



**MCCARREY
LAW
GROUP**

March 9, 2007

REAL ESTATE: TENANTS IN COMMON

A tenancy in common (“TIC”) is a legal arrangement that permits two or more individuals to hold an undivided interest in a specific parcel of real estate without rights of survivorship. This means that unlike a joint tenant’s real estate interest which automatically passes to the surviving joint tenants upon his death, a participant in a TIC may use his will to designate who will inherit his tenancy in common interest.

TIC’s have become increasingly popular as vehicles for holding real estate. There are several reasons, but key among them are:

- Recent IRS rulings have made it clear that a holder of real estate as a tenant in common is the owner of a real estate interest and thus eligible for §1031 exchanges.
- In contrast to traditional time share arrangements that do not provide the purchaser with legal title to the underlying real estate, the use of a TIC vests legal title in each purchaser of an undivided interest in a vacation or second home. In these instances, each purchaser obtains a “fractional interest” in the real estate, thus allowing him to buy as much or as little of a project as he wants all while obtaining legal title to the real estate and receiving the tax and other benefits associated with real estate ownership.
- Increasingly it is more common to have multi-unit properties placed in a TIC, particularly when some or all of the owners intend to occupy the property. Occupying owners enter into a separate contract referred to as a Tenancy in Common Agreement (“Agreement”) which grants them the exclusive right to use a certain unit or a specific part of the property. This Agreement is not recorded and therefore, among other things, gives participants in a TIC absolute right to the property they occupy while providing relief from some of the regulatory requirements and restrictions that would otherwise apply.

TIC’s have several advantages to developers, including:

- Most importantly, TIC’s permit smaller parts of an underlying property to be sold as fractional interests to multiple buyers. Often, the aggregate amount obtained from

selling fractional interests significantly exceeds the value of the property to a single purchaser.

- In California, appellate courts have recognized a difference between recorded and unrecorded agreements. The practical effect of this is felt in areas where municipalities have prohibited apartment conversions. Developers creating TIC's are able to sell undivided interests in an apartment building and through the use of an unrecorded Agreement, individual purchasers obtain contractual rights to occupy specific units. It should be noted that in California, TIC's that involve more than five units require the issuance of a White Report by the Department of Real Estate.

There are many factors that must be taken into consideration before entering into a TIC. Chief among the considerations are tax issues which require each owner in a TIC to consult with his or her tax advisors. While there is a degree of legal complexity inherent in TIC's, in fact TIC's appear to be the prevailing direction of many segments of the real estate market. The many benefits offered from a TIC will often outweigh the issues that must be addressed by investors acquiring a property as tenants in common.