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MEMORANDUM OF LAW

DATE: March 26, 2004

TO: Lee Hennes, Senior Land Surveyor

FROM: City Attorney

SUBJECT: Subdivision Map Act Tenant Notice Requirements For Condominium Conversions With Previously Approved Final Maps

QUESTION PRESENTED

Under the Subdivision Map Act [SMA],¹ what notices must a subdivider or subsequent owner give to tenants where a final map has previously been approved for the property for condominium purposes?

SHORT ANSWER

The SMA sets out several tenant protections for condominium conversion projects. Section 66459 sets out the tenant notice requirements where a final map has been approved for a condominium project and the subdivider or subsequent owner later rents a dwelling in that project. These notices include a written notice prior to the execution of the rental agreement, ninety days' written notice prior to any offer to sell the unit, and a ninety-day right of first refusal to purchase the unit upon the same or better terms as those initially offered to the general public. In addition, Section 66427.1(c) requires a subdivider or subsequent owner to provide each tenant 180 days' written notice prior to termination of tenancy if the notice has not been provided previously.

¹ The SMA is codified at California Government Code sections 66410-66499.52. All section references will be to the California Government Code unless otherwise indicated.

ANALYSIS

I. SECTION 66459: BACKGROUND

Some developers of apartment complexes in the City of San Diego have previously obtained subdivision map approvals for condominiums, but then chose to rent out the units rather than sell the units immediately. This practice has been referred to as creating "shelf condominiums," and leaves the developer flexibility to sell the units at a later date. *See* David M. Van Atta, "Potential Problems with 'Shelf' Condominiums," 17 CEB Real Prop. L. Rep. 141 (April 1994).

In response to this practice, an organization named Tenants United For Fairness raised concerns in the early 1990's that tenants entering into rental agreements for units in these condominium projects were not being given sufficient notice that their units could be sold to allow them time to relocate. California Senate Housing and Urban Affairs Committee Report, AB 3013 (June 3, 1992). Section 66459, which became effective on January 1, 1993, created notice requirements and other protections for tenants living in shelf condominium projects. Section 66459 reads as follows, in pertinent part:

- (a) If a final map has been approved for a condominium project, community apartment project, or stock cooperative project, and the subdivider or subsequent owner of the project, on or after January 1, 1993, rents a dwelling in that project, he or she shall, prior to offering the separate interest for sale to the general public, deliver the following notice, printed in at least 14-point bold print, prior to the execution of the rental agreement:

TO THE PROSPECTIVE TENANTS OF

(address)

THE UNIT YOU MAY RENT HAS BEEN APPROVED FOR SALE TO THE PUBLIC AS A CONDOMINIUM PROJECT, COMMUNITY APARTMENT PROJECT, OR STOCK COOPERATIVE PROJECT (WHICHEVER APPLIES). THE RENTAL UNIT MAY BE SOLD TO THE PUBLIC, AND, IF IT IS OFFERED FOR SALE, YOUR LEASE MAY BE TERMINATED. YOU WILL BE NOTIFIED AT LEAST 90 DAYS PRIOR TO ANY OFFERING TO SELL. IF YOU STILL LAWFULLY RESIDE IN THE UNIT, YOU WILL BE GIVEN A RIGHT OF FIRST REFUSAL TO PURCHASE THE UNIT.

(signature of owner or owner's agent)

(dated)

(b) The condominium project, community apartment project, or stock cooperative project shall not be referred to in a lease or rental agreement as an "apartment" or "apartments" on or after the date of the approval by the local agency of the final map for the condominium project, community apartment project, or stock cooperative project in which the final map was approved on or after January 1, 1993.

(c) Any tenant of a condominium project, community apartment project, or stock cooperative project pursuant to this section shall be given at least 90 days' written notice of the intention to sell the rental unit to the general public. This subdivision shall not alter or abridge the rights or obligations of the parties in performance of their covenants, including, but not limited to, the provision of services, payment of rent, or other obligations imposed by Sections 1941, 1941.1, and 1941.2 of the Civil Code.

