PERKINS COIE

All San Francisco Multi-Family Buildings and Sites Subject to New Sales Regulations

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Effective June 2, 2019, San Francisco has enacted the “Community Opportunity to Purchase Act” or COPA (codified as San Francisco Administrative Code, Section 41.B.1 through Section 41.B.14).

Recognizing the housing crisis in San Francisco, a need to keep residents in place, the goal to retain the affordable housing stock and the desire to preserve neighborhoods, San Francisco will grant both a right of first offer (ROFO) and a right of first refusal (ROFR) on San Francisco apartment buildings of three units or more, on any buildings under construction of three units or more and on any sites that could be developed into residential units of three units or more (collectively, Multi-Family Property). The responsibility to comply with COPA generally falls on a seller, rather than a prospective purchaser.

Who gets a ROFO and ROFR?

Each “Qualified Nonprofit” will have a ROFO and ROFR on the sale of Multi-Family Property. A “Qualified Nonprofit” is a 501(c)(3) corporation that must demonstrate, among other things, a dedicated mission to providing housing for low- and moderate-income households. The Mayor’s Office of Housing and Community Development (MOHCD) will certify each Qualified Nonprofit and maintain a list of Qualified Nonprofits that will have a ROFO and a ROFR.

How does a seller comply with COPA?

Before a seller of Multi-Family Property can offer its property for sale to the public, the seller must give notice and offer to sell the Multi-Family Property to each Qualified Nonprofit. Each Qualified Nonprofit will have five days to express an interest in purchasing the Multi-Family Property. If a Qualified Nonprofit expresses an interest to purchase the Multi-Family Property, then the Qualified Nonprofit will have 25 days to make an offer to purchase the Multi-Family Property; if a Qualified Nonprofit makes an offer, the seller may reject the offer and proceed to offer the Multi-Family Property for sale to other potential purchasers, but subject to the Qualified Nonprofit’s ROFR.

If no Qualified Nonprofit expresses an interest to purchase the Multi-Family Property, then the seller is free to offer the Multi-Family Property to other purchasers, but, again, subject to the Qualified Nonprofit’s ROFR.

In addition to a ROFO, each Qualified Nonprofit has a ROFR. Once the seller of the Multi-Family Property has passed the above-ROFO process, the seller can then offer the Multi-Family Property to other potential purchasers. At the time (1) either a potential purchaser makes an offer to the seller that the seller is willing to accept, or the seller makes an offer to the potential purchaser that the potential purchaser is willing to accept, and (2) before either party accepts the offer, the seller must give notice and a ROFR to the Qualified Nonprofit. The offer to the Qualified Nonprofit must be on the same terms and conditions as the seller and potential purchaser were prepared to accept, except the Qualified Nonprofit will have 60 days for due diligence investigations and to obtain financing.

Within 15 days after the sale of the Multi-Family Property, the seller must file a declaration made under penalty of perjury that the seller has substantially complied with COPA.

What if a purchaser makes an unsolicited offer that the seller cannot refuse? Is the Multi-Family Property still subject to a ROFO and ROFR?

Yes, the seller of the Multi-Family Property must give notice and offer the Multi-Family Property to Qualified Nonprofits. A Qualified Nonprofit has 30 days to accept the offer of sale.

What happens if a seller violates COPA?

Qualified Nonprofits have a private right of action. There is a rebuttable presumption that the damages are the difference between the sale price of the Multi-Family Property and the purchase price that the Qualified Nonprofit could purchase the Multi-Family Property. If the violation is determined to be “knowingly and willful,” then the rebuttable presumption of damages is 10% of the purchase price for a first-time violation, 20% of the purchase price for second-time violation and 30% for a third-time violation. The Qualified Nonprofit is also entitled to attorneys’ fees and such other remedies available at law. A purchaser’s property interest may be affected if the purchaser “willfully colluded” with the seller to violate COPA.

Are there incentives to sell to a Qualified Nonprofit?

Yes. COPA also amended the San Francisco Business and Tax Regulations Code so that sellers receive a partial transfer tax exemption if the Multi-Family Property is sold to a Qualified Nonprofit under COPA.

By August 31, 2019, 90 days after promulgation, MOHCD is required to publish “appropriate rules and regulations” to implement and interpret COPA that will hopefully provide more clarity to COPA and how it will affect Multi-Family Property sales.

COPA raises a great number of questions. MOHCD may resolve some of those questions and undoubtedly the courts may resolve others. We will report back as COPA develops.

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