

## REGULATORY RESPONSES TO THE CONDOMINIUM CONVERSION CRISIS

The conversion of rental housing to condominiums has created regulatory interest nationwide.<sup>1</sup> Although not a new form of housing,<sup>2</sup> condominiums occupy a rapidly growing share of the housing market.<sup>3</sup> The number of condominium conversions each year has thus increased dramatically during the last decade.<sup>4</sup>

A variety of market factors make condominium conversion attractive. Landlords argue that rent control and rising costs preclude an adequate return on their investment.<sup>5</sup> Construction of new condominium projects is comparatively expensive; often it is difficult to locate property on which to build because of a shortage of multi-family zon-

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1. "Condominium" refers to real estate that is partly owned separately and partly owned in common by the owners of the separate portions. The undivided interests in the common areas must be vested in the unit owners. See U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, *THE CONVERSION OF RENTAL HOUSING TO CONDOMINIUMS AND COOPERATIVES* (1980) [hereinafter cited as 1980 HUD STUDY]; U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, *CONDOMINIUM/COOPERATIVE STUDY I-4* (1975) [hereinafter cited as 1975 HUD STUDY]; Rohan, *The "Model Condominium Code"—A Blueprint for Modernizing Condominium Legislation*, 78 COLUM. L. REV. 587, 588 n.8 (1978).

2. The condominium concept dates back to Roman times and was popular in the Middle Ages. Common in Europe and Latin America, it was not until the 1950s that an American jurisdiction authorized the creation of condominiums. See 125 CONG. REC. H7346 (1979) (remarks of Rep. Rosenthal); Bucknall, *Leasehold Condominiums: The Further Flight of the Fee*, 14 OSGOODE HALL L.J. 29 (1976).

3. In 1975, 85% of the condominiums in existence were less than five years old. See 1975 HUD STUDY, *supra* note 1, at I-7. A survey by the National Association of Realtors found that condominiums constituted at least 10% of the housing market in 300 market areas. Almost 200 reported a significant increase in demand for condominiums in one year. See REALTORS REVIEW, July 1978, at 12. In San Francisco there was a 92% increase in the ownership of condominiums between 1970 and 1978. See *Condominium Conversions in San Francisco* (November, 1978) (unpublished joint study by the San Francisco Department of City Planning and Members of the Real Estate Industry, on file with *Washington University Law Quarterly*).

4. No national statistics are kept on condominium conversions, but 145,000 conversions were estimated in 1979. That figure compares with 85,000 in 1978, and 45,000 in 1977. Conversions may reach 150,000 in 1980. BUS. WEEK, February 18, 1980, at 95 (U.S. Housing Markets study by Advance Mortgage Corp.); Daily Journal of Commerce, Seattle, Washington, Jan. 31, 1980, at 5, col. 1.

Condominium conversion is largely a regional phenomenon. Areas most affected include much of California, New York City, metropolitan Washington, D.C., metropolitan Chicago, metropolitan Boston, and Seattle. See *Condominium Housing Issues: Hearings on S.612 Before the Subcomm. on Banking, Housing, and Urban Affairs*, 96th Cong., 1st Sess. 86-95 (1979) [hereinafter cited as 1979 Hearings].

5. See 1980 HUD STUDY, *supra* note 1, at V-1; 1975 HUD STUDY, *supra* note 1, at I-11.

ing.<sup>6</sup> Tax reforms in 1969 and 1976 made investment in rental housing less attractive.<sup>7</sup> Condominium conversion, therefore, is more lucrative than rental housing.<sup>8</sup>

The conversion process also has certain drawbacks. For example, tenants who cannot afford to purchase their apartment are forced to move.<sup>9</sup> Tenants forced to find alternate rental housing and persons who purchase their apartment face increases in the cost of housing.<sup>10</sup> Because conversion tends to occur in low vacancy areas,<sup>11</sup> these factors deplete the number of available housing units even further.<sup>12</sup> Those most affected can least afford to move: elderly persons, lower income households, and young persons clearly suffer the most when conversion occurs.<sup>13</sup>

State and local governments are responding to these negative consequences by enacting legislation to slow the conversion process.<sup>14</sup> This

6. See 125 CONG. REC. H7347 (1979).

7. *Id.* See also 1975 HUD STUDY, *supra* note 1, at I-11.

8. Profits from conversion can be enormous, ranging from 50 to 500%. See 125 CONG. REC. H7347 (1979). Real estate officials advise against converting unless the profit is anticipated at 20-25%. See U.S. NEWS & WORLD REP., Oct. 9, 1972, at 60.

9. Studies conducted on Palo Alto, California, metropolitan Washington, and Evanston, Illinois, show at least an 82% displacement rate. This figure refers to the proportion of tenants who did not purchase their apartments. The Evanston study showed that 55-73% of the displaced tenants moved out of the municipality entirely. See 1979 Hearings, *supra* note 4, at 48-53 (statement of Daniel Lauber).

10. In 1975 those who bought their apartment faced monthly costs of 30 to 35% more. Displaced tenants often pay more for their new apartments. See 125 CONG. REC. H7347 (1979).

11. Vacancy rates are extremely low in the housing markets that contain the greatest number of conversions. Washington, D.C., parts of Chicago, and Seattle have vacancy rates under 2.5%, which is far below the 5% rate characteristic of a healthy market. See 1979 Hearings, *supra* note 4, at 103.

12. Condominium conversions clearly create a vicious cycle in a city's rental housing market. Conversions occur in areas where a shortage of adequate rental units already exists, thus panicking many people into buying converted units. This reduces the availability of rental housing even further, and drives up the rents in remaining apartments. The combination of lower vacancy rates and higher rents then prompts another round of "condomania." In short, the demand for many converted condominiums is partially artificial—created by shortages that have been created by developers. 125 CONG. REC. H7348 (1979).

13. *Id.* at H7347.

14. For a general discussion of these issues see F. JACKSON & W. LIPPMAN, CONDOMINIUM AND COOPERATIVE CONVERSIONS (1980); C. RHYNE, W. RHYNE & P. ASCH, MUNICIPALITIES AND MULTIPLE RESIDENTIAL HOUSING: CONDOMINIUMS AND RENT CONTROL (1975); U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, CONDOMINIUM CONVERSION CONTROLS (1979); 1980 HUD STUDY, *supra* note 1; Wynn, *Condominium Conversion and Tenant Rights—Wisconsin Statutes Section 703.08: What Kind of Protection Does It Really Provide?*, 63 MARQ. L. REV. 73 (1979); Note, *The Condominium Conversion Problem: Causes and Solutions*, 1980 DUKE L.J. 306; Com-

Note discusses controls on condominium conversions, their sources in land use regulations, and legal issues presented by those controls.

## I. ORIGINS OF LAND USE REGULATION

Land use regulation, which is peculiarly within the province of state government,<sup>15</sup> provides the basis for condominium conversion regulation. Home rule provisions in state constitutions<sup>16</sup> or enabling acts passed by state legislatures<sup>17</sup> delegate this power to municipalities. The state's police power thus authorizes local governments to legislate and regulate for the public health and welfare.<sup>18</sup> Legislative findings of public need, establishment of goals, and delegation of regulatory authority to municipalities are presumptively valid and thus are rarely overruled by courts.<sup>19</sup> Both state and federal courts hold that land use conflicts are fundamentally state issues.<sup>20</sup> Moreover, the Supreme

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ment, *The Regulation of Rental Apartment Conversions*, 8 *FORDHAM L.J.* 507 (1980); Note, *The Validity of Ordinances Limiting Condominium Conversion*, 78 *MICH. L. REV.* 124 (1979); Note, *Condominium Conversion Legislation: Limitation on Use or Deprivation of Rights?—A Re-examination*, 15 *NEW ENG. L. REV.* 815 (1980); Note, *Conversions in California*, 53 *SO. CAL. L. REV.* 225 (1979).

15. The Supreme Court decided five major land use cases that dealt with constitutional issues in the 1920s. See *Washington ex rel. Seattle Trust Co. v. Robergi*, 278 U.S. 116 (1928); *Newton v. City of Cambridge*, 277 U.S. 183 (1928); *Gorieb v. Fox*, 274 U.S. 603 (1927); *Zahn v. Board of Pub. Works of Los Angeles*, 274 U.S. 325 (1927); *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926). The Supreme Court has since considered only nine land use cases. See *San Diego Gas & Elec. Co. v. City of San Diego*, 49 U.S.L.W. 4317 (U.S. Mar. 24, 1981) (No. 79-678); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Moore v. City of E. Cleveland*, 431 U.S. 404 (1977); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Young v. American Mini-Theater, Inc.*, 427 U.S. 50 (1976); *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976); *Hills v. Gautreaux*, 425 U.S. 284 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

16. For example, Illinois is a home rule state. The Illinois Constitution grants authority to municipalities to regulate for the protection of the public health, safety, morals, and welfare. *ILL. CONST.* art. 7, § 6.

