THE CONDOMINIUM CRISIS: A PROBLEM UNRESOLVED

*CHRISTIAN C. DAY**
*MARK I. FOGEL***

I. INTRODUCTION

Condominium conversion became a major public issue during the 1970's.[1] As economic growth declined, the amount of new housing construction diminished, increasing the pressure for preserving low-

* Assistant Professor of Legal Studies, The Wharton School, University of Pennsylvania; B.A., Cornell University, 1967; J.D., New York University, 1970.

** B.A., Brandeis University, 1977; J.D., Washington University, 1981.

1. The increasing volume of studies, periodicals, and newspaper articles addressing condominium conversion, its roots and effects, demonstrates the growing public concern over this issue. Particularly toward the end of the 1970's, critical attacks by consumer advocates brought this issue to the forefront. *See* CITY OF LOS ANGELES, CALIFORNIA, RENT STABILIZATION STUDY (1979) [hereinafter cited as L.A. STUDY]; COMPREHENSIVE PLANNING ORG. OF SAN DIEGO REGION, RENT CONTROL AND CONDOMINIUM CONVERSION STUDY (1979) [hereinafter cited as SAN DIEGO STUDY]; METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS, CONDOMINIUM HOUSING: A NEW HOMEOWNERSHIP ALTERNATIVE FOR METROPOLITAN WASHINGTON (1976) [hereinafter cited as D.C. STUDY]; MONTGOMERY COUNTY, MARYLAND, REPORT OF THE TASK FORCE ON CONDOMINIUM CONVERSION (1979) [hereinafter cited as MONTGOMERY COUNTY STUDY]; PLANNING DEP'T, CITY OF PALO ALTO, CALIFORNIA, PALO ALTO CONDOMINIUM CONVERSION STUDY (1974) [hereinafter cited as PALO ALTO STUDY]; 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 (1975) [hereinafter cited as 1975 HUD STUDY]. *See also* Soloway, *Condos, Co-ops, and Conversions: A Guide on Rental Conversions for Local Officials*, STATE OF CALIFORNIA, OFFICE OF PLANNING AND RESEARCH (1979). For an overview of other publications concerning condominium conversion, see 1980 HUD STUDY, *supra*, ANNOTATED BIBLIOGRAPHY.

and moderate-income housing.[2] In 1970, there were an estimated 85,000 condominium units in the continental United States. By 1980, there were close to 60,000 converted units in the Chicago metropolitan area alone, with an incredible 32,000 units in the Lake Shore Drive neighborhood.[3] Numerous factors have caused this recent movement toward the condominium form of housing. Consequently, condominiums have had and continue to have a major impact upon the American housing market. In fact, many predict that condominiums will become the principal form of housing in the United States within twenty years.[4]

One important form of condominium development is the "condo conversion,"[5] involving the transformation of a rental building into a number of individually owned housing units. Each condominium purchaser becomes an owner of the apartment unit and a share of the common grounds.[6] Condominium purchasers have, therefore, all the legal advantages and disadvantages of real estate ownership.

The trend toward conversion has highlighted the existent problem of an inadequate supply of rental housing. Condominium conver-

2. *See, e.g.*, MONTGOMERY COUNTY STUDY, *supra* note 1, at 1 (noting that between 1974 and 1979 there was only one privately produced multi-family housing project built in the county); 2 1975 HUD STUDY, *supra* note 1, at I-11 (noting that multiple-family rental housing starts have decreased).

3. 1980 HUD STUDY, *supra* note 1, App. I at 62-63.

4. 125 CONG. REC. H7346-47 (daily ed. Sept. 5, 1979) (remarks of Rep. Rosenthal).

5. A condominium is a form of real estate ownership. In a condominium, the purchaser obtains a complete fee simple title in his or her living unit within a larger property (in the case of a conversion, in his or her building). In addition, the purchaser acquires an undivided fee simple interest in the common areas of the building, for example, the hallways, recreational facilities, parking areas, and the underlying land. Each unit owner is, therefore, a tenant-in-common with the other unit owners. *See* Rohan, *The "Model Condominium Code"—A Blueprint for Modernizing Condominium Legislation*, 78 COLUM. L. REV. 587, 587 n.3 (1978).

