohen v. Olmstead Condominium.\(^2\) Here, the board failed to follow several provisions of its bylaws when attempting to exercise its right of first refusal and, thus, was enjoined from its exercise. First, the bylaws required the board to exercise its right on the same terms and conditions as the contract that was already accepted by the seller. The seller had contracted to sell the unit for $217,500. While the board followed the bylaw provision requiring consent by a majority of the unit owners (in writing), the ballot that was approved by the unit owners listed the purchase price incorrectly, at $217,000. In the court's view, while $500 was not a significant difference, strict compliance with the bylaws was required by RPL §339. What is more, the board failed to notify the seller of its decision to exercise its right of first refusal within 45 days of receiving the notice of sale, as required by the bylaws. The board had received the notice of sale on Dec. 29, 1997. However, the board did not vote on whether to exercise its right until May 7, 1998, or 129 days after it received the notice of sale, clearly a delay in exercising its rights.\(^4\) Despite this result, the bylaws for many modern condominiums give the board some control over the time to exercise a refusal right by providing that the offer to sell is not considered to be complete until the seller has furnished all of the requisite data required in connection with the sale such as the purchaser's references, financial data and intended use of the premises.

The cited cases illustrate the bias of courts to strictly construe the bylaw provisions in order for a board to exercise its right of first refusal. In addition, a board must act in good faith when exercising its right of first refusal. In Extract v. Residential Board of Beaumont Condominium,\(^5\) the seller submitted notice of his proposed sale to the board. The bylaws allowed the board to request further information with respect to the outside offeror and the sale agreement. The board argued that the time within which the holder of a right of first refusal must exercise that right is tolled upon the holder's request for additional information, where such request is not authorized by the agreement. The board sent a letter to the seller, which the board purported to be a request for further information. However, the court found that the letter was not a request for further information, but rather it was an imposition of conditions upon the proposed sale not authorized by the bylaws, and not made in good faith.

The court further found that the right of first refusal is not tolled upon the holder's request for additional information if the request is not authorized by the agreement.\(^6\)

**Conclusion**

As a general rule, a condominium board does not have the power to reject a particular unit purchaser outright. Although infrequently involved, through its right of first refusal, a condominium board may be able to "screen" prospective purchasers and prevent "undesirables" from purchasing a unit.

The right of first refusal has been held not to represent an unreasonable restraint on alienation. However, a condominium board should be cognizant of its bylaws which pertain to the exercise of this right, as courts have shown a propensity to nullify the exercise of the board's right if the bylaws are not strictly adhered to.

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(1) See Siegler, "Troublesome bylaw Provisions," N.Y.L.J. at 3, col. 1; Similar restraints have been upheld in the leasing context as well. See Four Brothers Homes at Heartland Condominium v. Gerbino, 262 A.D.2d 179, 691 N.Y.S.2d 114 (2d Dept. 1999) (holding that a condominium could validly prohibit the leasing of any common units). Here, the board failed to follow several provisions of the bylaws for many modern condominiums, giving the board the right to exercise its right of first refusal. In addition, the board must act in good faith when exercising its right of first refusal. In Extract v. Residential Board of Beaumont Condominium, the seller submitted notice of his proposed sale to the board. The bylaws allowed the board to request further information with respect to the outside offeror and the sale agreement. The board argued that the time within which the holder of a right of first refusal must exercise that right is tolled upon the holder's request for additional information, where such request is not authorized by the agreement. The board sent a letter to the seller, which the board purported to be a request for further information. However, the court found that the letter was not a request for further information, but rather it was an imposition of conditions upon the proposed sale not authorized by the bylaws, and not made in good faith. The court further found that the right of first refusal is not tolled upon the holder's request for additional information if the request is not authorized by the agreement. As a general rule, a condominium board does not have the power to reject a particular unit purchaser outright. Although infrequently involved, through its right of first refusal, a condominium board may be able to "screen" prospective purchasers and prevent "undesirables" from purchasing a unit.

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