

FAQs

(frequently asked questions)

Tenancy In Common Dispute Resolution

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Over the past 20 years, residential Tenancies in Common (TICs) established themselves as an affordable pathway to home ownership in an otherwise unaffordable San Francisco marketplace. TIC ownership offered a solution to the City's vexing condominium conversion rules, which allow for easy and affordable conversions, but require a waiting period before conversion can begin. As a short-term bridge to condo ownership, problems inherent in TIC ownership were tolerable, often even invisible, and thousands of 2-6 unit buildings were transformed from tenant-occupied investment properties to owner-occupied homesteads. However, as the waiting time for condo conversion has lengthened from 3-5 years to over *20 years*, the challenges of long-term TIC home ownership have become more apparent, heightening the need for a clearer understand of how TIC disputes are resolved.

Are TICs & Condos the Same?

No. Tenancy In Common (TIC) ownership is **not** the same as condominium ownership. The distinction between the two types of home ownership has much to do with differing standards of shared **ownership** and **use**. In a condominium, the dwelling units are separately owned by individuals, and the rest of the property ("Common Area") is owned by all of the owners jointly, through a Homeowners Association ("HOA"). A condo owner's right to occupy of his or her dwelling unit flows from the legally recorded and transferrable **ownership** of the Unit. Since neither ownership nor use of the dwelling units themselves is shared, the rules under which condo HOAs operate largely focus on facilitating the harmonious shared use and maintenance of the Common Areas. In a TIC, the **entire property** is owned by the TIC group (the tenants-in-common, or "cotenants") in percentage shares. A TIC cotenant's right to occupy a particular dwelling unit flows only from a written TIC Agreement, a private and unrecorded contract signed by the cotenants, setting forth their mutual promises regarding the exclusive **use** of the dwelling units and the shared use of other parts of the TIC property. While the governing rules of both condominium HOAs and TIC Agreements deal similarly with shared use and maintenance of Common Areas, TIC Agreements must also wrestle with much thornier issues concerning financing and re-sale of the dwelling units themselves.

Who Makes the Rules for Condos and TICs?

All California condominiums operate under the Davis-Stirling Common Interest Development Act. Whenever the legislature changes the Davis-Stirling Act, in an effort to improve the rules for condominium HOAs, the rules for *all* California condominium HOAs change in lockstep. The governing rules for TICs, by contrast, are *not* defined under

California law, meaning that the governing rules laid out in any particular TIC Agreement will be based solely upon the knowledge and experience (and drafting style) of the attorney writing the document. TIC rules do *not* change over time, statewide. Typically, TIC rules are changed only by unanimous agreement of the TIC cotenants, and that rarely happens, since the need to change the governing rules usually arises out of a dispute among cotenants.

How do the Differences Between TICs & Condos Affect Disputes?

Condominium disputes are governed by the Davis-Stirling Act, and over the years, California courts have interpreted and refined those rules, publishing precedents and procedures to assist judges and arbitrators when they are called upon to adjudicate disputes among condo owners. With the separate unit ownership afforded by condominiums, responsibility for payment of big-ticket expenses of mortgages and property taxes is **not** shared. Thus, while condo owners may share responsibility for payment of Common Area maintenance and insurance, those costs tend to be small in comparison with mortgage and property taxes, and the failure of one owner to pay a share of condo HOA expenses does not carry with it any threat of foreclosure of the other units. The principal enforcement mechanism against a condo owner who fails to pay shared expenses is a “lien” – a legal claim against the owner’s unit, to force the owner to pay up, eventually.

By contrast, TICs do **not** have the benefit of the Davis-Stirling Act, and established mechanisms to enforce the private contractual terms of TIC agreements are largely nonexistent. Also, there are no California appellate court decisions dealing with residential TIC disputes, in large part due to the arbitration requirements found in most TIC Agreements (arbitration decisions are not published nor are they appealable). In a TIC, the failure of a cotenant to pay his/her share of property taxes or monthly mortgage payment poses a direct and immediate risk to the other cotenants’ homes. The threat of a lien against a defaulting cotenant is often ineffective in a TIC crisis, particularly if the defaulting cotenant intends to stay put for life, and has no immediate or future plans to sell. Accordingly, TIC agreements tend to focus on other enforcement mechanisms, such as the contractually forced sale of a defaulting cotenant’s TIC share. Such mechanisms, however formidable they may look on paper, are largely untested in the real world.

How Much Does the TIC Agreement Matter?