This article will not expressly deal with cooperative conversions. A cooperative also refers to building ownership by a non-profit corporation whose shareholders are its residents. The shareholder-residents are actually tenants who lease their apartments from the corporation. They purchase shares from the corporation which entitle them to live in their particular apartments and use the common areas and facilities of the building. They also pay a "rent," usually calculated on the basis of the size of their respective units, to maintain the building. Cooperatives differ from condominiums in that the corporation, not each individual unit owner, obtains a mortgage for the property. [1978 Reference File 2] HOUS. & DEV. REP. (BNA) 25:0011. *See also* 1980 HUD STUDY, *supra* note 1, at I-5-6.

6. *See* note 5 *supra*.

sions exacerbated this problem by consuming an increasingly substantial portion of that already limited market. Converters, both single-building owners and condominium developers, took existing multi-family rental units and altered them for individual apartment ownership. Although this conversion process resulted in renewed interest in the inner city, it also caused a problem: tenant displacement.[7] Many tenants, primarily the elderly and persons of low- and moderate-income, were unable or unwilling to purchase their apartments and suffered the hardships of unexpected relocation.[8] Problems multiplied during governmental ambivilance[9] as the dis-

7. Tenant displacement has been measured by the number of persons who do not purchase their apartments after conversion. The tenant displacement issue is hotly contested. Some question the significance of the high displacement rate.

A number of communities conducting studies of tenant displacement have found that over 60% of the tenants formerly residing in a converted apartment building did not purchase their units. *See* 1980 HUD STUDY, *supra* note 1, at IX-10-11. These statistics become important when the community has a rental housing vacancy rate of less than 5%. *See* text accompanying notes 43-45 *infra*. *See also Condominium Housing Issues: Hearings on S. 612 Before the Subcomm. on Banking, Housing, and Urban Affairs*, 96th Cong., 1st Sess. 48-53 (1979) (statement of Daniel Lauber).

8. *See, e.g.*, 125 CONG. REC. H7348 (daily ed. Sept. 5, 1979) (noting the elderly, the poor, and the young suffer the most adverse consequences from conversion); Ritter, *Condominium Conversions: A City Attorney's View*, 55 FLA. B.J. 94 (1981) (displacement of elderly and low-income tenants through condominium conversions has become a crisis in southern Florida because of the high retiree and Hispanic immigrant populations). *See also* MONTGOMERY COUNTY STUDY, *supra* note 1, at 47; Comment, *Conversion of Apartments to Condominiums and Cooperatives: Protecting Tenants in New York*, 8 U. MICH. J.L. REF. 705, 707-08 (1975).

9. Although conversions occurred throughout the 1970's, it was not until the latter part of the decade that cities and states began enacting conversion regulations. Before displacement problems became apparent, many cities solicited private restoration. The cities provided substantial tax benefits and sold abandoned buildings at deflated prices. As conversion pressures grew, they were reluctant to impair the rehabilitation efforts of private developers. Consequently, there was substantial government indecision regarding regulation of conversions. *See generally* Comment, *The Condominium Conversion Problem: Causes and Solutions*, 1980 DUKE L.J. 306.

The tension between the city's desire to encourage conversions and the need to protect its tenants is clearly exemplified in the conversion ordinance of Boston, Massachusetts, BOSTON, MASS. ORDINANCE CODE ch. 4 § 200 (1979), which provides:

Preamble:

Whereas, A serious emergency exists with respect to the housing of a substantial number of citizens of Boston; and

Whereas, The deterioration and demolition of existing housing and an insufficient supply of new housing have resulted in a substantial and critical shortage of safe, decent, and reasonably priced rental housing accommodations; and

Whereas, Home ownership creates an interest in real estate which tends to contribute to the maintenance and preservation of housing and to an increase in

placed had difficulties finding and affording suitable replacement housing.[10] Unregulated, the developments in condominium conversion compelled government action.