17. Many states enabling acts are based on the Standard State Zoning Enabling Act, which grants the power to regulate population density, location and use of buildings, and size and lot restrictions. U.S. DEPT OF COMMERCE, BUREAU OF THE CENSUS, *STANDARD STATE ZONING ENABLING ACT* (1926), reprinted in *ALI A MODEL LAND DEVELOPMENT CODE 210* (1968 TENT. DRAFT 1). See also D. MANDELKER & R. CUNNINGHAM, *PLANNING AND CONTROL OF LAND DEVELOPMENT 217-22* (1979).

18. See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Reinman v. Little Rock*, 237 U.S. 171 (1915); *Welch v. Swasey*, 214 U.S. 91 (1909); *L'Hote v. New Orleans*, 177 U.S. 587 (1900); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Soon Hing v. Crowley*, 113 U.S. 703 (1885); *Barbier v. Connolly*, 113 U.S. 27 (1885).

19. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

20. See *Sea Ranch Ass'n v. California Coastal Zone Comm'n*, 537 F.2d 1058 (9th Cir. 1976);

Court has avoided deciding land use cases by deferring to the state if the regulations are reasonably related to a legitimate state interest.<sup>21</sup>

### A. Zoning

Zoning is and has been for two centuries the predominant tool of land use regulation.<sup>22</sup> Historically courts relied on the law of nuisance to control uses of property that harmed adjacent owners.<sup>23</sup> Nuisance law proved inadequate, however, because it forced complainants to meet the difficult burden of proving actual harm to their property and could not prevent the placement of incompatible uses.<sup>24</sup> In response to these inadequacies, municipalities enacted comprehensive planning ordinances to establish broad goals, and used zoning ordinances to implement them.<sup>25</sup> Zoning creates an organized separation of incompatible uses by grouping compatible uses together. Municipalities thus became a source of public management based on a police power derived from state enabling legislation or specific grants.<sup>26</sup>

Zoning ordinances grew in number and complexity during the last

*Santa Fe Land Improvement Co. v. City of Chula Vista*, 71 F.R.D. 573 (S.D. Cal. 1976); *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 390 F. Supp. 1004 (C.D. Cal. 1975); *Olinger v. City of Palm Springs*, 386 F. Supp. 1376 (C.D. Cal. 1975); *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713, cert. denied, 423 U.S. 808 (1975); *Berenson v. Town of Newcastle*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975). But see *Sixth Camden Corp. v. Township of Evesham*, 420 F. Supp. 709 (D.N.J. 1976); *M.J. Brock & Sons, Inc. v. City of Davis*, 401 F. Supp. 354 (N.D. Cal. 1975); *Donohoe Construction Co. v. Maryland-Nat'l Capital Park & Planning Comm'n*, 398 F. Supp. 21 (D. Md. 1975).

21. See *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (nontraditional family values); *Berman v. Parker*, 348 U.S. 26 (1954) (aesthetic values).

22. See D. HAGMAN, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* 69 (1971).

23. See 1 R. ANDERSON, *AMERICAN LAW OF ZONING* § 2.03 (1968).

24. See generally 1 R. ANDERSON, *supra* note 23, at § 7.14; D. HAGMAN, *supra* note 22, at 165-69.

25. The Idaho Supreme Court, for example, has made a comprehensive plan a condition precedent to zoning ordinance validity. See *Dawson Enterprises, Inc. v. Blaine County*, 98 Idaho 506, 567 P.2d 1257 (1977). See generally D. MANDELKER & R. CUNNINGHAM, *supra* note 17, at 741. See also *Sabo v. Township of Monroe*, 394 Mich. 531, 232 N.W.2d 584 (1975) (Williams, J., concurring).

26. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The Village of Euclid enacted a comprehensive zoning ordinance that regulated building size, lot size, and use. Apartment buildings were prohibited, therefore, in "residential" areas. The Court upheld the ordinance, saying that the ordinance was valid unless "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.* at 395. See generally PRINCIPLES AND PRACTICE OF URBAN PLANNING (W. Goodman ed., 4th ed. 1968).

half century.<sup>27</sup> They now define the public welfare even more broadly by using subzones that separate even potentially incompatible uses.<sup>28</sup> These intricate zoning devices maintain their presumptive validity.<sup>29</sup> Municipalities need only enact zoning ordinances pursuant to properly delegated authority,<sup>30</sup> and the ordinances must not be arbitrary or unreasonable in accomplishing the objectives of the comprehensive plan.<sup>31</sup>

Although the presumptive validity of zoning ordinances limits judicial scrutiny, courts enforce basic constitutional requirements.<sup>32</sup> The regulation must not constitute a taking of property without compensation in violation of the fifth amendment of the United States Constitution.<sup>33</sup> This requirement, however, is minimal. Courts, in deference to legislative determinations of public needs and goals,<sup>34</sup> rarely invalidate

27. See Fagin, *Regulating the Timing of Urban Development*, 20 LAW & CONTEMP. PROB. 298 (1955); Note, *Time Controls on Land Use: Prophylactic Law for Planners*, 57 CORNELL L. REV. 827 (1972).

28. For a discussion of zoning devices see Wright, *Constitutional Rights and Land Use Planning: The New and the Old Reality*, 1977 DUKE L.J. 841, 853-55; Note, *Controlled Growth Zoning: Confronting the Inevitable*, 66 KY. L.J. 99, 108 (1977).

29. "Implicit in such a philosophy of judicial self-restraint is the growing awareness that matters of land use and development are peculiarly within the expertise of students of city and suburban planning . . ." Golden v. Planning Bd. of Ramapo, 30 N.Y.2d 359, 370, 285 N.E.2d 291, 301, 334 N.Y.S.2d 138, 151 (1972).

30. *E.g.*, Come v. Chancy, 289 Ala. 555, 269 So. 2d 88 (1972); Wiegel v. Planning & Zoning Comm'n of Westport, 100 Conn. 239, 278 A.2d 766 (1971); Dawson Enterprises v. Blaine County, 98 Idaho 506, 567 P.2d 1257 (1977); Sweetman v. Town of Cook, 18 Ill. App. 3d 230, 309 N.E.2d 763 (1974); Nottingham Village, Inc. v. Baltimore County, 266 Md. 339, 292 A.2d 680 (1972); Sabo v. Township of Monroe, 394 Mich. 531, 232 N.W.2d 584 (1975); Raabe v. City of Walker, 383 Mich. 165, 174 N.W.2d 789 (1970); Holingren v. City of Lincoln, 199 Neb. 178, 256 N.W.2d 686 (1977); Kozesnik v. Montgomery Township, 24 N.J. 154, 131 A.2d 1 (1957); Odell v. Haas, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968); Tulsa Rock Co. v. Board of County Comm'rs, 531 P.2d 351 (Okla. Ct. App. 1975); Shelton v. City of Bellevue, 73 Wash. 2d 28, 435 P.2d 949 (1968). See Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 900, 904 (1976).

31. See, *e.g.*, Berman v. Parker, 348 U.S. 26 (1954); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); City of Santa Fe v. Gamble-Skogmo, Inc., 389 P.2d 13 (N.M. 1964).

32. See generally Wengut, *Constitutional Principles Applied to Land Use Planning and Regulation: A Tentative Restatement*, 19 NAT. RESOURCES J. 1, 1-8 (1979).

33. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The dispositive case in this area is Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). See generally F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE: A STUDY OF THE CONSTITUTIONAL LIMITS OF GOVERNMENTAL AUTHORITY TO REGULATE THE USE OF PRIVATELY-OWNED LAND WITHOUT PAYING COMPENSATION TO THE OWNERS* (1973).

34. No compensation is necessary if the regulation is for the public health and welfare. See generally Michelman, *Property, Utility and Fairness: Comments on the Ethical Formulations of*

zoning ordinances on fifth amendment grounds. Additionally, courts find that zoning does not deprive an owner of all possible uses of the property.<sup>35</sup> To defeat a fifth amendment challenge, a municipality need demonstrate only a relationship to the public welfare.<sup>36</sup> States justify size and use limitations, for example, under one of the many public interests in health, safety, and general welfare.<sup>37</sup> Thus, complainants face a nearly irrebuttable presumption of validity.<sup>38</sup>

The equal protection clause<sup>39</sup> of the Constitution imposes an additional requirement on zoning and land use law. Similar classes of people must be treated equally in separating uses.<sup>40</sup> Courts, in deciding this issue, distinguish between legitimate classifications and suspect classifications. The Supreme Court has found that housing is not a fundamental right that involves strict equal protection scrutiny.<sup>41</sup> Con-

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*"Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings, Private Property, and Public Rights*, 81 YALE L.J. 149 (1971); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

35. See, e.g., *Goldblatt v. Hempstead*, 369 U.S. 590 (1961); *Edgar A. Levy Leasing Co. v. Siegal*, 258 U.S. 242 (1922); *Block v. Hirsh*, 256 U.S. 135 (1921); *Walls v. Midland Cannon Co.*, 254 U.S. 300 (1920); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Reinman v. Little Rock*, 237 U.S. 171 (1915); *Mugler v. Kansas*, 123 U.S. 623 (1887); *Finn v. 415 Fifth Ave. Co.*, 153 F.2d 501 (2d Cir.), *cert. denied*, 328 U.S. 839 (1946).