The differences in how TIC Agreements look has much to do with the drafting style of the author. Some attorneys favor a format that mimics condominium Covenants, Conditions & Restrictions (“CC&Rs”), while others draft documents that more closely resemble partnership agreements. Given the fact that TICs and condos are legal “apples and oranges,” the stylistic differences in TIC Agreements are less important than the similarities. Most TIC Agreements display an obvious and intentional bias in favor of a cotenant who wishes to remain in his or her home, often at the expense of a cotenant who wants to sell or rent. A properly drafted residential TIC Agreement will assign usage and occupancy rights, allocate decision-making authority, specify how common expenses are to be shared, discuss future condominium conversion, address the death or bankruptcy of a cotenant, cover the sale of individual interests (including approval of buyers and rights of first refusal), attempt to address re-financing issues, enumerate coexistence rules concerning pets, quiet hours, etc., and offer mechanisms for the fair resolution of as many potential disputes as the drafting attorney can envision. Such provisions are not, however, self-enforcing. In practice, the experience of TIC groups grappling with internal disputes will have more to do with the personalities of the individual cotenants than with the language in the group’s written TIC Agreement.

How are Disputes Resolved *Without* a Written TIC Agreement?

In the absence of a binding written **and signed** TIC Agreement (and outside of the Family Law Courts, which are only authorized to dispose of property co-owned by spouses), California law offers only one real remedy to a dispute between the cotenants, which is the right to “Partition” - the forced sale at the hands of the Court of the **entire property**.

What are Forced Sale and Partition?

What are Forced Sale and Partition? Many written TIC Agreements include provisions authorizing Partition and/or Forced Sale as remedies for the failure of the Cotenant to meet TIC obligations. A **Forced Sale** involves the involuntary sale of a defaulting cotenant’s *share* of the TIC property. **Partition** is a statutory procedure which involves the sale of the *entire* TIC property by a California court. Through Partition, every cotenant has the legal right to have a court take control of the entire property, sell it, and then divide the sales proceeds among the former cotenants. While a Forced Sale may be more appealing, because it affects only the share of a defaulting cotenant, the mechanisms to achieve a forced sale are largely theoretical, and the results unpredictable. Thus, a Partition sale may be the only realistic way a cotenant can escape an intolerable TIC situation. **Warning** - many TIC Agreements include provisions which *suspend* the cotenants’ partition rights for a number of years, ranging from a year or two to up to *75 years* (for fractional mortgage TICs). And while Partition is commonly believed to be a relatively quick and inexpensive option, developing trends suggest that in TIC disputes, it can be otherwise, that is, slow and costly.

Mediation or Arbitration?

Mediation or Arbitration? California courts are seldom involved in resolving TIC arguments, because most written TIC Agreements require the cotenants to resolve their disputes through binding *arbitration*, a private proceeding in which a paid neutral arbitrator reviews the case and imposes a decision that is legally binding for both sides. Many TIC Agreements also require cotenants to postpone arbitration until they have first attempted to settle their dispute through *mediation*, a non-binding negotiation facilitated by a trained mediator. Mediation can be a useful tool in helping the parties resolve their issues quickly and at a low cost, and offers a solution that all parties can live with. But a negotiated solution requires a compromise by everyone, and this can be exceptionally difficult in many TIC disputes. Because a mediator has no authority to render a decision, if the parties fail to settle at the mediation, the mediation process may be viewed (in hindsight) as a waste of time and money. There is growing anecdotal evidence that in TIC disputes, getting the dispute before a neutral arbitrator as quickly as possible may be the better choice. Arbitrators’ decisions are final, and binding on all participants. However, such decisions can be unpredictable, arbitrary, unfair, or illogical, and since arbitration awards are not appealable, there is no mechanism to try to overturn an arbitrator’s decision.

What are the Most Common TIC Disputes?

NOISE & NUISANCE

Victorian and Marina-style flats are the most prevalent San Francisco TIC buildings, but such properties seldom meet modern expectations for sound transmission. While renters tend to be more tolerant of their neighbors, owners often have a heightened expectation of peace and quiet as their reward for paying mortgages and property taxes. When such properties are occupied by cotenant owners, competing ideas of reasonable expectations can result.

PARKING AND STORAGE

TIC owners often will prepare their TIC Agreement before they have had a full opportunity to test how their vehicles will fit in the garage, and how storage is best divided. Savvy

cotenants will update their TIC Agreement as their mutual understanding of the best allocation of exclusive common areas evolves.