Government responses to condominium problems have occurred primarily at the state and local levels.[11] The main thrust of state con-

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real estate taxes which has a salutary effect on the City and its people, and the City Council should, therefore, encourage an increase in such ownership or at least should avoid discouraging it; and

Whereas, Individual ownership of multiple unit housing accommodations offers a number of advantages when compared to an unattached one-family house, not the least of which is a considerable saving in energy used for heating, and the City Council should, therefore, encourage an increase in such ownership or at least should avoid discouraging it; and

Whereas, At present in the City there is a great interest in and a significant amount of conversions of multiple unit rental housing occupied by tenants to condominium units occupied by individual owners thereof; and

Whereas, Notwithstanding the general good accomplished by such increase in home ownership, many people of limited means, particularly the elderly, are suffering thereby in that they have difficulty in obtaining alternative rental housing at prices which they can afford when evicted for condominium conversion; and

Whereas, The untoward effects of condominium conversion evictions on tenants can be adequately dealt with by providing potentially displaced tenants with sufficient time to examine the housing market, evaluate available housing alternatives, formulate future housing plans, secure any necessary financing and decide whether to purchase the condominium unit or relocate; and

Whereas, This emergency cannot be dealt with solely by the operation of the private rental housing market nor solely by Chapter 15 of the Ordinances of 1975, as amended, and unless evictions for condominium conversions are additionally regulated and controlled, such emergency and the inflationary pressures and displacement resulting therefrom will produce serious threats to the public health, safety, and general welfare of the citizens of Boston; . . .

10. *See* note 7 *supra*.

11. For an examination of the various state and local responses and the issues raised by these statutes and ordinances, see 1980 HUD STUDY, *supra* note 1; Katun, Krantz, & Blinderman, *Condominiums and Recent Legislative Action in Florida*, 55 FLA. B.J. 148 (1981); Mursten, *Florida's Regulatory Response to Condominium Conversions: The Roth Act*, 34 U. MIAMI L. REV. 1077 (1980); Snyderman & Morrison, *Rental Market Protections Through the Conversion Moratorium: Legal Limits and Alternatives*, 29 DE PAUL L. REV. 973 (1980); 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, *Government Regulation of Condominium Conversion*, 8 B.C. ENV. AFF. L. REV. 919 (1980); Note, *The Condominium Conversion Problem: Causes and Solutions*, 1980 DUKE L.J. 306; 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, *Municipal Regulation of Conversion in California*, 53 S. CAL. L. REV. 225 (1979); Note, *Regulatory Responses to the Condominium Conversion Crisis*, 59 WASH. U. L.Q. 513 (1981); Comment, *Conversion of*

dominium legislation has focused upon consumer protection for the purchaser.[12] Since few states specifically address tenant problems, many municipalities have enacted ordinances providing tenant protection.[13] The remedial focus of these statutes and ordinances, however, neglects the real objective: encouraging the development and retention of sufficient rental housing. Present conversion legislation has only mitigated the impact of conversion on tenants although, in some cases, measures have been enacted that seek protection of the existing rental housing stock by regulating or prohibiting conversion.[14]

Apartments to Condominiums: Social and Economic Regulations Under the California Subdivision Map Act, 16 CAL. W. L. REV. 466 (1980); Comment, *The Regulation of Rental Apartment Conversions*, 8 FORDHAM URB. L.J. 507 (1980); Comment, *The Legality and Practicality of Condominium Conversion Moratoriums*, 34 U. MIAMI L. REV. 1199 (1980).

12. *See, e.g.*, CONN. GEN. STAT. § 47-886 (1981); HAWAII REV. STAT. §§ 514A-1 to -108 (1980); N.H. REV. STAT. ANN. § 356-B:54 (Supp. 1979); OHIO REV. CODE ANN. § 5311.26 (Anderson 1981); VA. CODE §§ 55-79.94 (Supp. 1980).

13. *See* 1980 HUD STUDY, *supra* note 1, at XII-4, which notes the following are among the cities which have enacted some form of condominium conversion ordinance:

In Arizona:	Mesa;
in California:	Chula Vista, Concord, Costa Mesa, Cupertino, Duarte, Garden Grove, Gardena, La Mesa, Long Beach, Los Angeles (city and county), Montclair, Mountain View, Oakland, Oceanside, Palo Alto, Riverside, San Diego, San Francisco, San Jose, and Walnut Creek;
in Colorado:	Boulder and Denver;
in Connecticut:	Glastonbury;
in Georgia:	Atlanta;
in Illinois:	Arlington Heights, Chicago, Evanston, and Skokie;
in Indiana:	Indianapolis;
in Massachusetts:	Boston, Brookline, and Cambridge;
in Minnesota:	Minneapolis;
in Missouri:	University City and Webster Groves;
in Ohio:	Beachwood, Lakewood, and Lyndhurst;
in Pennsylvania:	Philadelphia;
in Washington:	Seattle.

