

FAQs

Community Opportunity to Purchase Act (COPA) in San Francisco

1/15/20 Edition by David R. Gellman, Arthur Meirson & M. Brett Gladstone

This article is provided as a resource for understanding the changes which are taking place in San Francisco's real estate community, and summarizes those changes as they are understood on the publication date. Updated versions of this article may appear on the firm's website at www.g3mb.com.

The San Francisco Board of Supervisors unanimously passed in April of 2019, and Mayor London Breed signed into law, new Community Opportunity to Purchase Act (**COPA**) legislation requiring owners of residential properties consisting of **three or more housing units** (or vacant land which may be developed to include 3+ units) to offer to sell their property to certain "Qualified Nonprofits," pre-approved by the City, before seeking to sell those properties to anyone else, and giving those nonprofits a right of first refusal to match any offers received from potential buyers. The new legislation became effective September 3, 2019.

Although the new **COPA** legislation raises significant legal and practical questions about buyers' and sellers' rights and obligations, and while its full legal and economic and impact may remain uncertain for a number of years, there are only **six** "Qualified Nonprofit Organizations" currently participating in the COPA program (including the Chinatown Community Development Center, the Tenderloin Neighborhood Development Corporation, and the Mission Economic Development Agency). With their lack of access to unlimited funds, these Qualified Nonprofits will likely be exercising COPA rights over a **very limited number of properties**.

Even if the number of actual purchases by Qualified Nonprofits remains small, sellers of a multifamily residential buildings in San Francisco will be subjected to transactional delays and related costs. Sellers (and their agents) will likely spend a considerable extra time on any transaction. Property owners who need to sell quickly and sellers faced with 1031 exchange deadlines will be the most affected, as may be sales with deadlines tied to settling an estate or completing a legal settlement.

Sellers may face new liabilities under **COPA**, which confers new private enforcement rights on Qualified Nonprofits. The new law subjects violators (and parties that have "colluded" with them) to monetary damages, civil penalties, and attorney's fees. The San Francisco Apartment Association has stated in public comments that it believes the **COPA** legislation is "illegal and unconstitutional," and has indicated it may bring litigation against the City; other organizations have expressed similar concerns.

What is COPA?

“COPA”, the Community Opportunity to Purchase Act, is a new San Francisco law which requires that whenever most residential properties of **three or more units** are offered for sale, “Qualified Nonprofits” get first crack at buying. COPA also applies to vacant land that could be developed into 3+ units.

Is the Sale of my Building Subject to COPA?

Do you own a residential or mixed-use building? Does it have at least **three** legal residential units? Does it **not** fall under one of the six exemptions listed below? Then yes, the sale of your building **is** subject to COPA.

What Properties are Excluded from COPA?

The following transfers are **not** covered under COPA:

- (1) Any transfer made under a mortgage, deed of trust, or deed in lieu of foreclosure;
- (2) Any transfer made in connection with any bankruptcy proceeding;
- (3) Any transfer of an interest in real property held by the Federal or State government, or by any special district created by State law (including any sale for nonpayment of property taxes).
- (4) Any transfer by Will, Trust, or operation of law upon death, or any other transfer made in connection with a bona fide effort to pass an interest in real property to one’s beneficiaries or heirs (including transfers made in connection with a Living Trust or Transfer on Death Deed).
- (5) Any transfer between or among spouses, domestic partners, siblings (including half-siblings, step-siblings, and adoptive siblings), parents (including step-parents and adoptive parents) or guardians and their children, grandparents and their grandchildren, aunts or uncles and their nieces or nephews, great-aunts or great-uncles and their grand-nieces or grand-nephews, or first or second cousins.
- (6) Any transfer of an interest in a multi-family residential building which is income restricted at or below an average of 80% of Area Median Income for a minimum of 10 years, if the transfer is to an entity controlled by a California public benefit corporation which participates in the management, direction, or control of the building.

When did COPA go into effect?

If you listed your property for sale **on or after September 3rd, 2019**, all COPA provisions will be applicable, including the Right of First Offer and Right of First Refusal provisions (see below).

What if my Property was Under a Sale Contract signed Before COPA Took Effect?

If you listed your property and entered into a contract of sale **before September 3rd 2019**, your property is **exempt** from COPA requirements **for that contract**. If you **listed** your property but had **not entered into contract** to sell by September 3rd, COPA’s Right of First **Offer** provisions don’t apply, but you must still provide Qualified Nonprofits with COPA’s Right of First **Refusal**.