36. See generally *Wengut*, *supra* note 32.

37. Minimum lot and building sizes are usually sustained. See, e.g., *Senior v. Zoning Comm'r*, 146 Conn. 531, 153 A.2d 415 (1959), *appeal dismissed*, 363 U.S. 143 (1960); *Flora Realty & Inv. Co. v. City of Ladue*, 362 Mo. 1025, 246 S.W.2d 771, *appeal dismissed*, 344 U.S. 802 (1952); *Fischer v. Township of Bedminster*, 11 N.J. 194, 93 A.2d 378 (1952); *Lionshead Lake, Inc. v. Township of Wayne*, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953); *Franmor Realty Corp. v. Westbury*, 280 A.D. 945, 116 N.Y.S.2d 68, *appeal dismissed*, 304 N.Y. 843, 109 N.E.2d 714 (1952). Courts have also sustained building height regulations. See, e.g., *City of St. Paul v. Chicago, St. P., M. & O. Ry.*, 413 F.2d 762 (8th Cir.), *cert. denied*, 396 U.S. 985 (1969); *Norwood Heights Improvement Ass'n v. Baltimore*, 191 Md. 155, 60 A.2d 192 (1948); *Cobble Close Farm v. Board of Adjustment*, 10 N.J. 442, 92 A.2d 4 (1952). See generally J. BEUSCHER, R. WRIGHT & M. GITELMAN, *LAND USE* 212-23 (2d ed. 1976); Babcock, *Classification and Segregation Among Zoning Districts*, 1954 U. ILL. L.F. 186; Lundberg, *Restrictive Covenants and Land Use Control: Private Zoning*, 34 MONT. L. REV. 199 (1973); Williams & Wacks, *Segregation of Residential Areas Along Economic Lines: Lionshead Lake Revisited*, 1969 WIS. L. REV. 827; Note, *An Evaluation of the Applicability of Zoning Principles to the Law of Private Land Use Restrictions*, 21 U.C.L.A. L. REV. 1655 (1974).

38. See, e.g., *Berman v. Parker*, 348 U.S. 26 (1954) (use of eminent domain valid when invoked for aesthetic reasons); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (ordinance regulating building and lot size upheld). But see *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) (ordinance invalid).

39. No state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. See generally Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971).

40. See generally Note, *supra* note 28, at 120.

41. See *James v. Valtierra*, 402 U.S. 137 (1971) (state requirement for a local referendum on

sequently, complainants must meet difficult burdens of proof and overcome presumptions of validity.

### B. Growth Control Regulations

Until approximately 1960, zoning was the exclusive means of regulating land use.<sup>42</sup> Zoning inadequately controlled growth, however, which by that time increasingly concerned many municipalities.<sup>43</sup> To control growth, municipalities began to promulgate numerous supplementary regulations designed to limit growth directly by prohibiting the construction of buildings or necessary support facilities.<sup>44</sup> Municipalities enacted minimum lot size requirements, building moratoria, quotas, and limitations on the number of various types of buildings to accomplish goals of approved comprehensive plans.<sup>45</sup> These devices control the pace, direction, and volume of development and apply to all construction.<sup>46</sup>

Constitutional requirements for zoning also apply to growth control regulations.<sup>47</sup> The courts' threshold consideration is whether the mu-

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federally subsidized housing upheld). Further, there is no right to housing of "a particular quality." *Lindsey v. Normet*, 405 U.S. 56, 74 (1972). *But see* *Southern Alameda Spanish Speaking Organization v. City of Union City*, 424 F.2d 291, 295-96 (9th Cir. 1970) (court articulated a policy of housing responsibility in city planning). *See generally* Comment, *The Evolution of Equal Protection—Education, Municipal Services, and Wealth*, 7 HARV. C.R.-C.L. L. REV. 103 (1972); Comment, *The Right to Travel: Another Constitutional Standard for Local Land Use Regulations?*, 39 U. CHI. L. REV. 612 (1972).

42. *See generally* E. FINKLER & D. PETERSON, *NONGROWTH PLANNING STRATEGIES* (1974).

43. *See generally* TASK FORCE ON LAND UTILIZATION AND URBAN GROWTH, *THE USE OF LAND: A CITIZEN'S POLICY GUIDE TO URBAN GROWTH* (1973); MORRISON, *Population Movements and the Shape of Urban Growth: Implications for Public Policy* (Commission on Population Growth and the American Future, Research Reports, Vol. V, 1972).

44. *See generally* D. GODSCHALK, D. BROWER, L. MCBENNETT, B. VESTAL & D. HERR, *CONSTITUTIONAL ISSUES OF GROWTH MANAGEMENT* 8-10 (rev. ed. 1979).

45. Limits on the number of building permits as well as other forms of restrictions on future construction allow city officials to control the amount of expansion in their municipality. Some municipalities establish quotas that limit the number of permits, map approvals, or utility hook-ups. One municipality instituted a "blanket" quota by limiting the actual number of dwelling units to 40,000 in 1971. *See Arvida Corp. v. City of Boca Raton*, 59 F.R.D. 316 (S.D. Fla. 1973).

For a discussion of growth control techniques see D. BROWER & C. CARRAWAY, *TOOLS & TECHNIQUES OF GROWTH MANAGEMENT* (1978); D. MANDELKER & R. CUNNINGHAM, *supra* note 17, at 987.

46. *See generally* Fagin, *supra* note 27, at 298 (1955).

47. Growth control regulations can have significant economic consequences, including increased price and reduced quantity of housing. *See generally* R. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977).

nicipality exceeded its delegated authority.<sup>48</sup> As in zoning, there is a presumption of constitutionality as long as the regulation relates to legitimate purposes.<sup>49</sup> In addition, courts rarely overturn growth control regulations as violative of the fifth amendment taking clause,<sup>50</sup> even though the regulations may severely restrict the available uses of property.<sup>51</sup> Because taking and equal protection challenges to growth control regulations fail<sup>52</sup> unless the regulations adversely affect suspect classes or fundamental rights,<sup>53</sup> litigation has focused on the exclusionary effects of growth control regulations.<sup>54</sup> Building moratoria and de-

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48. See note 30 *supra*.

49. The municipality only needs to produce sufficient evidence that the legislators had a rational basis for the regulation. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389 (1926). The city can show this if: (1) The regulation was adopted with a legitimate purpose; (2) the regulation is necessary to reach that goal; and (3) the regulation is not unreasonably burdensome. *Lawton v. Steele*, 152 U.S. 133, 137 (1894).

50. See *Berman v. Parker*, 348 U.S. 26 (1954).

51. The fact that a regulation precludes the most profitable use of the property does not render it invalid. See, e.g., *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Walls v. Midland Carbon Co.*, 254 U.S. 300 (1920); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Reinman v. Little Rock*, 237 U.S. 171 (1915); *Mugler v. Kansas*, 123 U.S. 623 (1887). Cf. *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922) (statutes designed to mitigate housing shortage valid); *Block v. Hirsh*, 256 U.S. 135 (1921) (statute allowing tenant to remain in possession after expiration of lease upheld due to wartime emergency conditions); *Finn v. 415 Fifth Ave. Co.*, 153 F.2d 501 (2d Cir.), *cert. denied*, 328 U.S. 839 (1946) (rent control ordinance upheld); *Construction Indus. Ass'n v. City of Petaluma*, 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976) (municipality goal of preservation of small town character and slow growth upheld); *Stoneridge Apartments Co. v. Lindsay*, 303 F. Supp. 677 (S.D.N.Y. 1969) (rent control provision upheld); *Israel v. City Rent & Rehabilitation Administration*, 285 F. Supp. 908 (S.D.N.Y. 1968) (same); *Taxpayers Ass'n of Weymouth Township v. Weymouth Township*, 71 N.J. 249, 364 A.2d 1016 (1976), *cert. denied*, 430 U.S. 977 (1977) (ordinance that excluded residents under 52 years of age in mobile home park valid); *Inganamort v. Borough of Fort Lee*, 62 N.J. 521, 303 A.2d 298 (1973) (rent control provision upheld); *Golden v. Town of Ramapo*, 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291, *appeal dismissed*, 409 U.S. 1003 (1972) (controlled growth development plan upheld).

