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Constitutional rights in regulating tenancy in common conversions: Tom v San Francisco. 2004

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Ordinance forbidding residential tenants-in-common agreements from providing for exclusive rights of occupancy in particular unit by individual owners violated California constitutional right of privacy.

Tom v City & County of San Francisco (2004) 120 CA4th 674, 16 CR3d 13

When home buyers acquire a multi-unit building as tenants-in-common (TIC), in general, as co-owners, they each have an equal right to occupy any part of their property. They may, however, agree among themselves to give each owner an exclusive right of occupancy (ERO) in a particular dwelling unit in the overall TIC property. The San Francisco Board of Supervisors passed an ordinance forbidding ERO agreements in order to discourage the use of TIC agreements in the conversion of rental housing to owner-occupied housing. The ordinance generally requires that all parties to a TIC have a right of access to all units on the property. The effect of the ordinance is that unrelated persons who reside in multi-unit buildings would be required to share occupancy of their dwelling units with each other, or could not prevent other cotenants from entering their private living space. Property owners sought a writ of mandate to overturn the ordinance, contending, among other things, that it violated their constitutional right of privacy in their homes. The trial court granted the writ.

The court of appeal affirmed. The court held that the ordinance violated the right of privacy in the home granted by Cal Const art 1, §1. The court explained that a violation of the state constitutional right to privacy requires:

- A legally protected privacy interest;
- A reasonable expectation of privacy in the circumstances; and
- Conduct by defendant constituting a serious invasion of privacy.

The court stated that there is an "autonomy privacy" interest in choosing the persons with whom a person will reside and in excluding others from one's private residence, and that it is obviously reasonable to expect privacy in one's own home. The court opined that having unwelcome persons residing in one's home, or roaming throughout one's home, would amount to a serious invasion of privacy rights. Because the property owners established an invasion of privacy, the City had to show "that the invasion of privacy is justified because it substantively furthers one or more countervailing interests." The City did not bear that burden. The court stated that while providing more rental housing may be a laudable goal, in this case it was not a sufficiently strong countervailing interest because the ordinance was forbidden by the Ellis Act (Govt Code §§7060–7060.7) and because a governmental interest in precluding homeowners from going out of the landlord business did not justify the extreme privacy violation.

THE EDITOR'S TAKE: It is somewhat surprising that the court of appeal elected to resolve this issue on the constitutional ground of privacy rather than the lesser, more technical, ground of preemption; but maybe that is because the preemption issue was more difficult to resolve. I don't find anything in the Ellis Act that lets me readily conclude that,

because the state prohibits communities from compelling landlords to stay in the apartment rental business, those towns must also leave tenancies-in-common (TICs) alone.

Actually, a surprising feature of tenancy-in-common is that it is so little regulated by statute. Apart from a definitional section that says absolutely nothing—see CC §685: “An interest in common is one owned by several persons, not in joint ownership or partnership."—this form of concurrent ownership is just unregulated.

That omission has two significant consequences for potential TICers. On the one hand, it means that they can agree to just about anything they want; nothing is forbidden by statute; and now, under this case, much is constitutionally protected. On the other hand, owners of TICs better do a lot of agreeing, because there are no safe harbors and no guideposts; it is not the same as saying “I do” and thereby importing the entire Family Code into the agreement.

Although published forms are available, co-ownership agreements are not likely to be simple documents and may require some creative drafting. For example, the parties have to decide such matters as their respective contributions and percentage interests, management and control, restrictions on selling, leasing, financing, and the treatment of defaults. For attorneys, it would be like trying to force clients to think about what happens to inheritance rights if a child dies before the parents, and similarly unpleasant speculations. (A Davis-Stirling type of act for all common ownership interests might save a lot of paper.)

For as long as there is municipal rent control, some residents will keep trying to evade it and the cities will keep trying to cut off their escape routes. Condominium conversions have been more or less successfully stymied, but conversions to TICs are now more resistant than they were. Assuming that these TIC conversions cannot be stopped, lawyers can expect to spend more time in constructing them and managing them properly.

Of course, cities can choose not to be bothered by these TICs: While it is true that a TIC conversion removes a housing unit from the *rental* market, it does not take the unit off the *housing* market. Both before and after the conversion, San Francisco has the same number of housing units, with approximately the same number of persons living in them. It is hard to see who suffers if the removal of a unit from the rental market through TIC conversion also removes its occupants from the rental population, because its occupants are now owners rather than tenants.

The supreme court has been asked to review this case, so the future of TICs remains uncertain. But if this decision survives, we will certainly see more conversions. If San Francisco can no longer block them, this may be a good time to reconsider the restriction on condominium conversions, since most owners possessing candidates for conversion would surely prefer the advantages of a condominium over the difficulties of a tenancy-in-common. —*Roger Bernhardt*