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The Ellis Act 2005

By Andrew J. Wiegel

The Ellis Act 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.

Last year the Ellis Act was amended to make it less onerous to property owners, and the courts continued to support the power it has given to owners. In this article, the author gives an overview and update on how the Ellis Act has evolved and what it means to apartment 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 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.

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

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. This is the most widely misunderstood aspect of the statute, and it is also the subject of recent changes to the Act.

The Ellis Act itself does not impose any restriction on re-rental of units. But it does permit a local government from imposing restrictions if it chooses. For example, San Francisco has imposed restrictions, and Oakland has similar provisions. 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.

The most significant recent change to the law has been a change in the restrictions on the re-rental of units. The restrictions were amended to allow units which were withdrawn to be again offered for rent at market rates only five years after the effective date of withdrawal. This is a big change. Before this amendment, the San Francisco restrictions had included a perpetual restriction on the amount for which such a unit could be initially re-rented.

Before this 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. That provision is still allowed under the new law. Now, the tenant still has the right to reoccupy for 10 years, 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 market rent, or arguably what ever rent the owner wishes to charge even if it is well above market. The law allows the owner to set the rent. It does not specify that re-rental must be market rate.

The tradeoff for this change is a new period of "vacancy control" on any units which are re-rented during the first five years. Under the old law, if an owner re-rented the unit in compliance with the law and the tenant thereafter voluntarily vacated or was evicted on a three day notice, the vacating of the re-rented unit would have given the owner the right to set a new rent. The unit would have been treated the same as any other vacant unit, and the Ellis Act would no longer have any effect on rent or rentability.

Under the new law, there is a restriction on what the unit can be rented for during the first five years regardless of how many times it turns over. Even if a unit is properly re-rented in compliance with law and then voluntarily vacated, re-rental rate remains restricted during the first five years. The owner can only charge the rent paid at the time of withdrawal plus rent control allowed increases.

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 to charge market rent after five years only applies at the inception of a tenancy.

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.

Under the Ellis Act, San Francisco and Oakland require a 120-day notice to tenants to vacate, and 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. So, 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. 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.

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.

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 and then obtain market rent when the re-rental restrictions expire.

Andrew J. Wiegel is an attorney with Wiegel & Fried, LLP, a real estate dispute resolution firm with offices in San Francisco and Oakland. The attorneys of the firm have over five decades of collective experience litigating real estate disputes, leasing, rent control, insurance and property management issues. The information contained in this article is general in nature. Consult an attorney for advice with regard to any specific problem. Copyright © 2004 by Wiegel & Fried, LLP.