WINDOW MAINTENANCE

TIC owners seem to understand instinctively that the maintenance and replacement of the roof of their building is a shared responsibility. But while no one would think for an instant that maintenance and replacement of windows in a 60-story high-rise is the responsibility of the individual unit owners, in small TICs, it is a common assumption that the individual cotenants are each responsible for “their own” windows.

A written TIC Agreement may or may not offer guidance, but even when it does, it is not unusual for cotenants to fail to follow the terms of their documents. Custom and practice among the cotenants may, over time, modify the terms of a written TIC Agreement.

UNBALANCED TIC FINANCING

Sometimes a TIC group will acquire its building with one cotenant paying all cash, and another using mostly borrowed funds. Where individual “fractional” TIC mortgage loans are used, this situation is less perilous, but with a shared mortgage, such unbalanced TICs can pose a substantial risk to the all-cash cotenant. Should the value of the TIC property decline to the point where the cotenant who purchased with borrowed funds finds it expedient to walk away from the loan and the property, the all-cash cotenant can be stuck repaying the defaulting cotenant’s mortgage.

SALE OF TIC INTERESTS

TIC interests are marketed and sold throughout San Francisco under the Multiple Listing Service (MLS). It is possible to obtain appraisals of individual TIC “units” as well. Most TIC Agreements allow for the sale of a cotenant’s individual TIC interest to a new buyer (subject to short-term restrictions on sale to facilitate condominium conversion (see below)). TIC Agreements typically give the non-selling cotenant(s) a right to approve – reasonably – each new cotenant, and frequently guaranty the non-selling cotenant(s) the right to be first in line to buy, either under a “right of first refusal” to meet any offer, or via a “right of first offer,” using an appraiser to determine the sales price.

With a Shared Loan: If the cotenants currently share a single, group mortgage, the willingness of the lender to allow for a partial change of ownership will need to be considered. In many cases, however, the only way a TIC interest owned under a group mortgage can be sold is through a refinancing of the entire property. While the language of the TIC Agreement may dictate that the non-selling cotenants cooperate in the re-fi, things can go awry, especially if the credit score of one of the non-selling cotenants has deteriorated to the point that obtaining a new group loan becomes impossible.

With Fractional Loans: Cotenants who acquired their units with individual “fractional” mortgage loans have an easier time selling – a buyer qualifies for and obtains a new fractional mortgage in his or her own name, and the seller uses the sale proceeds to pay off the original fractional mortgage loan. The non-selling TIC cotenants are not involved in the refinancing at all. All of this assumes, however, that fractional TIC mortgages continue to be offered by lenders. With the number of lenders offering fractional TIC loans decreasing to next to none, future unavailability of these loans is an alarming concern.

ELIGIBILITY FOR CONDO CONVERSION

Eligibility for condominium conversion in San Francisco requires some degree of owner-occupancy. Two-unit buildings can bypass the City’s conversion lottery if both units

are owner-occupied for at least 12 months. Other properties require varying levels of owner-occupancy to remain eligible for the City's annual conversion lottery. Many TIC Agreements require that the owners continue to occupy their units until condominium conversion is achieved. But what happens when a TIC owner moves out too soon? The TIC Agreement may specify a certain amount of dollar damages owed to the other cotenant, or may be silent on the subject, leaving the amount of damages to be determined by a judge or arbitrator. However, there are no universally accepted standards as to the dollar value of loss of anticipated condominium status - a battle between expert witnesses will likely determine the damages owing to a TIC cotenant who ends up not owning a condominium unit after all.

CONDO CONVERSION AND AFTERMATH

A successful transition from shared TIC ownership to individual ownership of condominium units is often at the very core of a TIC Agreement. The more clearly the TIC Agreement defines the anticipated and agreed-upon outcomes of a condominium conversion of the TIC property - such as which unit gets what parking space, how conversion costs will be allocated, even who will be entitled to own which unit - the fewer the opportunities for disputing those outcomes when conversion happens. A serious problem arises when one of the cotenants is unable to obtain individual mortgage financing for his/her condo unit post-conversion. With a shared TIC mortgage loan, the *entire loan* must be paid off before any of the units can be deeded out to the respective owners, or sold to new buyers. If *one* cotenant can't re-finance his/her unit, *none of the other units can re-finance either*. Many TIC agreements include a provision designed to force a TIC cotenant to sell if the cotenant is unable to obtain an individual mortgage loan for his/her unit within a certain number of months from the date a condominium map is recorded. However, enforcing this contract provision can take months or even years, and can be very expensive.