52. See *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971). See generally *Wengut*, *supra* note 32.

53. See *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975).

54. The Court is especially concerned with the protection of civil liberties when a racial question is involved. See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (discrimination illegal in the sale or rental of property); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (private discrimination in sale of housing impermissible); *Barrows v. Jackson*, 346 U.S. 249 (1953) (no recovery for breach of racially restrictive covenants); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (racially restrictive covenants unenforceable). See also *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Hunter v. Erickson*, 393 U.S. 385 (1969).

If apparently legitimate land use planning objections result in the exclusion of minorities, the result is less clear. See *McDermott v. Village of Calverton Park*, 447 S.W.2d 837 (Mo. Ct. App.



velopment limitations are likely to withstand legal challenges if they are of limited duration.<sup>55</sup> Improper exclusionary motivations will rebut the presumption of validity, however, and thus impose a real limitation on municipal regulations.<sup>56</sup>

Municipalities may regulate widely if they remain within their comprehensive plan.<sup>57</sup> For example, in *Golden v. Planning Board of Ramapo*<sup>58</sup> the New York Court of Appeals considered a growth control plan that required development in one area before permitting expansion in another.<sup>59</sup> Despite arguments that the legislation resulted in a fifth amendment taking and was exclusionary, the court upheld the plan on the assumption that development in the restricted area would occur in the future.<sup>60</sup>

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1969), *rev'd*, 454 S.W.2d 577 (Mo. 1979) (one-use zoning ordinance permissible in some situations). *But see* *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975) (ordinance prohibiting construction of new multi-family units had discriminatory effect and therefore impermissible); *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975) (zoning plan with no provision for multi-family housing invalidated).

If an ordinance is patently exclusionary, it is invalid. In *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965), the court said:

The question posed is whether the township can stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live. We have concluded not. A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities can not be held valid. Of course, we do not mean to imply that a governmental body may not utilize its zoning power in order to insure that the municipal services which the community requires are provided in an orderly and rational manner.

. . . It is clear, however, that the general welfare is not fostered or promoted by a zoning ordinance designed to be exclusive and exclusionary.

*Id.* at 532-33, 215 A.2d at 612.

55. Building moratoria include temporary halts on the issuance of building permits, rezoning requests, and water and sewer connections. Development limitations refer to limits on the number of permits issued. *See generally* Ellickson, *supra* note 47; Note, *supra* note 28.

56. *See Steel Hill Dev., Inc. v. Town of Sanbornton*, 469 F.2d 956 (1st Cir. 1972). The court upheld a rezoning to six acre lot minimums despite its "serious worries whether the basic motivation of the town meeting was not simply to keep outsiders . . . out of the town . . . . Were we to adjudicate this as a restriction for all time . . . we might well come to a different conclusion." *Id.* at 962.

57. For example, a limit on the number of dwelling units permitted in Boca Raton was upheld. *See Arvida Corp. v. City of Boca Raton*, 59 F.R.D. 316 (S.D. Fla. 1973).

58. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *cert. denied*, 409 U.S. 1003 (1972).

59. For a discussion of the Ramapo plan see Note, *supra* note 27; Note, *supra* note 28.

60. 30 N.Y.2d 359, 373 n.7, 285 N.E.2d 291, 298 n.7, 334 N.Y.S.2d 138, 148 n.7 (1972), *cert. denied*, 409 U.S. 1003 (1972). The court noted that the Ramapo plan was a permissible first step. Finding no exclusionary intent, the court stated that "the present amendments merely seek, by the implementation of sequential development and timed growth, to provide a balanced cohesive

### C. *Early Condominium Legislation*

Condominiums, like any form of property ownership or land use, are subject to municipal and state regulation. Thus, all fifty states and the District of Columbia enacted some type of condominium ownership law.<sup>61</sup> Early regulation dealt with establishment of condominiums, content of the instruments creating condominiums, and disclosure of information to purchasers.<sup>62</sup> These first-generation statutes addressed needs of developers, but few of them contained consumer protection provisions.<sup>63</sup>

Condominium development increased significantly in the late 1960s and 1970s,<sup>64</sup> partially as a result of condominium enabling statutes.<sup>65</sup> Consequently, states amended their condominium statutes to ensure adequate disclosure to purchasers and to regulate the increased levels of condominium development.<sup>66</sup> The Uniform Condominium Act typ-

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community dedicated to the efficient utilization of land." *Id.* at 378, 285 N.E.2d at 302, 334 N.Y.S.2d at 152.

61. See 1975 HUD STUDY, *supra* note 1, at VI-3. For example, see ARIZ. REV. STAT. ANN. §§ 33.551-.556 (1974); ARK. STAT. ANN. § 50-1001 (1971); KAN. STAT. ANN. §§ 58-3102, -3111, -3115 (1976); KY. REV. STAT. ANN. § 381.805-.990 (Baldwin 1979); MASS. ANN. LAWS, ch. 183A, § 1 (Michie/Law. Co-op 1977); MINN. STAT. ANN. § 515.02-.26 (West Supp. 1977); MO. ANN. STAT. § 448.010-.050 (Vernon Supp. 1981); N.M. STAT. ANN. §§ 47-7-1 to -7-28 (Supp. 1980); S.C. CODE §§ 27-31-10 to -31-300 (1977); TENN. CODE ANN. § 64-2702 (Supp. 1980). These and other states modeled their condominium statutes after those of Puerto Rico, which was the first American jurisdiction to enact condominium legislation. P.R. LAWS ANN. tit. 31, § 1291 (Supp. 1973).

62. For a discussion of first generation condominium statutes, see Schreiber, *The Lateral Housing Development: Condominium or Home Owners Association?*, 117 U. PA. L. REV. 1104 (1969). See also 1A P. ROHAN & A. RESKIN, CONDOMINIUM LAW & PRACTICE app-9 (1980).

63. One commentator noted that:

[T]he major burdens of . . . [a condominium] statute are threefold: (1) to provide a procedure for the establishment and dissolution of a condominium and to secure a uniform pattern of legal documentation; (2) to accommodate existing legislation dealing with taxation, recording procedures, liens, land-use control, and security regulatory techniques to the special needs of the condominium; and (3) to anticipate possible judicial antagonism involving such matters as bars on partition and covenants real.

Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987, 1003 (1963). See generally Welfeld, *The Condominium and Median-Income Housing*, 31 FORDHAM L. REV. 457 (1963); Comment, *Community Apartments: Condominium or Stock Cooperative*, 50 CALIF. L. REV. 299 (1962).

Moreover, the Uniform Condominium Act was designed to "facilitate the creation of condominiums which will function properly over time." See Judy & Wittie, *Uniform Condominium Act; Selected Key Issues*, 13 REAL PROP. PROB. & TR. J. 437 (1978).

64. See notes 3-4 *supra* and accompanying text.

65. See notes 6-7 *supra* and accompanying text.

66. Many states recognized the need to amend their original statutes by adding stricter disclosure requirements and certain warranties. See, e.g., FLA. STAT. ANN. § 718.101-.508 (West Supp.

ifies these amendments by outlining condominium creation, management, and regulation, and by including disclosure requirements.<sup>67</sup>

Condominium statutes and ordinances nationally contain similar or identical provisions.<sup>68</sup> Every jurisdiction requires a declaration or master deed,<sup>69</sup> establishment of unit owner associations,<sup>70</sup> financial record keeping,<sup>71</sup> basic operational procedures for building owners,<sup>72</sup> and collective decision making on issues affecting the common areas.<sup>73</sup> States take varying approaches, however, when dealing with condo-

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1978); OHIO REV. CODE ANN. § 5311.01-.09, .11, .13, .18, .21, .27 (Page Supp. 1978); VA. CODE § 55-79.39 to .103 (Supp. 1978). There are presently four basic types of condominium statutes: (1) statutes or enabling acts that provide for creation and termination of the condominium, management of the property, and consumer protection requirements; (2) statutes that impose registration and disclosure requirements; (3) statutes that vest local planning agencies with authority to regulate subdivisions; and (4) securities statutes that apply to offerings of condominium units as investments. See 1975 HUD STUDY, *supra* note 1, at VI-5.

67. The Uniform Condominium Act contains five sections: (1) general provisions, definitions, applicability; (2) creation, alteration, and termination of condominiums; (3) management; (4) protection of the purchaser; and (5) administration and regulation. The Uniform Condominium Act was originally part of the Uniform Land Transactions Act, but was undertaken separately in 1975. See Jackson & Colgan, *The Uniform Condominium Act from a Local Government Perspective*, 10 URB. LAW. 429 (1978); Judy & Wittie, *supra* note 63, at 437; Rohan, *supra* note 1.