What if my Property was Listed, but not yet under Contract of Sale Before COPA Took Effect?

Properties whose buyers and sellers were engaged in **preliminary negotiations** but had not signed a binding contract for sale as of COPA’s effective date will be subject to all COPA rules, including Right of First Offer and Right of First Refusal provisions (see below). While the terms “contract for sale” aren’t defined under COPA, they may include not only a binding purchase and sale agreement but possibly also other forms of contract, e.g., an option to purchase (see below).

Does COPA Apply to the sale of TIC Interests?

No. A sale of an individual TIC *share* in a residential building will **not** be considered a building sale subject to COPA unless the transfer is connected with a series of transaction to sell the *entire building*.

Are Gifts Subject to COPA?

No. COPA applies only to *sales*, not gifts or bequests. COPA defines a “sale” as “the transfer, in exchange for money or any other thing of economic value.”

Does COPA Apply to the sale of a 2-Unit Building with an Illegal Unit or an ADU?

No. *Unlawful* residential units (i.e. dwelling units which don’t conform to legal requirements, such as Building or Planning Code standards) will not count toward the minimum of three or more residential rental units under COPA. But any third *legal* dwelling, such as an Accessory Dwelling Unit (ADU) *will* bring the property under COPA.

How does COPA Apply to Vacant Lots?

The seller of a vacant lot must comply with COPA if the City’s Planning Code and other laws, including zoning requirements, permit its use as residential and will allow the development of at least three residential units *without* having to obtain a variance or conditional use approval.

Who Decides which Qualified Nonprofits may Participate?

The San Francisco Mayor’s Office of Housing and Community Development (MOHCD). Non-profit organizations must apply to be included on the City’s list. Currently, only six Qualified Nonprofits are listed on the MOHCD’s website.

When can I List my COPA-Eligible Property for Sale?

Prudence dictates that Sellers comply with the COPA Notice of Sale rules (see below) before listing and marketing their properties for sale. Real Estate agent listing agreement should address the possibility of a COPA-related sale.

How do I Notify Qualified Nonprofits of my Intent to Sell; What are the Qualified Nonprofits’ Rights of First Offer (RFO)?

RFO. Sellers of a 3+ unit residential building (or a vacant lot which can support such development), must first contact all of the “Qualified Nonprofit” organizations on the MOHCD’s online list, by emailing an initial “Notice of Sale” to all Qualified Nonprofits at the same time. The Notice of Sale must include statements indicating: (a) seller’s intent to sell the building, (b) the number of residential rental units, (c) the address for each rental unit, and (d) the rental rate for each unit. This process establishes the Qualified Nonprofits’ *“Right of First Offer.”*

How Long do the Qualified Nonprofits have to Reply to the Notice of Sale?

Qualified Nonprofits have five (5) days to notify the seller if they are interested in making an offer to buy the property. Upon receipt of such notification, the seller must provide further disclosures to the interested nonprofit(s), including the name and contact info for each tenant, which triggers an additional 25-day period during which the Qualified Nonprofit(s) may submit an actual Offer to Purchase the property.

What if there is No Reply to the Initial Notice of Sale?

If *none* of the Qualified Nonprofits on the MOHCD list express an interest in making an offer within the initial 5-day period, the seller may proceed in marketing the property for sale and may solicit 3rd party offers for purchase, with *no* Rights of First Refusal (see below).

How can I Sell to 3rd Party Buyers? What are the Qualified Nonprofits’ Rights of First Refusal (RFR)?

RFR. If a Qualified Nonprofit makes an Offer to Purchase the property, the seller is *not* required to accept the Offer. However, any Qualified Nonprofit that made an Offer *rejected* by the seller acquires a *Right of First Refusal* to purchase the property by *matching the terms and conditions of a subsequent 3rd party sale*. Under the Right of First Refusal, the seller must provide notice to any Qualified Nonprofit whose initial Offer was declined setting forth

the terms and conditions the seller has received from any 3rd party purchase offer the seller intends to accept. Also, in the event a seller hasn't provided the initial 5-day Notice of Sale before accepting an offer, perhaps unsolicited, all of the Qualified Nonprofits are **still entitled** to receive notification of their Right of First Offer, followed by a 30-day offer submittal period.

What Happens when a Qualified Nonprofit exercises its Right of First Refusal?