(d) Any tenant who lawfully resides in a condominium project, community apartment project, or stock cooperative project pursuant to this section shall be given a right of first refusal by the subdivider or subsequent owner of the project for the purchase of his or her rental unit upon the same terms and conditions that the unit will be initially offered to the general public or terms and conditions more favorable to the tenant. This right to purchase shall run for a period of 90 days from the date of the notice, unless the tenant gives written notice within the 90-day period of his or her intention not to exercise that right.

(e) Failure to comply with this section shall not invalidate the transfer of title to real property.

...

The required notices set out by Section 66459 do not apply in certain situations, such as a project with four dwelling units or less.² Cal. Gov't Code § 66459(f).

A. SECTION 66459(a): NOTICE PRIOR TO EXECUTION OF RENTAL AGREEMENT

The first notice required by Section 66459 is that if a final map has been approved for a condominium project, and the subdivider or subsequent owner of the project, on or after January 1, 1993, rents a dwelling in that project, he or she shall, prior to offering the separate interest for sale to the general public, deliver the notice quoted in the statute prior to the execution of the rental agreement. Cal. Gov't Code § 66459(a). This notice warns the prospective tenant that the unit may be sold to the general public. So long as a tenant in the building has entered into a rental agreement on or after January 1, 1993, this notice requirement

² In addition, Section 66459 does not apply to certain transfers pursuant to court order or transfers by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust.

applies to the subject property.

It has been argued that Section 66459(a) is ambiguous as to whether it applies to projects for which a final map was approved prior to 1993.³ However, under standard rules of statutory construction, the more reasonable interpretation is that the phrase, “on or after January 1, 1993,” applies to the date the subdivider or subsequent owner entered into a rental agreement, not the date the final map was approved.

First, the reference to January 1, 1993, is placed in the middle of the phrase, “. . . and the subdivider or subsequent owner of the project rents a dwelling in that project . . . ,” rather than at the end of the sentence. This choice of placement supports the interpretation that the date was intended to refer to the rental of dwellings only, not the date the final map was approved. Second, the language of Section 66459(a) does not contain limiting language stating that the notice does *not* apply to projects with maps approved prior to 1993. Had the Legislature intended to do so, it could have included the same language in Section 66459(a) as that contained in Section 66459(b), which states that the condominium project shall not be referred to in the rental agreement as an “apartment” on or after the date of approval by the local agency for the condominium project “in which the final map was approved on or after January 1, 1993.”

Therefore, while the issue has not been directly addressed by a court, the more reasonable interpretation of Section 66459 is that so long as a tenant in the project has entered into a rental agreement on or after January 1, 1993, the notice requirements apply to projects in which a final map was approved prior to January 1, 1993.

B. SECTION 66459(c): NOTICE OF INTENT TO SELL

Section 66459(c) states that “any tenant of a condominium project . . . pursuant to this section shall be given at least 90 days’ written notice of the intention to sell the rental unit to the general public.” Cal. Gov’t Code § 66459(c). Subsection (c) makes no mention of a date limitation for application of this notice, as contained in subsections (a) and (b). Therefore, it is not clear whether the Legislature intended this notice requirement to apply to properties in which a final map was approved prior to January 1, 1993. However, consistent with the reasoning applicable to Section 66459(a), the more reasonable interpretation is that this notice does apply to tenants residing in projects in which a final map was approved prior to January 1, 1993.

³Several commentators have recognized the ambiguity contained in section 66459(a), and at least two support the interpretation that the notice in section 66459(a) does not apply to projects in which final map approval was obtained prior to January 1, 1993. *See* David M. Van Atta, “Potential Problems with ‘Shelf’ Condominiums,” 17 CEB Real Prop. L. Rep. 141, 143 (April 1994); *see also* Dwight C. Hirsh, IV, “Review of Selected 1992 California Legislation,” 24 Pac. L. J. 1010, 1011 fn. 12 (January 1993).