68. See note 61 *supra* and accompanying text.

69. See, e.g., ARIZ. REV. STAT. ANN. § 33.553-.554, .561 (1973); FLA. STAT. ANN. § 718.104, .105, .112, .504 (West Supp. 1981); HAWAII REV. STAT. §§ 514A-11, -12, -17, -31, -32, -81 (Supp. 1979); ILL. ANN. STAT. ch. 30, §§ 303, 304, 305, 317, 318 (Smith-Hurd 1972); MD. ANN. CODE art. 21, §§ 11-102, -108, -109 (1975); MASS. ANN. LAWS ch. 183A, §§ 8, 9, 11, 12 (Michie/Law Co-op Supp. 1973); N.Y. REAL PROP. LAW §§ 339-i, -n, -p, -u (McKinney Supp. 1980); P.R. LAWS ANN. tit. 31, §§ 1291-1293 (Supp. 1973); VA. CODE ANN. § 55-79.54, .58, .85, .88 (1974).

70. See, e.g., ARIZ. REV. STAT. ANN. § 33.553-.554, .561 (Supp. 1973); FLA. STAT. ANN. § 718.104, .105, .112 (West Supp. 1981); HAWAII REV. STAT. §§ 514A-11, -12, -17, -31, -32, -81 (Supp. 1979); ILL. ANN. STAT. ch. 30, §§ 304, 318 (Smith-Hurd 1972); MD. ANN. CODE art. 21, §§ 11-103, -104, -105 (as amended 1975); MASS. ANN. LAWS ch. 183A, §§ 8, 9, 10, 11, 12 (Michie/Law Co-op Supp. 1973); N.Y. REAL PROP. LAW §§ 339-i, -n (McKinney Supp. 1980); P.R. LAWS ANN. tit. 31 §§ 1292, 1293 (Supp. 1973); VA. CODE ANN. § 55-79.54, .58, -73 (1974).

71. See, e.g., FLA. STAT. ANN. § 718.111(7) (West Supp. 1973); HAWAII REV. STAT. § 514A-85 (Supp. 1979); ILL. ANN. STAT. ch. 30, § 319 (Smith-Hurd 1972); MD. ANN. CODE art. 21, § 11-113 (1975); MASS. ANN. LAWS ch. 183A, § 10 (Michie/Law Co-op Supp. 1973); N.Y. REAL PROP. LAW § 339-w (McKinney Supp. 1980); P.R. LAWS ANN. tit. 31, § 1293b (Supp. 1973).

72. See, e.g., FLA. STAT. ANN. § 718.111 (West Supp. 1978); ILL. ANN. STAT. ch. 30, § 318.1 (Smith-Hurd 1972); MASS. ANN. LAWS ch. 183A, §§ 8, 10, 11, 12 (Michie/Law Co-op Supp. 1973); N.Y. REAL PROP. LAW § 339-v (McKinney Supp. 1980); VA. CODE ANN. § 55-79.73 (1974).

73. See, e.g., FLA. STAT. ANN. § 718.112, .117, .118 (West Supp. 1978); HAWAII REV. STAT. §§ 514A-21, -82 (Supp. 1979); ILL. ANN. STAT. ch. 30, § 315, (Smith-Hurd 1972); MD. ANN. CODE art. 21, § 11-121 (1975); MASS. ANN. LAWS ch. 183A, §§ 17, 19 (Michie/Law Co-op Supp. 1973); N.Y. REAL PROP. LAW §§ 339-i, -t, -cc (McKinney Supp. 1980); P.R. LAWS ANN. tit. 31, §§ 1291n, 1292f, 1293i (Supp. 1973); VA. CODE ANN. § 55-79.71, .77 (1974).

minium consumer protection.<sup>74</sup>

Condominium statutes adequately protected condominium owners and purchasers, but could not handle the conversion problems that appeared in the late 1970s as a result of the increase in conversion of rental units to condominiums.<sup>75</sup> Shortages of rental housing grew worse as the increase in conversions resulted in the removal of more units from the marketplace.<sup>76</sup> The diminished supply also caused price increases that further reduced the ability of some to obtain rental housing.<sup>77</sup> These factors induced municipalities to promulgate new regulations that focused directly on controlling the conversion process.

## II. CURRENT CONDOMINIUM REGULATION

Land use law provides the foundation for condominium conversion controls. Municipalities employ growth control techniques to regulate conversions. Although only a few state statutes provide for the protection of tenants in the conversion process, most statutes provide for local responses to unacceptable levels of conversion.<sup>78</sup> These responses are divisible into two categories—moratoria and tenant protections.

### A. *Moratoria*

Most municipalities impose moratoria to control growth by temporarily preventing utility hook-ups, building permits, and rezoning requests.<sup>79</sup> These devices usually survive a constitutional challenge because they are viewed as interim measures<sup>80</sup> or as responses to a tem-

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74. See, e.g., FLA. STAT. ANN. § 718.201, .203, .503, .504, .506 (West Supp. 1981); HAWAII REV. STAT. §§ 514A-18, -46, -64, -67, -69 (Supp. 1979); ILL. ANN. STAT. ch. 30, § 322 (Smith-Hurd 1972); MD. ANN. CODE art. 21, §§ 11-118, -124 (1975); MASS. ANN. LAWS ch. 183A, § 13 (Michie/Law Co-op Supp. 1973); N.Y. REAL PROP. LAW § 339-r (McKinney Supp. 1980); P.R. LAWS ANN. tit. 31 §§ 1291b, 1291c, 1291d, 1291g (Supp. 1973); VA. CODE ANN. § 55-79.46, .67, .79, .88, .95, .103 (1974).

75. A small number of states have enacted legislation that deals with local control of condominiums. See 1977 Cal. Stats. ch. 923; 1978 Mich. Pub. Act 59; 1977 N.H. Laws ch. 488; Wis. STAT. § 703.27 (1979).

76. See notes 11 & 12 *supra* and accompanying text.

77. See note 10 *supra* and accompanying text.

78. Enabling acts and home rule provisions provide the necessary enabling legislation. See, e.g., statutes cited in note 75 *supra*.

79. See generally Ellickson, *supra* note 47; Note, *supra* note 28, at 110.

80. See, e.g., State v. Superior Court, 12 Cal. 3d 237, 524 P.2d 1281, 115 Cal. Rptr. 497 (1974); Monmouth Lumber Co. v. Ocean Township, 9 N.J. 64, 87 A.2d 9 (1952); Walworth Co. v. City of Elkhorn, 27 Wis. 2d 30, 133 N.W.2d 257 (1975).

porary insufficiency of municipal services.<sup>81</sup> Some municipalities employ moratoria as a stopgap while considering more comprehensive and permanent regulation.<sup>82</sup> Other municipalities prohibit conversions unless the rental stock exceeds a legislatively determined percentage.<sup>83</sup> A few municipalities approach conversion on a case-by-case basis by allowing a planning commission to decide which buildings may convert.<sup>84</sup> These methods, in many instances, can amount to a ban on conversion.<sup>85</sup>

The approach of Montgomery County, Maryland is typical of the first type of moratorium. In July 1979 the county council declared a public emergency in the rental housing market.<sup>86</sup> This situation justified the imposition of a 120-day moratorium on conversions.<sup>87</sup> The county council then introduced follow-up legislation in September 1979.<sup>88</sup> This legislation requires the developer to give written notice of intent to convert to representative tenant organizations and to the county itself.<sup>89</sup> The developer must then provide a 120-day right of first refusal to the tenant organization.<sup>90</sup>

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81. *See, e.g.*, *Builders Ass'n v. Superior Court*, 13 Cal. 3d 225, 529 P.2d 582, 118 Cal. Rptr. 158 (1974); *Morshead v. California Regional Water Quality Control Bd.*, 45 Cal. App. 3d 442, 119 Cal. Rptr. 586 (1975).

82. *See, e.g.*, D.C. Act 3-95, 26 D.C. Reg. No. 9, p. 1014 (Aug. 27, 1979); Seattle Ord. No. 107500 (July 18, 1978). The City of Seattle enacted permanent tenant protections in October 1978. SEATTLE MUNICIPAL CODE § 22.902.130 (Oct. 4, 1978). *See also* 126 CONG. REC. S2003 (daily ed. Feb. 28, 1980) (remarks of Sen. Williams).