RESERVES

Many TIC Agreements require the cotenants to build up a reserve fund for eventual replacement of common areas, such as the roof, exterior paint, etc. Yet a surprising number of TICs fail to honor the terms of their written TIC Agreement, and choose to operate on a pay-as-you-go basis. Initially, this may seem reasonable to the cotenants, and appealing as a way to minimize monthly expenses, but over the long haul, the results can be disastrous. Often, the only practical solution when critical repair work needs to be done, but one cotenant is short of cash, is for another cotenant to advance the funds, and take back an IOU for the debt.

Is TIC Dispute Resolution Expensive?

It is unpleasantly surprising to discover just how expensive it can be to try to resolve a serious TIC dispute. With no statutory mechanisms in place to assist, and no California case law dealing with residential TIC disputes, enforcement of the default provisions of even the most thoughtfully drafted TIC agreements can be a high-stakes crapshoot. Attorneys for both sides will charge hourly rates, expert witnesses are frequently required (also paid hourly), and of course, professional mediators and arbitrators must be paid their fees - usually in advance. The combined expenses incurred resolving even a minor dispute can easily exceed \$10,000; amounts well over \$75,000 have become commonplace. Reimbursement of expenses, including attorney's fees, by the loser to the winner is typically at an arbitrator's sole discretion, and cannot be assured, even in victory. Furthermore, if the reason for the dispute in the first place is because one of the cotenants has run out

of cash to meet his or her TIC obligations, an expensive legal battle will not likely generate any funds to settle unpaid TIC debts, or to reimburse the costs of enforcement.

What are Attorney Conflicts of Interest?

When TIC cotenants were all represented by the same lawyer in the drafting of their TIC Agreement, that lawyer may be unable to take sides in any dispute among the cotenants, due to attorney conflict of interest rules. This prohibition applies to all members of the attorney's law firm. Thus, a cotenant seeking legal representation likely will need to engage a lawyer who has no prior relationship with the cotenant(s) on the other side of the dispute.

What Can I Do to Reduce the Risks of TIC Ownership?

All co-ownership forms (TICs, condominiums, cooperatives, partnerships, etc.) involve risks associated with sharing use of property with others, and relying on each other to fulfill mutual obligations. Because TIC cotenants collectively own the *entire property*, the TIC group is collectively responsible for *all* obligations of property ownership. If one TIC owner fails to pay his or her portion of a shared monthly mortgage payment and a default results, the lender could foreclose on the entire building, causing all of the other owners to lose their homes. At the very least, all cotenants could suffer damage to their credit scores. If you are considering becoming a TIC owner, you should:

- Thoroughly investigate the background and qualifications of prospective cotenants;
- Exhaustively evaluate the property and financing;
- Evaluate how long you intend to own and occupy the property, and your ability to carry back seller financing on re-sale if no other options are available;
- Create a customized TIC agreement that each group member fully understands;
- Calculate your own ability to cover the financial obligations of a cotenant in default; re-calculate to include *more than one* defaulting cotenant;
- Establish a default reserve fund; and
- Observe and enforce the rules of your TIC agreement, including timely payment of all cotenant financial obligations.

What Sets G3MH Apart in TIC Dispute Resolution?

TIC EXPERIENCE:

Goldstein, Gellman, Melbostad, Harris & McSparran, LLP (G3MH) has been a respected member of San Francisco's real estate community for almost thirty years. G3MH attorneys have provided guidance and prepared the legal framework for over five hundred Tenancy In Common groups, representing more than two thousand homeowners. Our attorneys have reviewed and counseled hundreds of potential TIC buyers, and have reviewed and are intimately familiar with thousands of pages of TIC Agreements drafted by other counsel.

LITIGATION, MEDIATION AND ARBITRATION EXPERIENCE:

No other firm in San Francisco offers G3MH's depth of experience in TIC dispute resolution. In addition to representing individual clients in meditation, arbitration and court, G3MH also offers skilled mediators to help TIC groups resolve internal disputes.

SERVICE:

Practically any San Francisco Realtor® can confirm that G3MH is the "go-to" firm for TIC issues. G3MH maintains the staffing and resources to offer response times to client needs which few firms can match. G3MH's attorneys and paralegals are available to offer additional guidance in landlord/tenant issues, condominium conversion, title transfer

and vesting, trust and estate matters, easements, property tax issues, and all other matters related to TICs.

About the Authors:

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