

Small Property Owners Beware: Prop M is Now Law! **by Andrew M. Zacks, Attorney at Law**

On November 4, 2008, the voters of San Francisco passed Proposition M, a far-reaching ballot initiative whose title stated the seemingly innocent purpose of preventing landlord harassment of tenants. Most voters probably never read the proposition at all, let alone the fine print. Parts of it are relatively benign. For instance, it prohibits landlords from making repeated offers to buy tenants out after the tenants have notified them in writing that they do not wish to receive further offers. Most of the “new” rules and provisions simply duplicate those already on the books. However, parts of Prop M contain dangerous traps for landlords, and others are clearly problematic and probably illegal.

For example, Sec. 37.10B prohibits the landlord from requesting information that violates a tenant’s right to privacy, including but not limited to residence or citizenship status or social security number. Clearly, Prop M won’t prohibit you from asking prospective tenants for their social security number in order to do a credit check. But what happens if you inherit a tenant from a previous owner who failed to execute a proper tenant application? Are you prohibited from asking for a social security number from the sitting tenant? You probably are. But this question, like many others, re- mains unanswered by Prop. M, leaving small property owners wide open to litigation.

Prop M Puts Risks All on Landlord’s Side

The most troubling part of the new law is the enforcement and penalties section, which presents significant dangers to small property owners. A violation of the law entitles a complaining tenant to treble damages, including, potentially, emotional distress. Landlords may also be liable for punitive damages. Prevailing plaintiffs—i.e., tenants—are entitled to attorney’s fees, but landlords who prevail are not, no matter how meritless the tenant’s lawsuit.

In other words, expect to see a lot of extortionate lawsuits, since tenants will have little downside risk. You might be thinking, “I have nothing to fear, since I will never act in bad faith, with ulterior motive, or without honest intent.” However, tenant activists are very creative and clever in defining these terms, and tenants can simply lie about what you said or did. More importantly, it will always be up to a San Francisco jury to decide the ultimate facts involving these issues.

Watch Out For Innocent Mistakes

Prop. M adds two additional, highly troubling provisions that landlords should be concerned about. Under the subsection civil action, that lists the violations for which owners may be sued, the law states: “a violation of this chapter may be asserted as an affirmative defense in an unlawful detainer action.” Chapter refers to the entire Rent Ordinance, not just to Prop M and its bad faith/ulterior motive/honest intent requirement. That means, for example, that an honest \$2 overcharge on a rent increase due to complicated math, or even an incorrect rent increase by a prior landlord, would be a defense to an unlawful detainer for nuisance or illegality if the tenant were operating a methamphetamine lab, or an owner move-in case, or any other basis that is wholly unrelated to the overcharge. The courts will probably read this

to apply only until the violation is cured, but that could result in having to restart long processes due to innocent mistakes. However, this cannot be a defense to an Ellis Act eviction since those are governed by state law, and state law does not tolerate this kind of regulation; of that I am certain.

Finally, and alarmingly, sec. 37.10B(c)(6) creates one-way attorney's fees for tenants who win eviction lawsuits, even if the rental agreement does not contain a fee provision. This shifts enormous risks to landlords without any to tenants, making settlement on reasonable terms much harder. This provision appears to conflict with a recent California Supreme Court decision (*Action Apartment Association v. City of Santa Monica*) that struck down local tenant protections that interfered with California's statutory litigation privilege. The purpose of one-way fees is to discourage landlords from filing suit, just as Santa Monica's unlawful restrictions were so designed.

SPOSF and other property owner interests should not allow Supervisor Chris Daly and the tenant attorneys' band of activists to simply have their way with our property rights. SPOSF will decide soon whether to participate in a legal challenge to Prop M.

Andrew M. Zacks is an attorney with the law firm Zacks & Utrecht in San Francisco, (415) 956-8100. He specializes in San Francisco real estate, landlord-tenant litigation and appeals and has developed an expertise in assisting clients in the municipal regulation of residential real property. Having specialized in this area for over 18 years, Mr. Zacks is frequently retained to provide consulting services, expert testimony and has served as a mediator in numerous real estate disputes. Reprinted with permission of the Small Property Owners of San Francisco Institute (SPOSFI) News. For more information on becoming a member of SPOSFI or to send a tax-deductible donation, please visit their website at www.smallprop.org or call (415) 647-2419.