Qualified Nonprofits have five days to exercise their Right of First Refusal (30 days if the seller is responding to an unsolicited offer). A Qualified Nonprofit can be required to include the same closing date and contingency removal dates as the 3rd party offer it is matching. But if a 3rd party offer does not have such dates, or later postpones such dates, the close of escrow with a Qualified Nonprofit could be delayed. COPA regulations state that Qualified Nonprofit must be given a minimum of 60 days to release any contingencies.

What if the Terms of a 3rd Party Sale Change During Escrow?

Terms of sale can change during the escrow closing period, following seller disclosures and buyer inspections. **Material changes** to the terms and conditions of a 3rd party sale may be considered a **new offer**, which the seller must then present to all Qualified Nonprofits which declined the original offer, and the Right of First Refusal process starts over again. COPA rules state that "material changes to a contract are unique to each transaction and will inevitably vary on a case by case basis ...[and]... will generally mean changes to the significant terms of a contract that a Qualified Nonprofit justifiably relied on to make a decision to not accept a Seller's offer for a Building". Material changes are likely to include changes to the financial terms, the property, or requirements of performance under the contract.

Can I Accept an Offer with a COPA Contingency?

Yes - COPA rules expressly authorize "conditional" 3rd party sales agreements. If a seller receives a 3rd party offer to purchase that the seller wishes to accept, or if the seller makes an offer to sell that a 3rd party wishes to accept, the respective offer to purchase and/or offer of sale may be accepted **contingent** upon no Qualified Nonprofits exercising their Right of First Refusal. The City suggests contract language along the lines of "Purchaser's Purchase of the Multi-Family Building will not occur if a Qualified Nonprofit exercises the right of first refusal conferred by this Section."

Must I sell to a Qualified Nonprofit I don't like?

Unknown. COPA makes no provision for sellers to refuse to participate based upon religious, political or other Constitutional objections. You can be the test case before the Supreme Court!

Can Qualified Nonprofits Share Information about my Property with other Potential Buyers?

No. Qualified Nonprofits must maintain any information obtained from a seller under COPA, including seller disclosures and terms and conditions of an offer of sale as, **confidential** to the maximum extent permitted by law (except that a Qualified Nonprofit may share such information with other Qualified Nonprofits to facilitate their exercise of their own COPA rights).

Can a Qualified Nonprofit Assign its Purchase Rights?

A Qualified Nonprofit which has entered into a purchase agreement with a seller under COPA may only assign such purchase agreement to **another** Qualified Nonprofit.

Are there Penalties for Violating COPA?

Yes. Qualified Nonprofits may bring a legal action against the seller if they discover that a multi-family residential building has been sold in violation of COPA. Potential remedies include money damages, attorneys' fees and, if the violation is **knowing or willful**, civil

monetary penalties of up to 30% of the value of the property sold. These remedies can be imposed against the seller and any parties who have willfully *colluded* with the seller to violate COPA, including real estate brokers and agents. It also may include buyers if there is evidence of collusion with the seller to evade COPA rules.

Does COPA affect Options to Purchase, Rights of First Refusal & Foreclosure Sales?

Yes, *unless the property was already under contract as of September 3rd, 2019* (COPA's effective date). In that case, the legislation "shall not be construed to impair" any such contract, or to affect property interests held by anyone other than the seller, *including existing options to purchase and rights of first offer or refusal*. While acquisition of a property by a lender in a foreclosure sale may be exempt from COPA rules, a *subsequent* sale by anyone – including a lender – who acquires ownership via foreclosure is *not* exempt from COPA rules.

Is a Lease-Purchase Agreement a Sale under COPA?

COPA defines a "sale" of a multi-family building as "[t]he transfer, in exchange for money or any other thing of economic value, of a present interest in the multi-family residential building, including beneficial use, where the value of the present interest is the Fee Interest in the multi-family residential building, or substantially equal to the value of that Fee Interest". This would likely include nearly every form of Lease-Purchase arrangement.

Sale Subject to a Life Estate or Lifetime Lease?

Because COPA defines a sale to include the transfer of a "*present interest*" in a multi-family residential building ... where the value of the present interest is ... substantially equal to the value of [the] Fee Interest", it would be reasonable to conclude that a sale subject to a retained Life Estate or Lifetime Lease would *not* fall under COPA rules. However, there is currently no data to either support or refute this assumption.

How will COPA Affect Probate Sales?