83. MARIN COUNTY CODE tit. 20, § 20.72 (1979). *See also* LA MESA MUNICIPAL CODE § 22.04.080, Ord. No. 2158 (Sept. 15, 1978) (allowing half of the average number of apartments constructed in the previous two years to convert); CODE OF PALO ALTO ch. 22.04 (1979) (conversion prohibited if vacancy rate is below three percent). In addition, Palo Alto currently prohibits conversion unless two-thirds of the tenants consent and the developer offers all the tenants a lifetime lease. Palo Alto Ord. No. 3251 (Nov. 24, 1980); Palo Alto Ord. No. 3246 (Oct. 27, 1980).

84. *See, e.g.*, City of Belmont Ord. No. 609, § 15.6(a) (Aug., 1977) (city council may deny approval if conversion "would be detrimental to the supply of alternative types of housing within the City of Belmont and . . . would tend to create a shortage of a particular housing type within the community"). *See also* CONCORD MUNICIPAL CODE ch. 4(7), § 4478(c) (1978) (approval granted for conversion only if it "will not have an adverse effect on the diversity of housing types available in the City").

85. For example, South Lake Tahoe, California, currently restricts conversions until a prohibition on the construction of multiple family housing within the city is repealed. City of South Lake Tahoe Ord. No. 540 (Aug. 21, 1979).

86. MONTGOMERY COUNTY CODE § 11A-10(a) (Supp. 1980).

87. *Id.* § 11A-10(b).

88. *Id.* § 11A-5C.

89. *Id.* § 11A-5C(c).

90. *Id.* § 53A.

Condominium developers challenged these ordinances in *Apartment & Office Building Ass'n v. Montgomery County, Maryland*.<sup>91</sup> The circuit court for Montgomery County upheld the moratorium as an enlargement of state law and found the declaration of emergency unreviewable.<sup>92</sup> The court further held that the right of first refusal violated no constitutionally protected rights.<sup>93</sup>

South Lake Tahoe, California enacted an outright prohibition in August 1979.<sup>94</sup> A California Regional Planning Agency prohibition on construction of new multi-family housing intensified an already severe housing shortage. The city declared that the conversion of rental apartments would exacerbate this condition as well as substantially increase the cost of housing.<sup>95</sup> The city, based on these findings, created the open-ended moratorium, effective until the repeal of Regional Planning Agency prohibition.<sup>96</sup>

### B. *Tenant Protections*

States and municipalities also promulgated regulations that protect tenants' rights in conversions. These regulations basically consist of notice requirements,<sup>97</sup> purchase rights,<sup>98</sup> relocation assistance,<sup>99</sup> evic-

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91. Eq. No. 68354 (Cir. Ct. Md., filed Dec. 6, 1979), *aff'd in part and rev'd in part sub nom.* Rockville Grosvenor, Inc. v. Montgomery County, No. 146 (Md., filed Nov. 13, 1980).

92. *Id.*, slip op. at 2. *But see* District of Columbia v. The Washington Home Ownership Council, Inc., 415 A.2d 1349 (D.C. 1980). The D.C. Court of Appeals enjoined enforcement of the D.C. Emergency Condominium and Cooperative Conversion Stabilization Act of 1979, which reimposed a 90-day limit on the conversion of rental projects. The court held that the city was authorized to respond to emergency situations, but could not continue the legislation for the same emergency. *See* note 123 *infra*.

93. Eq. No. 68354, slip op. at 3 (Cir. Ct. Md., filed Dec. 6, 1979), *aff'd in part and rev'd in part sub nom.* Rockville Grosvenor, Inc. v. Montgomery County, No. 146 (Md., filed Nov. 13, 1980).

94. *See* City of South Lake Tahoe Ord. No. 540 (Aug. 21, 1979).

95. *Id.* § 1(3).

96. *See* note 85 *supra* and accompanying text.

97. *See, e.g.*, D.C. Law 3-204, § 203(a) (June 27, 1980), 27 D.C. Reg. No. 28, p. 2975 (July 11, 1980) (to be codified at D.C. CODE tit. 45, ch. 16(a) (Supp. 1980)) (notice to convert); FLA. STAT. ANN. § 718.402 (West Supp. 1981) (early termination of lease unenforceable); MD. ANN. CODE art. 21, § 11-102.1(A) (1975) (180 day notice to convert); VA. CODE ANN. § 55-79.94 (1974) (120 day notice to convert).

98. *See* D.C. Law 3-204, §§ 402-403 (June 27, 1980), 27 D.C. Reg. No. 28, p. 2975 (July 11, 1980) (to be codified at D.C. CODE tit. 45, ch. 16(a) (Supp. 1980)); LOS ANGELES MUNICIPAL CODE § 12.5.2(E)(3), Ord. No. 153024 (Oct. 4, 1979).

99. *See, e.g.*, D.C. Law 3-204, §§ 302-303 (June 27, 1980), 27 D.C. Reg. No. 28, p. 2975 (July 11, 1980) (to be codified at D.C. CODE tit. 45, ch. 16(a) (Supp. 1980)) (provides assistance to eligible displaced tenants); SUBDIVISION CODE OF THE CITY AND COUNTY OF SAN FRANCISCO art. 9, § 1393 (1975) (as amended) (developer must provide relocation services to low-income tenants).

tion limitations,<sup>100</sup> and tenant approval.<sup>101</sup> Most states include a notice of conversion in their condominium legislation, usually ranging from ninety to 120 days.<sup>102</sup> A few municipalities extend the period in recognition of the greater difficulties of the elderly and handicapped.<sup>103</sup>

Some municipalities recently granted tenants a right of first refusal in the conversion process.<sup>104</sup> These laws generally require developers to offer contracts of sale to the tenants on at least as favorable terms as other prospective purchasers would receive. By combining a right of first refusal with a specific eviction period limitation, the provision prevents the developer from selling to another purchaser at a lower price within that specified period.<sup>105</sup>

In many areas, relocation assistance constitutes an important source of tenant relief. Some municipalities provide advisory and information services,<sup>106</sup> and others compel the developer to pay a displaced tenant's moving expenses.<sup>107</sup> Thus, tenants who cannot afford to stay in their converted apartment receive assistance from the developer to find new housing. The Montgomery County, Maryland circuit court addressed this issue in *Rockville Grosvenor, Inc. v. Montgomery County*.<sup>108</sup> The court upheld an ordinance that required developers to reimburse tenants for moving expenses,<sup>109</sup> but invalidated regulations that provided

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100. See N.Y. GEN. BUS. LAW § 342(e) (McKinney 1978) (amended by S.B. 10486 prohibiting eviction proceedings in Westchester, Nassau, and Rockland Counties against tenants 62 years old and older).

101. See, e.g., SUBDIVISION CODE OF THE CITY AND COUNTY OF SAN FRANCISCO art. 9, § 1388 (1975) (as amended) (prohibited conversions on large buildings unless 40% of the tenants consent); N.Y. GEN. BUS. LAW § 352(e) (McKinney 1978) (although in effect only until 1977, required 35% of the tenants to agree to purchase).

102. See note 97 *supra* and accompanying text.

103. See, e.g., MUNICIPAL CODE OF CHICAGO ch. 100.2 § 100.2-6 (1978); CODE OF THE VILLAGE OF OAK PARK § 24. 7/8 .7(C) (1978).

104. For example, Glendale, California requires that "the present tenant or tenants of any unit to be converted shall be given such exclusive right to contract to purchase the unit occupied as provided by state law." GLENDALE MUNICIPAL CODE art. XI, § 28-1104, Ord. No. 4427 (Dec. 19, 1978). See S.B. 1645, Sept. 25, 1980, California State Senate for applicable state law.

105. See note 98 *supra*.

106. See note 99 *supra*.

107. See, e.g., N.J. ANN. CODE ch. 31, § 8 (1975); ALAMEDA MUNICIPAL CODE § 11-14D3(e) (1980); SEATTLE ORD. NO. 107707, § 3.9 (OCT. 4, 1978); WALNUT CREEK MUNICIPAL CODE § 10-1.704.6 (1978).

108. Eq. No. 68230 (Cir. Ct. Md., filed Aug. 23, 1979), *aff'd in part and rev'd in part*, No. 146 (Md., filed Nov. 13, 1980).

