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The Ellis Act

By Andrew J. Wiegel

The Ellis Act[1] has become a familiar name in the apartment industry. The Act preempts local laws which try to force property owners to continue renting their buildings to residential tenants. It trumps the rent control law, and it can be used to invalidate other laws that a city may pass seeking to deter owners from invoking the power of the Act or trying to force owners to continue renting.

The Ellis Act has been amended to make it less onerous to property owners, and the courts continued to support the power it has given to owners. There is still a lot of misinformation about the Ellis Act and how it works circulating in the industry. Here are some highlights of what the Ellis Act does and does not do:

The Ellis Act guarantees the right to stop renting a building for residential use without regard to any local law to the contrary. If a building has 4 units or more, it can be removed from rent under the Ellis Act even if the owner continues to rent other buildings on the same or other parcels. If a building contains 3 units or less, it can be removed from rent under the Ellis Act even if the owner continues to rent other buildings on other parcels, but other buildings on the same parcel must also be removed. The often stated requirement that the owner must be "going out of business" is not in the law. The owner is free to stay in business with other buildings.

Once a building has been removed from residential rental use under the provisions of the Ellis Act, it can be subject to restrictions on re-rental under local rent control laws. The Ellis Act itself does not impose any restriction on re-rental of units. But it does permit a local government to impose certain restrictions if it chooses. For example, San Francisco has imposed restrictions[2], and Oakland has similar provisions.[3] The restrictions which a local government may impose are strictly limited to those expressly authorized in the state law. Attempts to impose additional restrictions have consistently been thrown out by the courts.[4]

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1 California Government Code Sections 7060 et seq.

2 SFAC (Rent Control Ordinance) Section 37.9A.

3 Oakland Municipal Code Sections 8.22.400 et seq.

4 E.g. San Francisco=s attempt to require a conditional use permit for owner occupancy.

RESTRICTIONS ON UNITS AFTER ELLIS ACT

The restrictions allowed under the Ellis Act apply to the later re-rental of units. Here are the basic rules:

> No unit in the building may be rented in the two years following the effective date of withdrawal of units.[5] The residential units need not be left vacant. They can be owner-occupied, even by an owner with less than 25% ownership, and they can be used for family purposes such as housing an owner's family members without charging rent. They can even be used for a commercial purpose if a change in use is permitted by zoning restrictions. They may not be rented for residential use, regardless of how cleverly one tries to disguise the use. For example, letting someone who works for you live in a unit as part of their compensation would violate the law.
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> After two years following the date of removal, any unit which was tenant occupied at the time of removal is subject to "vacancy control" and can only be rented at the lawful base rent in effect at the date of removal plus any allowable increases. It must also be offered back to the tenant who was evicted. Note that this restriction does not appear to apply to units which were vacant when the Ellis Act process commenced.
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> After five years following the date of removal, any vacant unit may be rented at whatever price the owner chooses to establish and no units remain subject to vacancy control. However, any tenant who has given notice of the request for the right to reoccupy must be given that right, albeit at the new rent established by the owner. After ten years the right to reoccupy ceases.

Before the 2004 change in the law, The San Francisco Rent Board consistently insisted that any unit which was ever re-rented, 5, 10, 20 years or more later, could only be rented at the rent last paid plus rent control allowed increases, and that is what the rent control ordinance said. But now, the restriction on the initial re-rental rate only applies for five years. After that, when a unit is first put back on the market, the city can not restrict the rent which can be charged.

San Francisco also has a 10 year provision for the right of the evicted tenant to reoccupy the unit when it is offered for rent, but if that re-rental occurs after the five year point, the tenant's right will not include the old rent control protected rent. The tenant can be required to pay whatever rent the owner wishes to set, even if it is arguably above market. The law allows the owner to set the rent. It does not specify that re-rental must be market rate.

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5 The date of withdrawal of a unit can be ascertained by referring to the ANotice of Constraints on Real Property≅ which the city records against the property when the Ellis Act is used. This should appear on a title report and be available from the title company. The date will not necessarily be the same for all units.

Please remember that in any case, once a tenant is in, whether they are new or old, and regardless of when they move in, the rent they pay will then be protected from further increases under the rent control law. The right of the owner to set the rent after five years only applies at the inception of a tenancy of a vacant unit.

Meanwhile, in the courts, an owner's right to perform a "bona fide" Ellis act eviction has been upheld without the tenant being able to raise alleged retaliatory eviction as a defense. This is important because it has been primarily through the abuse of sham defenses that tenants and their advocates have been able to delay and increase the cost of Ellis Act evictions in an effort to deter owners from asserting this valuable legal right.

PROCEEDURE

To employ the Ellis Act, all of the residential rental units in a building must be removed from rental housing use. Commercial rental units are not affected and may continue to be rented.

To invoke the Ellis Act, and owner must give a technically demanding and specific 120-day notice to tenants to vacate and include a down payment of half of the relocation payment required. Disabled persons, and those at least 62 years old, who have lived in the unit more than one year must be given a full year to relocate following the Notice of Intent to Withdraw, if they so request, as well as additional relocation funds. Tenants have more than enough time to relocate without abusing the court process.

Any owner who re-rents any units within the first two years following withdrawal is liable to each evicted tenant for actual and punitive damages.[6] This Draconian provision seems to create a windfall suit for all former tenants even if only one unit is re-rented. But, after the first two years the restrictions place the landlord in a position little worse than he or she would have been had the eviction not been performed.

Re-rental between two years and five years after withdrawal means going back to square one, with the original tenant, or a new tenant, re-occupying at the old rent, with the equivalent of banked rent increases. Re-rental after five years means returning to the market with units for which full market rent can be obtained.

CONCLUSION

The real estate market seems to have accepted the use of the Ellis Act. There is now a disclosure item on some local transfer disclosure forms. But for owner-occupiers, the fact that the Ellis Act was used does not seem to create much stigma. In conjunction with tenancy in common cooperation, it remains the most reliable tool for the creation of the affordable home ownership which the city so badly needs. While the evictions of seniors or disabled tenants, even for owner occupancy, can adversely impact the right

6 SFAC 37.9A(d) The old penalty equal to 6 months rent has been superseded.

to convert property to condominiums under present law, the use of the Ellis Act to evict non-senior, non-disabled tenants does not have that effect

With the elimination of vacancy control after five years, previously withdrawn properties can now be evaluated for their future rental potential in a more predictable way. It is conceivable that for some properties the highest and best use would be to leave them vacant for the required time, or use them for family purposes, and then obtain market rent when the re-rental restrictions expire.

The author, Andrew J. Wiegel is the principal attorney of Wiegel Law Group, a San Francisco real estate dispute resolution firm. The attorneys of the firm have over five decades of collective experience litigating real estate disputes, leasing, rent control, insurance and property ownership related issues. The information contained in this article is general in nature. Consult an attorney for advice with regard to any specific problem.