The local COPA legislation isn't integrated with the California Probate Code, which governs the sale of real property from a decedent's probate estate. While transfers to beneficiaries and heirs are expressly exempted from COPA, a *sale* of those assets by an executor or trustee is *not*. It remains to be seen how this mismatch will play out.

How will COPA Affect Gifts to CRUTs?

A gift of real estate to a Charitable Remainder Unitrust (CRUT) is typically followed by a sale of the property by the CRUT trustee. While the initial gift of a San Francisco multi-family residential building to a CRUT will *not* be subject to COPA, a subsequent *sale* of the property by the CRUT trustees must adhere to all COPA rules.

Are Like-Kind (IRC §1031) Exchanges Subject to COPA?

Yes. And because of the extra time allowed to Qualified Nonprofits to decide whether or not to make an offer, owners transferring their properties via an IRC §1031 like-kind exchange will need to be aggressive in managing §1031 deadlines. The need for certainty in closing dates to satisfy these deadlines may force exchanging owners to look outside of San Francisco for acquisition properties, which are not subject to any COPA rules.

What Must I File after Selling a Property subject to COPA?

Within 15 days of the sale of a property subject to COPA, the seller must file a Declaration of Compliance with the San Francisco Mayor's Office of Housing and Community Development (MOHCD), affirming under penalty of perjury that the sale substantially complied with the requirements of COPA.

What Happens to the Property after it is Sold to a Qualified Non-Profit?

After a property has been sold to a Qualified Non-Profit organization under COPA:

- The building becomes rent-restricted affordable housing *in perpetuity*
- Average Rents cannot exceed 80% of Area Median Income
- Average income of all tenants cannot exceed 120% Area Median Income
- A Notice of Special Restrictions is recorded against title to the property

Does a Sale to a Qualified Non-Profit Affect the Transfer Tax Paid by the Seller?

Yes - a sale to a Qualified Nonprofit is subject to a *partial* Transfer Tax exemption. *Only* subsections (a), (b), and (c) of the Business and Tax and Rules Code §1102 will apply to sellers executing a transaction under COPA, while the increased tax rate imposed by subsections (d), (e), and (f) of §1102 will not apply. The maximum transfer tax rate imposed on buildings sold under COPA is at the rate of \$6.50 for each \$1,000 or “fractional part thereof for the entire value or consideration, including, but not limited to, any portion of such value or consideration that is less than \$1,000,000.”

How do I Choose a Lawyer to Assist Me?

A Law Firm to be Consulted About San Francisco’s COPA Law Should Offer You:

- Experienced attorneys knowledgeable in all aspects of the rules for buying and selling housing units in San Francisco;
- A thorough understanding of the San Francisco Zoning, Planning and entitlement processes;
- Expertise in property transfer issues, including sales, gifts, exchanges, and leases;
- An ability to communicate with clients clearly and understandably.

What Sets Goldstein, Gellman, Melbostad, Harris & McSparran, LLP (“G3MH”) Apart?

EXPERIENCE:

G3MH has been a respected member of San Francisco’s real estate community for over thirty-five years. During that time, we have provided guidance to and represented thousands of property owners in a wide range of real estate matters, including TIC creation, condominium conversion, leasing, dispute resolution and all other aspects of residential property ownership and management.

REASONABLE FEES:

G3MH provides services on an hourly basis. The hourly rate charged will be based upon the level of experience of the attorney you work with, which we will endeavor to match to the task at hand.

SERVICE:

G3MH is a full-service law firm, which means that our attorneys are available to offer guidance in landlord/tenant issues, tenancy-in-common issues, condominium conversion, title transfer and vesting, trust and estate matters, easements, zoning, planning and property tax issues, and all other real estate matters, including litigation and arbitration. No other firm in San Francisco offers the staffing and resources to meet your needs in every aspect of residential real estate ownership.

About the Authors:

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Of Counsel to G3MH, attorney **M. Brett Gladstone** represents investors, developers, and government agencies in land-use proceedings and CEQA compliance concerning residential and mixed-use developments throughout the Bay Area. Brett makes regular appearances before Bay Area Planning Commissions, City Councils, Boards of Supervisors and Landmarks Boards. A 1980 graduate *magna cum laude* of Harvard University and a member of the Class of 1983 of Duke University School of Law, Brett lectures on a variety of topics, including development entitlements, condominium law, and planned developments. Governor Gavin Newsom appointed Mr. Gladstone to the California Architects Board in 2019. Brett can be reached at 415-673-5600, or via email at BGladstone@g3mh.com.

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