

# OWNER-OCCUPANCY

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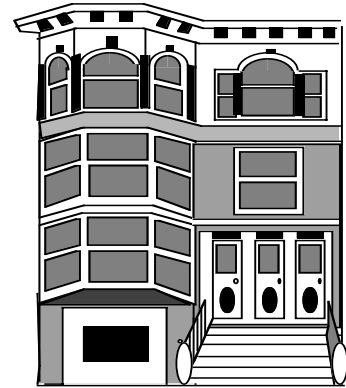
# ELLIS EVICTIONS

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## *HOW DOES SAN FRANCISCO'S RENT CONTROL LAW AFFECT EVICTIONS?*

The law strictly limits rent increases for most residential tenants. But it does not restrict the rent for new tenants occupying vacant dwellings. To prevent owners from evicting tenants to create vacancies and increase rents, the law prohibits evictions without "Just Cause", and recognizes only 14 specific circumstances of Just Cause. This means that once a tenant occupies a rent-controlled dwelling, he/she can stay for life unless a Just Cause situation arises. This eviction protection applies even if the tenant signs a written agreement providing for a month-to-month tenancy, a limited-duration lease, or a specific vacancy date.

## *WHAT BUILDINGS ARE RENT-CONTROLLED?*

In general, all dwellings built before 1979 are subject to rent and eviction controls. Single-family homes (without "in-law" units) and condominiums where all tenants moved in on or after January 1, 1996 are exempt from rent increase limits, but are still subject to eviction controls. This exemption does not apply to condominium conversions unless the condominium has already been sold by the owner who converted it, or the condominium is the only one in the building that has not been sold and the owner has occupied it for at least one year after conversion.

## *WHAT ARE THE REQUIREMENTS FOR OWNER-OCCUPANCY EVICTIONS?*

The law recognizes owner-occupancy as one of the Just Causes for eviction only when specific conditions are met by the owner and the tenant. The following is a partial list of these requirements:

- **Protected Tenants:** Certain tenants are "protected" and cannot be evicted for owner-occupancy except in very limited circumstances. Protected tenants are those 60 or over or disabled who have occupied for 10 years, and those catastrophically ill who have occupied for 5 years. Also remember that no tenant with an unexpired lease can be evicted, and that tenants who occupy a unit during conversion to a condominium are entitled to remain for one year after conversion, or for life if they are over 62 or disabled.
- **Ownership Percentage:** The occupying owner must own at least 25% of the building.
- **One Eviction Limit:** Only one owner-occupancy eviction per building is allowed. Owners cannot use owner-occupancy as the Just Cause for two or more evictions in the same building unless (i) the owners are related to each other as parent/child, grandparent/grandchild, or sibling, or (ii) a building permit has been issued to legally combine the units to be occupied as a single unit. Such permits are rarely issued and are subject to review by the Planning Commission.

- **Single Unit Limit:** There cannot have been an owner-occupancy eviction in a different unit within the same building since November 1998. Following a post-11/98 owner-occupancy, the affected unit is the only unit that can be targeted for an owner-occupancy eviction. This restriction applies forever, regardless of resale, unless the owner successfully petitions the Rent Board based upon hardship.
- **Alternative Dwelling:** None of the evicting owners can own a “comparable” vacant dwelling anywhere. If a “comparable” dwelling becomes available prior to the evicted tenant vacating, the tenant does not have to move. The law does not define “comparable”. If any of the evicting owners own a “non-comparable” vacant dwelling, that dwelling must be offered to the evicted tenant for a rent based upon what the evicted tenant was previously paying. Adjustments for size and amenities are allowed, but these do not bring the rent to market rate. The alternative dwelling restriction can be problematic when a TIC group buys a duplex which has one occupied and one vacant unit. Under these circumstances, we recommend that an owner occupy the vacant unit and establish a paper trail of residency there before the other owner attempts an owner-occupancy eviction.
- **Minimum Occupancy:** The occupying owners must intend to occupy the dwelling as their principal residence within three months and then for a period of at least 36 continuous months. If the owners do not meet the occupancy requirements, they are likely to be sued for wrongful eviction absent a compelling, unforeseeable reason for the change of plan. Damages in these lawsuits can run well into six figures. Also, regardless of the reason for the early vacancy, if the owners intend to re-rent the dwelling, they must offer it to the evicted tenant at the previous rent. If the evicted tenant declines, the owner must offer the unit to the general public at the evicted tenant's previous rent.
- **Recording:** A document must be recorded in the County Records designating the unit that has been the subject of the eviction and the resulting restrictions. This document will show

up on all future title reports and may affect the value of the property and the owner's ability to obtain financing.

- **Good Faith:** The occupying owners must act in good faith, with honest intent, and without ulterior motive. Tenants frequently resist owner-occupancy evictions in court by claiming that an ulterior motive, such as profit, underlies the eviction. Tenants are entitled to a jury trial.
- **Moving Expenses:** Tenants in multi-unit buildings are entitled to a \$1,000 payment (per person) if they have resided in a unit for 12 or more months. This payment is also required for tenants evicted from illegal "in law" units.

*HOW HAVE COURT DECISIONS AFFECTED OWNER-OCCUPANCY EVICTION RULES?*

In a February 2003 decision, the Court of Appeals struck down the requirement that owners offer any vacant "non-comparable" unit to the evicted tenant for a rent based upon what the evicted tenant was paying. We believe that owners can rely on this decision and offer "non-comparable" units at market rate, but the decision may be appealed. In April 2003, a local judge found three additional owner-occupancy requirements invalid in particular circumstances: (i) the prohibition on evicting "protected" tenants, (ii) the restriction to only one owner-occupancy per building, and (iii) the requirement that an owner occupy the building before he/she can evict a tenant to allow the owner's relative to occupy. This second decision is not binding on other judges and may be overturned on appeal, so it would be risky to rely on it.

