

Coping with COPA – New San Francisco Law Requires Owners of Certain Apartment Buildings to Offer to Sell to Nonprofits

The information in this article is based on new regulations issued by the City of San Francisco, and supersedes the article published in early June of this year.

San Francisco has recently enacted the Community Opportunity to Purchase Act (COPA), a law that provides San Francisco nonprofits with the right to purchase apartment buildings of three or more units before they are put on the market. It also provides these nonprofits a right of first refusal when a third party makes an offer later in the process. The law became effective September 3 as to all apartment buildings with three or more rental units, regardless of other uses on the same lot (such as retail, offices, etc.)

COPA confers upon San Francisco Qualified Nonprofits a first right to purchase real property in San Francisco improved with three or more residential rental units and property on which three or more residential units could be or are being built. The first right to purchase consists of both a right of first offer as well as a right of first refusal. A multifamily residential building acquired by a Qualified Nonprofit under COPA must be maintained as rent-restricted affordable housing in perpetuity.

The impact of COPA on owners of multifamily residential buildings in San Francisco is fraught with practical questions and legal implications. The seller of a multifamily residential building in San Francisco will be subjected to transactional delays and related costs, and clients and their agents could spend a good deal of extra time on any transaction. Owners who have to sell in a timely way to help fund a move to a new location (perhaps due to a job transfer or other reasons) and sellers needing to meet a 1031 exchange deadline will be greatly affected. Also, this could affect those who have a deadline related to settling an estate or completing a court settlement. There are some regulations to help understand the law, but even with the regulations in place, the logistics of complying with the law are complex and easily misunderstood—delays from five days to perhaps six months or more can be anticipated.

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What is a "sale"?

A sale includes not only the transfer of a fee interest in the building for money or anything of economic value, but certain transfers of controlling interests in trusts, corporations or other entities. There are exceptions such as transfers to heirs; and transfers among defined family members. The COPA regulations state that the sale of an individual property interest in a building, such as a sale by one tenancy-in-common owner (regardless of percentage ownership), will not be considered a building sale if such sale is not substantially connected with the transaction or set of transactions for sale of all property interests in the building.

What is a "Qualified Nonprofit"?

The city has created a list of six nonprofit organizations that meet certain specified criteria, including demonstrating (i) a commitment to the provision of affordable housing for low and moderate-income residents and (ii) the capacity (including the legal and financial capacity) to effectively acquire and manage residential real property at multiple locations in San Francisco.

The six Qualified Nonprofits are as follows:

- Bernal Heights Neighborhood Center (BHNC)
- Chinatown Community Development Center (CCDC)
- Mission Economic Development Agency (MEDA)
- San Francisco Community Land Trust (SFCLT)
- San Francisco Housing Development Corporation (SFHDC)
- Tenderloin Neighborhood Development Corporation (TNDC)

What is the "right of first offer"?

Before a seller may "offer" a multifamily residential building for sale to any purchaser other than a Qualified Nonprofit, or solicit any offer to purchase such as placing the property on the MLS, the seller must notify each Qualified Nonprofit of its intent to sell and allow those nonprofits an opportunity to make an offer to purchase. Each Qualified Nonprofit has five calendar days within which to notify the seller of its intent to further consider whether to make an offer to purchase. Upon receipt of any such notice of intent from a Qualified Nonprofit, the seller must disclose to each such Qualified Nonprofit the names of, and any available contact information for, any tenant in each rental unit along with rental amounts. The Qualified Nonprofit then has 25 additional calendar days to make and submit to the seller an offer to purchase. The seller is free to accept or reject any offer. If the seller rejects all offers, or if no Qualified Nonprofit makes an offer during these 25 days, the seller can offer the multifamily residential building for sale to the public, subject to the right of first refusal described below.

What is the "right of first refusal"

Before accepting any offer of purchase or offer of sale from a party other than a Qualified Nonprofit (unless

such acceptance is expressly subject to the condition that no Qualified Nonprofit exercises its right of first refusal), the seller must offer to sell the multifamily residential building to any Qualified Nonprofit that previously submitted an offer to purchase during the first five days. Such offer is required to contain the same terms and conditions as the third party offer that the seller desires to accept, including the same closing date. If a Qualified Nonprofit did engage with the seller during the first 30 days after the seller informed the nonprofits of the intent to sell, any such Qualified Nonprofit has five calendar days after the seller's submission of terms of a third party offer of sale to notify the seller of its decision to purchase on the terms offered by the third party.

If no Qualified Nonprofit elects to proceed with the purchase or the applicable time period within which they are required to do so expires, the seller may proceed with the sale of the multifamily residential building consistent with the third party purchase offer. If the terms of the proposed third party purchase offer later become materially different from those submitted to the Qualified Nonprofits in the right of first refusal notice, the materially different offer of purchase will be considered a new offer subject to the right of first refusal process once again. For example, a major price reduction as a result of due diligence that finds an underground storage tank would re-trigger the right of first refusal. The difficult question presented here is whether or not a change in terms results in a materially different offer. Whether there is a material difference will depend on the facts of each case. We suggest that you engage an attorney when changes occur so that there can be an accurate analysis (based on interpretations of California court decisions) as to whether or not a particular change is, in fact, material.

The nonprofit that presents a purchase offer on the same terms of the third party offer can be required to include the same closing date and contingency removal dates. But if the third party offer does not have such dates, or later postpones such dates, the close of escrow with a nonprofit could be many months. The regulations state that the nonprofits must be given a minimum of 60 days to release contingencies.

What happens if you violate COPA?

Every seller of a multifamily residential building in San Francisco must, within 15 days of the close of escrow, submit to the City Agency a signed Declaration under penalty of perjury affirming that the sale substantially complied with the requirements of COPA. If a multifamily residential building is sold in violation of COPA, Qualified Nonprofits are permitted to bring a legal action against the seller. Potential remedies include damages, attorneys' fees and, if the violation is knowing or willful, civil monetary penalties presumptively tied to the value of the property. These remedies are imposed against the seller or a party that has willfully colluded with the seller to violate COPA. This latter party could include brokers and others listing multifamily residential buildings for sale in San Francisco.

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