109. "The exercise of the police power to require payments into funds to carry out valid public purposes involved with the public welfare, have been sustained in a long history of this State, . . ." *Id.*, slip op. at 11. See also *Westchester West II Ltd. Partnership v. Montgomery County*,

for automatic allowances up to \$750.<sup>110</sup>

Municipalities also may grant statutory tenancies to certain tenants. Elderly or handicapped tenants thus gain a life tenancy in their apartment even as the rest of the building is converted to condominiums.<sup>111</sup> Other eviction limitations prohibit the eviction of tenants prior to the termination of their leases.<sup>112</sup> This provides tenants with a temporary delay while the conversion process proceeds because developers cannot bring eviction proceedings.<sup>113</sup>

Finally, a few municipalities establish regulations that require tenant approval before approving a conversion application. In San Francisco forty percent of the existing tenants must consent before the city will approve a conversion.<sup>114</sup> Palo Alto, California<sup>115</sup> combines tenant approval with vacancy rates by requiring two-thirds tenant approval if the vacancy rate falls below a fixed percentage.<sup>116</sup>

In 1974 New York's Goodman-Dearie law<sup>117</sup> combined some of these techniques.<sup>118</sup> This statewide conversion law required thirty-five percent of the tenants to agree to purchase their apartments,<sup>119</sup> provided for a two year prohibition on evictions during the conversion,<sup>120</sup>

276 Md. 448, 348 A.2d 856 (1975); *Bowie Inn v. City of Bowie*, 274 Md. 230, 335 A.2d 679 (1975); *Salisbury Beauty Schools v. State Bd.*, 268 Md. 32, 300 A.2d 367 (1973).

110. It seems to me that what was expressed here calls for an indemnification payment upon the establishment of the cost having been incurred or to be incurred, and with respect to or in relationship to some criteria for determining a person to be in need of financial assistance.

These regulations seem to establish a different rule not in harmony with the legislative history of the enactment, in keeping with its apparent purpose or making it available to those intended to be benefited by the statute, and not otherwise.

*Rockville Grosvenor, Inc. v. Montgomery County*, Eq. No. 68230, slip op. at 17 (Cir. Ct. Md., filed Aug. 23, 1979).

111. *See* note 100 *supra*.

112. *See* BYLAWS OF THE TOWN OF BROOKLINE art. XXXVIII, ¶¶ 8, 9(a) (1978).

113. *See* *Chan v. Town of Brookline*, 484 F. Supp. 1283 (D. Mass. 1980) (town amendment permitted tenants to stay in possession; court denied developers preliminary injunction because of potential hardship to tenants).

114. *See* note 101 *supra*.

115. CODE OF PALO ALTO ch. 22, § 22.04.050(a) (1979).

116. *See* 1979 *Hearings*, *supra* note 4, at 161.

117. Law of June 15, 1974, ch. 1021, §§ 2-3, 1974 N.Y. Laws 2626 (expired 1976).

118. At least one New York Court upheld these requirements. In *People v. Lexington Sixty-First Assocs.*, 38 N.Y.2d 588, 345 N.E.2d 307, 381 N.Y.S.2d 836 (1976), the court found that the 35% tenant approval requirements had been met fraudulently and overturned a trial court determination that tenants who had made arrangements to leave their apartments could not come back.

119. Law of June 15, 1974, ch. 1021, § 2-a.1(i), 1974 N.Y. Laws 2626 (expired 1976).

120. *Id.* § 2-a.1(iii) (expired 1976).



and granted a fifteen day period for tenants to voice their objections to the conversion.<sup>121</sup> The New York legislature allowed this law to expire in 1976.<sup>122</sup>

The District of Columbia enacted a moratorium<sup>123</sup> in 1979 to provide time for the city council to propose an answer to the conversion problem. The 1977 Act had permitted conversion notwithstanding the vacancy rate if a majority of tenants signed a written agreement consenting to the conversion.<sup>124</sup> In 1980 the city council amended the 1977 Act by imposing even more stringent notice and tenant approval requirements.<sup>125</sup>

### III. CHALLENGES TO CONDOMINIUM CONVERSION CONTROLS

Legal challenges to condominium conversion controls will determine the shape of future regulations. As the conversion process spreads, municipalities will respond with more regulations.<sup>126</sup> The nature of these regulations will depend on the needs of a particular area. In all cases, however, states and municipalities will have to fashion legislation according to basic constitutional and statutory requirements.

As with zoning and growth control regulations, courts will test conversion regulations on a case-by-case basis.<sup>127</sup> The major concerns with temporary moratoria are their duration and their relationship to a legitimate purpose.<sup>128</sup> When moratoria approach outright bans, courts

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121. *Id.* § 2-a, 2 (expired 1976).

122. *Id.* § 2 (expired 1976).

123. Condominium and Cooperative Conversion Stabilization Emergency Act of 1979, D.C. Act 3-95, 26 D.C. Reg. No. 9, p. 1014 (Aug. 27, 1979). This moratorium remained in effect for three months. The city council then enacted emergency legislation to extend this moratorium. D.C. Act 3-248, 27 D.C. Reg. No. 37, p. 3954 (Feb. 26, 1980), D.C. Act 3-132, 26 D.C. Reg. No. 22, p. 2436 (Nov. 23, 1979). *See* note 92 *supra*.

124. D.C. CODE § 5-1281(b) (Supp. 1979). The Act generally provided that if a building was not in a "high rent" area and the vacancy rate was less than 3%, the developer had to persuade at least half of the tenants to consent to the conversion. The Act required notice of conversion, *id.* § 5-1268(b)(1), a right of first refusal, *id.* § 5-1268(b)(2), and relocation assistance, *id.* § 5-1291.

125. D.C. Law 3-204 (June 27, 1980), D.C. Reg. No. 28, p. 2975 (July 11, 1980) (to be codified D.C. CODE tit. 45, ch. 16(a) (Supp. 1980)). The new Act also creates statutory tenancies for low-income elderly tenants. *Id.* § 208. *See also* notes 97-99 *supra*.

126. *See* note 4 *supra* and accompanying text.

127. *See* notes 34-35 *supra* and accompanying text.

128. *See, e.g., Builders' Ass'n v. Superior Court*, 13 Cal. 3d 225, 529 P.2d 582, 118 Cal. Rptr. 158 (1974); *State v. Superior Court*, 12 Cal. 3d 237, 524 P.2d 1281, 115 Cal. Rptr. 497 (1974); *Morshead v. California Regional Water Control Bd.*, 45 Cal. App. 3d 442, 119 Cal. Rptr. 586 (1975); *Monmouth Lumber Co. v. Ocean Township*, 9 N.J. 64, 87 A.2d 9 (1952); *Walworth County v. City of Elkhorn*, 27 Wis. 2d 30, 133 N.W.2d 257 (1965).

will determine the success of the regulations individually.<sup>129</sup> Although there are no strict lines of demarcation,<sup>130</sup> land use regulations are not a taking if there is a relation to a stated goal.<sup>131</sup>

Tenant protections such as notice requirements<sup>132</sup> and the right of first refusal<sup>133</sup> should pose few problems.<sup>134</sup> They are traditional means of regulating property transactions and benefit developers as well. Moreover, tenant protections do not significantly affect a property owner's interest.

Courts also must treat relocation assistance<sup>135</sup> and statutory tenancies<sup>136</sup> individually. Opponents challenge these devices on grounds similar to those presented in opposition to the more restrictive moratoria.<sup>137</sup> For example, the court in *Grace v. Town of Brookline*<sup>138</sup> reviewed eviction limitations and held that the restriction of property owners' rights was permissible when in the public interest.<sup>139</sup>

129. See, e.g., *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962) (no "set formula"); *United States v. Caltex*, 344 U.S. 149, 156 (1952) (no "rigid rules").

130. Regulation of the use of land is not a taking if there is a relation to a legitimate purpose. See, e.g., *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390-91 (1926); *Maher v. City of New Orleans*, 516 F.2d 1051, 1066 (5th Cir. 1975), cert. denied, 426 U.S. 905 (1976). See generally *Sax, Takings and the Police Power*, 74 *YALE L.J.* 36, 50 (1964).

131. Challenges to rent control statutes are analogous situations. In *Apartment & Office Bldg. Ass'n v. Washington*, 381 A.2d 588 (D.C. Ct. App. 1977), the court held that rent controls were not a taking despite a deferred rate of return because the legislature determined that an emergency existed and because the owner retained a reasonable use of the property. See generally *F. BOSSELMAN, D. CALLIES & J. BANTA, supra* note 33; *Wengut, supra* note 32.

132. For example, a New Jersey court upheld the spirit of eviction protections in *Fishman v. Pollack*, 165 N.J. Super. 235, 397 A.2d 1144 (1979). Condominium purchasers tried to circumvent eviction protections by invoking an owner-occupier exception to the regulations. The court held that the exceptions could not apply to condominium conversion situations because to do so would defeat the purpose of the protections. See also note 97 *supra* and accompanying text.

133. See note 98 *supra* and accompanying text.

134. See note 99 *supra* and accompanying text.

135. See notes 99-100 *supra* and accompanying text.

136. See note 100 *supra* and accompanying text.

137. See note 51 *supra* and accompanying text.

138. 399 N.E.2d 1038 (Mass. 1979).