C. SECTION 66459(d): RIGHT OF FIRST REFUSAL

Section 66459(d) requires the subdivider or subsequent owner to give any tenant who lawfully resides in a condominium project “pursuant to this section” a right of first refusal for the purchase of the unit upon the same or better terms and conditions as initially offered to the general public. Cal. Gov’t Code § 66459(d). The section does not explicitly require a written notice, and the tenant may waive his or her right of first refusal. *Id.* Again, consistent with the reasoning applicable to Section 66459(a), while it is unsettled whether this requirement applies to a project in which the final map was approved prior to January 1, 1993, the more reasonable interpretation is that it does apply to tenants residing in projects for which a final map was approved prior to January 1, 1993.

I. SECTION 66427.1(c): 180-DAY NOTICE PRIOR TO TERMINATION OF TENANCY

Pursuant to Section 66427.1, the City must make findings related to tenant notices prior to the approval of a final map for the conversion of residential real property to a condominium project. Cal. Gov’t Code § 66427.1. Many of these notices are tied to certain events, such as filing of the tentative map or public report. For example, Section 66427.1(a) states that each tenant shall receive notice of the intention to convert at least sixty days prior to the filing of the tentative map. Cal. Gov’t Code § 66427.1(a). Section 66427.1(c) states that the City must find that each tenant “has been, or will be, given 180 days’ written notice of intention to convert prior to termination of tenancy due to the conversion or proposed conversion.” Cal. Gov’t Code § 66427.1(c).

An argument could be made that the 180 days’ written notice of intention to convert should not apply once the tentative and final map have been approved because the notices contained in Section 66427.1 did not anticipate the “shelf condominium” situation. However, the more reasonable interpretation is that if the 180-day notice set out in Section 66427.1(c) has not already been given, then it applies after the project has received final map approval.

First, the plain language of Section 66427.1(c) states that in order to approve a final map, the City must find that each of the tenants of the proposed condominium has been, *or will be*, given 180 days’ written notice of intention to convert prior to termination of tenancy due to the conversion or proposed conversion. No time limit is set for the expiration of this notice requirement. Rather, the statute as written anticipated that the notice could be given after the approval of the final map.

Second, when read together, the requirements of Section 66427.1(c) and Section 66459(c) are consistent with one another. The intent of a statute should be gathered from the whole act, reconciling potentially conflicting provisions where possible, and “a construction that makes sense of an apparent inconsistency is preferred over one that renders statutory language useless or meaningless.” *Gaetani v. Goss-Golden West Sheet Metal Profit Sharing Plan*, 84 Cal. App. 4th 1118, 1127 (2000). Here, the two tenant notice requirements have different triggering

events. The 180-day written notice of intention to convert contained in Section 66427.1(c) must be given prior to termination of tenancy. In contrast, the ninety-day written notice of intention to sell the unit contained in Section 64459(c) must be given prior to offering to sell the unit to the general public. Therefore, neither notice requirement renders the other meaningless or inconsistent.

Finally, an interpretation which requires that tenants must be given 180 days' notice prior to termination of their tenancy in addition to ninety days' notice prior to offering the units for sale is consistent with the policy goals of the Subdivision Map Act to protect tenants. Therefore, the more reasonable conclusion is that if the 180-day notice contained in Section 66427.1(c) has not already been given, then it is required where a final map has been previously approved.

CONCLUSION

Sections 66459 and 66427.1 set out the tenant notices a subdivider or subsequent owner must give where a condominium project has a previously approved final map. The required written notices pursuant to Section 66459 include a notice prior to the execution of the rental agreement stating the possibility that the unit may be sold to the public and at least ninety days' notice prior to any offer to sell the unit. In addition, tenants must be given a ninety-day right of first refusal to purchase the unit upon the same or better terms as those initially offered to the general public. In addition, while an argument could be made that the 180-day notice prior to termination of tenancy contained in Section 66427.1(c) does not apply, the more reasonable interpretation is that it does apply if it has not already been given.

Finally, while it is unsettled whether Section 66459 applies to properties which received final map approval prior to January 1, 1993, the more reasonable interpretation is that it does apply so long as a tenant in the project has entered into a rental agreement on or after January 1, 1993.

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