*WHAT ARE THE REQUIREMENTS FOR ELLIS ACT EVICTIONS?*

Owner-occupants who cannot meet the owner-occupancy eviction requirements often rely on an alternative Just Cause for eviction derived from a law known as the “Ellis Act”. The Ellis Act allows owners to “go out of business” and remove dwellings from rental use subject to certain restrictions listed below.

- **Evict All Tenants:** All tenants in every dwelling on the property must be evicted.
- **Future Rentals:** During the first two years after eviction, no dwellings can be re-rented. If a dwelling is re-rented during the first five years, the maximum rent is the amount paid by the evicted tenant plus any rent increases which would have been allowed if the dwelling had never been vacated. In addition, during the ten years after the eviction, re-rental must be first offered to the evicted tenant if that tenant has registered for re-rental.
- **Reporting and Recording:** Government filings are required at the time of the eviction and then annually for five years. In addition, a document must be recorded in the County Records describing the ongoing rental restrictions. This document will show up on all future title reports and may affect the value of the property and the owner's ability to obtain financing.
- **Protected Tenants:** Elderly, disabled, and catastrophically ill tenants are not protected from Ellis evictions, but may be entitled to extended notice. Tenants with unexpired leases cannot be evicted.
- **Moving Expenses:** Low income tenants are entitled to moving expenses of \$4,500, and elderly (over 62) and disabled tenants are entitled to moving expenses of \$3,000.

*DO EVICTIONS AFFECT CONDOMINIUM CONVERSION?*

The law in this area is unclear. The Subdivision Code seems to give the Planning Commission discretion to disapprove condominium conversion where there is evidence that tenants have been evicted to "prepare" a building for conversion, and a five-year rental history is required as part of the conversion application packet. Nevertheless, we are not aware of any instance where a conversion application was denied based upon eviction history.

*DO ELLIS EVICTIONS AFFECT RESALE VALUE OR FINANCING OPTIONS?*

Some Realtors believe that Ellis evictions lower resale value, but this is difficult to substantiate with market data. There are certain lenders who refuse to finance Ellis buildings, but this has proven problematic only for larger buildings where relatively few lenders are willing to provide financing. We recommend that resale and financing issues be investigated and evaluated before Ellis act evictions are undertaken.

*WHAT ARE THE PROCEDURES FOR OWNER-OCCUPANCY AND ELLIS EVICTIONS?*

In an eviction, even minor mistakes are fatal, and require the owner to begin the entire process anew. The following is a partial list of procedures:

- **Notice:** An eviction notice must be in writing and contain the magic words in the proper places. The form of the notice depends on the Just Cause for the eviction. Avoid any conversation that could be interpreted as an improper oral notice or any letter that could be interpreted as an improper written notice.
- **Filing:** A copy of the notice must be filed with the Rent Board within 10 days of delivery to the tenant. Additional filing requirements apply to Ellis evictions.
- **Service:** A separate copy of the notice to each occupant may be delivered either personally or by certified mail. Slipping the notice into the mailbox or under the door is not sufficient. Under certain circumstances, other types of delivery are sufficient, and fewer than all occupants may be provided notices, but the rules are complex.
- **Waiting Period:** Tenants being evicted for owner-occupancy are entitled to 60 days notice. The 60-day period does not begin until a legally correct notice is properly served. If you delay the notice based on assurances that the tenant will move voluntarily, and the tenant does not vacate as promised, you will still have to give the tenant a full 60-day notice. You are allowed to give a notice which provides more

than 60 days to vacate, and to extend a notice period. Ellis evictions involve additional waiting periods. The notice must be filed 120 days before termination, and the waiting period is extended to one year for tenants who are at least 62, or disabled, provided the tenant has occupied the dwelling for at least one year.

- **Rent Collection:** An owner cannot accept rent for any period following notice expiration. If you give a 60-day notice on the 15th of July, then accept full rent on the first of September, you invalidate your notice.
- **Unlawful Detainer:** If the tenant does not vacate on time, the owner must file a lawsuit seeking possession. These lawsuits generally take 45 days to go from filing to trial, but occasionally take much longer. Few eviction cases go to trial but the number is increasing.

#### *CAN YOU PAY A TENANT TO MOVE?*

Legislation enacted in June, 2002 provides that if an owner or agent tells a tenant that he/she could or might be evicted under owner-occupancy or Ellis rules, the owner must serve an eviction notice within five days even if the owner and tenant reach a buyout agreement. The law also makes it illegal to discuss a buyout with a tenant unless the tenant is represented by an independent attorney, and that any agreement be approved by a sitting or retired judge. An April, 2003 court decision held the notice and tenant representation requirements unconstitutional, but left the judge approval requirement in effect. This decision should be reliable pending a possible appeal.

#### *ABOUT THE AUTHOR AND THE FIRM*

The firm of Goldstein, Gellman, Melbostad, Gibson & Harris, LLP, formed in 1986, has extensive experience in real estate litigation and transactions. The firm's practice includes real property sales and exchanges, general land use, buyer/seller disputes, landlord/tenant disputes, estate planning and probate. Attorneys David Gellman and Boyd McSparran work together to handle landlord/tenant matters for the firm. The firm offers three companion articles to this one. They are entitled "Condominium Conversion in San Francisco", "Questions and Answers on Tenancy In Common", and "Unmarried Couples and Property

Ownership". Copies are available from the firm free of charge.

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