RESEARCH MEMORANDUM

FROM:     John Edward Dallas
TO:       MHA Board, Val Orselli
CC:       Steve Herrick
DATE:     October 12, 2010
RE:       Review of Co-op Information Package – Part II

INTRODUCTION

Supplementing my October 9, 2010 research memorandum, below are my further comments on the co-op information package, or the Plan, based on my review of the draft e-mailed to me by Val on October 5.

CO-OP INFORMATION PACKAGE

PART I

C.  INTRODUCTION

4. The Regulatory Agreements

Since there are six different Regulatory Agreements, each with its own “Restriction Period” and covering different buildings, the phrase “During the Restriction Period, the buildings” at the start of the first paragraph on Page 11 should read “During the Restriction Periods.”

Paragraph Two on Page Five states: “However, even after the Restriction Period is over, the Ground Lease requires that the income restrictions on the Apartments be maintained.” (Emphasis added.) The mandatory nature of the income restrictions cited here contradicts an earlier mention of their optional nature, in subsection 4 (“Resale Restrictions”) in Section A (“Special Risks to Be Considered by Purchasers”): “Because of the affordability requirements of the Ground Lease, these [resale] restrictions may be continued after the Restriction Periods.” (Emphasis added.)
D. THE OFFERING

2. Purchase Price For Original Purchasers

This section says: “For six (6) months from the acceptance for filing date [i.e. September 9, 2010] of this information package (the ‘Conversion Period’), the purchase price for Original Purchasers will be **Two Hundred and Fifty Dollars ($250.00)** per Apartment (one hundred Shares for each apartment) plus taxes, filing fees and closing costs, if applicable.” (Only italics added.)

First, this passage contradicts the definition of Original Purchase Price in Section B (“Definitions), which says: “The original purchase price of $250.00 per Apartment applies to all tenants in Good Standing for a period of six months from the date of this offering.” (Emphasis added.) Will the Original Purchase Price be in effect for six months from the Acceptance for Filing date or from the date that each Tenant receives a copy of the Information Package?

Second, the words “original purchase price of $250.00 per Apartment” under the definition “Original Purchase Price” convey that Apartments are being sold under the current Plan. Since the Plan does not involve condo sales, the previous passage should be rephrased as “original purchase price of $250 for the Shares for each Apartment.”

Finally, returning to the text under “Purchase Price For Original Purchasers,” it mentions “one hundred Shares for each apartment.” This is incorrect. Since 3,280 Shares will be allocated to 328 Apartments equally (regardless of the size of a unit), 10, not 100, Shares will be allotted to each Apartment.

K. SUMMARY OF PROPRIETARY LEASE

2. This section says: “A Shareholder may assign his or her shares and Proprietary Lease to a family member whether or not that family member is then resident in the Lessee’s apartment….” (“Lessee’s” should read “Shareholder’s.”)

Article III, Section 4(b)(ii) of the Proprietary Lease, which covers “Transfer to a Family Member,” says that the neither the Board nor Shareholders may unreasonably withhold consent to the assignment of the lease and the transfer of Shares by a Shareholder to a financially responsible member of the Shareholder’s family who has lived in the apartment for a two-year period prior to the transfer. Does this same standard – that the Board or the Shareholder may not unreasonably withhold consent – apply to a Shareholder’s assignment of his or her Proprietary and transfer of his or her Shares to a
non-resident family member? In addition, does the definition of “Family Member” as articulated in Part I Section B (“Definitions”) apply also to non-resident family members?

Also with respect to Section K(2), it says, “[T]he proposed assignee’s gross family income does not exceed 80% of the area median income, and can satisfy the directors that the assignee intends to utilize the apartment as his or her family’s primary residence.” (Emphasis added.) The passage is ambiguous as written, since it implies that the apartment need be the primary residence for the assignee’s family, but not for the assignee. Such a situation would, of course, violate Article V, Section 3(b) of the Proprietary Lease, which imposes a primary-residency requirement on Shareholders.

Furthermore, read in the light of numerous court decisions interpreting similar Proprietary Lease provisions, in which a comma was ruled to be the equivalent of “or,” Article V, Section 3(b) of the Proprietary Lease (“Use of Premises”) implies that a Shareholder’s spouse, children, parents, brothers, sisters, grandparents, grandchildren and domestic employees, including a home attendant, can live in the apartment in the absence of the Shareholder. It says: “The Shareholder shall not occupy or use the Apartment or permit it or any part of it to be occupied or used for any purpose other than as a private residence for the Shareholder, Shareholder’s spouse, children, parents, brothers, sisters, grandparents, grandchildren and domestic employees, including a home attendant.” To close a potential loophole allowing a Shareholder’s family members to live in a Shareholder’s unit while the Shareholder has a primary residence elsewhere, the previous passage might be written as follows: “...for the Shareholder and, provided that the Shareholder is also in occupancy, Shareholder’s spouse, children, parents....”