139. The Town of Brookline prohibited developers from evicting tenants who refused to vacate converted buildings voluntarily, but provided that the condominium purchaser could bring an eviction proceeding. These provisions effectively slowed the pace of conversion. The Massachusetts Supreme Judicial Court held this was not a taking:

In a strict sense, the amendments do effect a transfer of rights incident to ownership: the tenant in possession at the time of conversion is permitted to remain in possession even though the owner seeks recovery for his own personal use. In our view, however, this

The basis for the taking challenge is the effect of a regulation on landlords' use of property.<sup>140</sup> Regulations that require tenant approval of the conversion process are thus potentially less likely to succeed. Municipalities often invoke the police power, however, to cope with tight rental housing markets, so even these more restrictive regulations are arguably permissible if related to the general welfare.<sup>141</sup> Further, because courts do not find a taking when a regulation simply deprives an owner of the most profitable use of the property, a mere diminution in value will not of itself invalidate conversion regulations.<sup>142</sup>

Equal protection analysis of condominium conversion regulations generally fails to result in invalidation. Equal protection challenges to land use regulations traditionally focus on exclusionary effects.<sup>143</sup> Thus, municipalities can safely legislate to protect displaced tenants faced with the conversion process in areas where replacement housing is difficult to find.<sup>144</sup>

Municipalities must avoid discriminating against condominiums as a form of ownership. Instead, municipalities should focus on the use to which the property is put<sup>145</sup> because courts will uphold legitimate land use classifications.<sup>146</sup> Condominium conversion regulations single out

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redistribution of rights is not unlike the redistribution of rights effected by rent and eviction control generally.

*Id.* at 1045.

140. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. A taking is established if the land use regulation is so arbitrary and unreasonable that a private owner is not compensated for a public use. *See* F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 33; Wengut, *supra* note 32.

141. *See, e.g.*, *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922); *Stoneridge Apartments Co. v. Lindsay*, 303 F. Supp. 677 (S.D.N.Y. 1969); *Israel v. City Rent & Rehab. Admin.*, 285 F. Supp. 908 (S.D.N.Y. 1968); *Inganamort v. Borough of Fort Lee*, 62 N.J. 521, 303 A.2d 298 (1973).

142. *See, e.g.*, *Goldblatt v. Hempstead*, 309 U.S. 590 (1961); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922); *Block v. Hirsh*, 256 U.S. 135 (1921); *Walls v. Midland Cannon Co.*, 254 U.S. 300 (1920); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Reinman v. Little Rock*, 237 U.S. 171 (1915); *Mugler v. Kansas*, 123 U.S. 623 (1887); *Finn v. 415 Fifth Ave. Co.*, 153 F.2d 501 (2d Cir.), *cert. denied*, 328 U.S. 839 (1946).

143. *See* note 54 *supra* and accompanying text.

144. Exclusionary effects of condominium conversion regulation are minimal. Indeed, the regulations are aimed at preventing exclusion of tenants who cannot afford to purchase their apartments. A right to travel challenge will therefore have little success.

145. *See, e.g.*, *Maplewood Village Tenants Ass'n v. Maplewood Village*, 116 N.J. Super. 372, 282 A.2d 428 (1971); *Bridge Park Co. v. Borough of Highland Park*, 113 N.J. Super. 219, 273 A.2d 397 (1971); *Kaufman & Broad, Inc. v. Board of Supervisors*, 20 Pa. Commw. Ct. 116, 340 A.2d 909 (1975). *See generally* Rohan, *supra* note 1.

146. *See* *Norsco Enterprises v. City of Fremont*, 54 Cal. App. 3d 488, 126 Cal. Rptr. 659

developers or owners who wish to convert their property to condominiums; thus, the regulatory classification must have a legitimate basis to remain valid.<sup>147</sup>

*Goldman v. Town of Dennis*<sup>148</sup> tests this argument. The Town of Dennis prohibited the conversion of any nonconforming cottage colony to condominium ownership unless the lot met certain zoning requirements.<sup>149</sup> The court held that the prohibition was a valid land use regulation because conversion to condominiums would result in use of the property for more than just the summer season.<sup>150</sup>

All municipal regulations are vulnerable to a challenge on grounds that the municipality exceeded its statutory authority. Condominium conversion regulations generally require an explicit declaration of the emergency that compels action.<sup>151</sup> Of course, state law must not preempt the regulations. In *Zussman v. Rent Control Board of Brookline*,<sup>152</sup> for example, the Massachusetts Supreme Court held that a state statute encouraging home ownership in the form of condominiums preempted the Rent Control Board's conversion application denial.<sup>153</sup> Thus, local regulations cannot attempt to regulate in an area already regulated by state statute unless the local regulation is simply an enlargement of the state statute pursuant to state enabling legislation or

(1976). The City of Fremont levied fees instead of requiring a land dedication for recreational purposes against an owner-converter. The court held that because condominiums represented special land use problems the levy of fees for condominium conversion was justified. *See also* *Grace v. Town of Brookline*, 399 N.E.2d 1038 (Mass. 1979).

147. *See* *Rockville Grosvenor, Inc. v. Montgomery County*, Eq. No. 68230 (Cir. Ct. Md., filed Aug. 23, 1979), *aff'd in part and rev'd in part*, No. 146 (Md., filed Nov. 13, 1980). The court concluded that relocation payments did not arbitrarily discriminate against landlords seeking to convert because "[i]t is clear from the expressions in the legislation as to its purpose, and the objectives sought to be gained through the enactment, that this is an appropriate classification and there is no invidious discrimination in it." *Id.*, slip op. at 12.

148. 375 N.E.2d 1212 (Mass. 1978).

149. *Id.* at 1213.

150. *Id.* at 1214. The court stated that the town council could reasonably believe that conversion would encourage expansion of use beyond the summer season: "Although the limitation is phrased in terms of the type of ownership, we think it is valid as a regulation of a 'change of use.'" *Id.* *See also* *Town of Tuftonboro v. Lakeside Colony, Inc.*, 119 N.H. 445, 403 A.2d 410 (1979); *Maplewood Village Tenants Ass'n v. Maplewood Village*, 116 N.J. Super. 372, 282 A.2d 428 (1971).

151. *See* *Apartment & Office Bldg. Ass'n v. Montgomery County*, Eq. No. 68354 (Cir. Ct. Md., filed Dec. 6, 1979), *aff'd in part and rev'd in part sub nom. Rockville Grosvenor, Inc. v. Montgomery County*, No. 146 (Md., filed Nov. 13, 1980).

152. 367 Mass. 561, 326 N.E.2d 876 (1975).

153. *Id.*

home rule.<sup>154</sup>

Challengers of condominium conversion controls offer policy arguments as well. Some argue that municipalities can best prevent the adverse effects of condominium conversion by providing an adequate supply of alternative rental housing.<sup>155</sup> There is, however, little new construction, and this solution does not address the needs of those for whom moving in itself is a hardship. Others argue that conversion controls have a detrimental effect on the housing economy,<sup>156</sup> further discouraging the construction of new housing. These policy arguments, however, are unlikely to succeed against an overwhelming state and municipal power to legislate for the public health and welfare.<sup>157</sup>

Still other challengers claim that the best solution is for tenant organizations to opt for conversion themselves.<sup>158</sup> Although this may solve the problems of tenants in a particular building, it will not relieve low vacancy rate phenomena. Depletion of the rental stock will continue unabated and the cost of housing will continue to increase. This situation will justify continued regulation by municipalities.

Condominium conversion controls are a sound response to the crisis created by burgeoning condominium conversion and the shrinking housing market. As predominantly local regulators, municipalities can best evaluate their own housing needs and can tailor the regulations to fairly balance the interests of the public with those of private property owners. Municipalities, moreover, must ensure that their condominium regulations emanate from sound land use policies and sufficient authority. Because they address discrete public health and welfare concerns, condominium conversion regulations resist challenges on constitutional and policy grounds. Municipalities, therefore, should not

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154. See, e.g., *Dome Realty v. City of Patterson*, 83 N.J. 212, 416 A.2d 334 (1980).

155. One commentator noted that:

It is not constructive to attempt to freeze conversion at its present level; this will only serve to increase the demand among existing condominium units, possibly to dangerously superheated levels. The objective should be to provide an environment that encourages the development of housing: not to preserve the sanctity of the rental format of apartment occupancy.

1979 Hearings, *supra* note 4, at 283 (statement of Philip Kozloff).

156. See *Daily Journal of Commerce*, Seattle, Washington, Jan. 31, 1980, at 5, col. 3.

157. See notes 18-19 *supra* and accompanying text.

158. See 1979 Hearings, *supra* note 4, at 178-85.

hesitate to protect the public by enacting condominium conversion controls as needed.

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