

Q. & A.

Imposing a 'Flip Tax' Retroactively

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Q. While transferring the minutes of our co-op shareholder and board meetings from paper copies to a computer disk, I came across an amendment passed by the board in 1983 that may have never been exercised. The amendment stated that an additional 1.5 percent of the sale price "be paid to the co-op at the time of closing, by certified check." There have been four apartments resold since 1983 and there is no record of this amendment ever being referred to. It was the buyer who was to pay the additional 1.5 percent, not the seller. Is the amendment still valid? Can these funds still be collected from the present shareholders of these apartments? R. R. Call, Manhattan.

A. Alvin Schein, a Manhattan co-op lawyer, said that when the writer refers to an "amendment passed by the co-op board," it is not clear whether it was an amendment to the proprietary lease or the bylaws. "It is unlikely that the board had the authority to amend the proprietary lease on its own," Mr. Schein said. "Most proprietary leases require an amendment to be approved by a supermajority vote of the shareholders." (A supermajority is usually two-thirds to three-quarters of the votes.) But, he said, bylaws often allow for amendment by the board, provided that procedural requirements are complied with. So, he said, the co-op's governing documents would have to be examined to verify that the amendment was properly adopted.

But even if the amendment is valid, he said, there is some question whether the transfer fee (commonly called a "flip tax") can be collected on previous sales. Since the fee was to be paid by the buyer, he said, one issue is whether the buyers knew of it at the time. "In several flip-tax court cases, the courts have held that knowledge that a transfer fee may be imposed was a necessary element as to the validity of the fee," Mr. Schein said. "So if buyers were never notified about the existence of the fee amendment, it may not be valid with respect to sales that have already occurred."

There is also the issue of whether retroactive imposition of the fee would be barred by the statute of limitations. Generally, he said, civil lawsuits must be started with six years of the event that gave rise to the action. "Therefore, any claim with respect to a fee that may have been due to the co-op at a transfer that occurred more than six years ago would almost certainly be time-barred," Mr. Schein said. And, he said, since the sale of a co-op apartment basically involves the sale of securities, and since the Uniform Commercial Code provides a shorter, four-year statute of limitations, a buyer could raise the shorter statute of limitations as a defense.

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