M. SUMMARY OF BY-LAWS

It says: “The Shareholders will adopt the By-Laws after Cooperative Conversion, at the First Annual Shareholder Meeting.” State law allows for not only the adoption but also the amendment or repeal of the Bylaws at the first annual shareholder meeting. Specifically, B.C.L. Section 601(a) says: “The initial bylaws of a corporation shall be adopted by its incorporator or incorporators at the organization meeting. Thereafter, subject to section 613 (Limitations on the right to vote), by-laws may be adopted, amended or repealed by a majority of the votes cast by the shares at the time entitled to vote in the election of any directors.”

Q. SENIOR CITIZENS

If the Buildings did not receive the Article XI tax exemption but were granted a J-51 tax abatement and exemption instead, which, unlike Article XI, would require the payment of some taxes, would SCRIE, as well as DRIE, still be inapplicable?
W. DEDUCTIBILITY OF REAL ESTATE TAXES AND MORTGAGE INTEREST

"Although most shareholders in cooperatives may deduct their share of the Building’s real estate taxes and mortgage interest from their federal, state, and city taxes” is incorrect, based on my experience as a Shareholder. (Emphasis mine.) While it is true that many co-op housing residents have the same potential tax benefits as other homeowners, which includes deducting their proportionate share of the interest on their cooperative’s mortgage and any real property taxes it has paid, the deduction is taken only on a federal income tax return. In addition, shareholders who qualify for the deduction must itemize their deductions in order to reap its benefit, filling out a Schedule A on their 1040 federal income tax return.

PART II

PURCHASE AGREEMENT

9. "Purchaser understands that the monthly maintenance for Purchaser’s apartment will be subject to periodic, Board-approved, increases in addition to Board-approved fuel-cost pass-alongs.” This section should be revised to include Board-approved special assessments, as per Article I, Sections 2 and 3 of the Proprietary Lease. Thus: “Purchaser understands that the monthly maintenance for Purchaser’s apartment will be subject to periodic, Board-approved increases and fuel-cost pass-alongs, and may be subject to Board-approved special assessments and fees for the use of appliances.”

BY-LAWS

ARTICLE II - SHAREHOLDERS

Section 2.01 - Annual Meetings

It states: “A meeting of shareholders shall be held biannually for the election of directors and/or annually for the transaction....” However, state law mandates the annual election of directors. According to B.C.L. Section 602(b): “A meeting of shareholders shall be held annually for the election of directors and the transaction of other business on a date fixed by or under the by-laws.” (Emphasis added.)

Section 2.03 – Special Meetings

References to “Section 3.04” should be changed to “Section 2.04.”
Section 2.04 – Notice of Meetings

“The notice of every special meeting of Shareholders shall indicate the person or persons by whom or at whose direction the meeting was called.” Since state law also requires that “[n]otice of a special meeting shall also state the purpose or purposes for which the meeting is called” (B.C.L. 605(a)), the preceding passage should be revised to include this requirement.

Section 2.06 – Quorum

“. . . One half (1/2) of all shareholders eligible to vote shall be necessary to constitute a quorum for the transaction of business” should be revised to “More than one-half of all shareholders . . . .” According to state law: “The holders of a majority of the votes of shares entitled to vote thereat shall constitute a quorum at a meeting of shareholders . . . .” B.C.L. 608(a).

ARTICLE VI – FISCAL MANAGEMENT

Section 6.06 – Examination of Books

It states: “The shareholder may bring a representative (such as an accountant or lawyer) to assist in the review of the records.” Furthermore, state law gives shareholders the right to examine their corporation’s books and records “in person or by agent or attorney.” B.C.L. Section 624(b). In other words, in addition to doing so in the company of a professional, shareholders may examine the co-op’s books and records by themselves or by giving a power of attorney to another individual.

ARTICLE XII – OPERATION OF THE PROPERTY

Section 12.11 – Modification of the Rules and Regulations

“The Cooperative Board shall have the right to amend, modify, add to, or delete any of the Rules and Regulations from time to time, provided, however, that any such amendment, modification, addition, or deletion may be overruled by a vote of at least 66 2/3% of all Shareholders, in number only and not Shares.”

It is unclear what Rules and Regulations refer to. (The Bylaws? The House Rules?)