Id. See generally SAN DIEGO STUDY, *supra* note 1, at 64; Ritter, *Condominium Conversions: A City Attorney's View*, 55 FLA. B.J. 94, 96 n.1 (1981).

14. *See* notes 140-208 and accompanying text *infra*.

Many factors have contributed to the movement toward condominium conversion. First and foremost, building owners and developers found they could reap huge profits by a successful conversion.[15] The usual conversion process begins with the developer-converter buying out the landlord, who usually obtains a sizeable capital gain on the sale. Next, the developer modifies the units for ownership and then sells them to the public at inflated rates, making a huge profit for his "efforts." Moreover, banks encourage conversions because they stand to gain by lending more money at higher interest rates in the fairly secure home mortgage market.

The second factor contributing to the condominium conversion movement is that rental housing has become increasingly unprofitable.[16] Third, tax laws affect the picture, as they inevitably do in all areas of real estate.[17] The Internal Revenue Code discourages landlords from investing in, maintaining, improving, and even personally disposing of rental housing.[18] Conversely, the Code encourages con-

15. *See, e.g.*, 125 CONG. REC. H7347 (daily ed. Sept. 5, 1979) (condominium conversions can be extremely profitable, with profits often ranging between 50 and 500 percent per conversion); Richardson, *Profits on Conversion—Maximizing the Landlord's After-Tax Return*, 55 FLA. B.J. 121 (1981) (high profits associated with conversion require special tax planning). *See also* 1980 HUD STUDY, *supra* note 1, at V-17-19.

16. *See* notes 46-106 and accompanying text *infra*. *See generally* 1980 HUD STUDY, *supra* note 1, at V-1; 1975 HUD STUDY, *supra* note 1, at I-11. Both studies have indicated that landlords are opting for conversion because of dramatically higher operating costs for rental units. Increased fuel costs, higher expenditures for other repairs and maintenance, and rents which have not kept up with escalating costs have driven present landlords to convert and prevented developers from entering the rental housing market. *See also* D.C. STUDY, *supra* note 1, at 32-35; Comment, *The Condominium Conversion Problem: Causes and Solutions*, 1980 DUKE L.J. 306, 311-12; Comment, *The Regulation of Rental Apartment Conversion*, 8 FORDHAM URB. L.J. 507, 507-08 (1980).

17. *See* notes 107-131 and accompanying text *infra*.

18. After the landlord has lost his tax shelter, an apartment building becomes a considerably less attractive investment. The landlord must begin to pay taxes on the income attributable to the property. Any money he adds to it, in terms of repairs and maintenance, is only a non-deductible capital expenditure, providing no tax benefit. I.R.C. § 167. Further, if the landlord decides to become a converter, in most circumstances he will be taxed on the profit as ordinary income. I.R.C. § 1231(b)(1)(B). The tax code will probably treat him as a dealer because he is holding property for sale in the ordinary course of business. I.R.C. § 1221(1). *See* Lippmann, *Income Tax Considerations in Conversion of Residential Rental Buildings to Cooperative or Condominium Ownership*, in PRACTICING LAW INSTITUTE, CONDOMINIUMS AND COOPERATIVE CONVERSIONS 235 (1979); Anderson & Cody, *Tax Considerations of the Condominium Sponsor and Purchaser* 48 ST. JOHN'S L. REV. 887 (1974); Holub, *Condominium Con-*

version, sometimes by even permitting the landlord to convert his ordinary income into capital gains.[19]

Although the factors listed above have played an important role in many conversions, recent developments in landlord-tenant law also have had a significant impact. These developments have filled the landlord's life with complications he or she never dreamed of when entering the rental housing market. These changes in both the landlord's and the tenant's status have motivated landlords not only to get out of the rental housing business, but to "go condo" as well.

This article will examine the legal developments that have pushed owners toward conversion. It will also analyze the tax system that makes condominium conversion possible for developers and ofttimes attractive for the renter to become an owner. The article will then examine the various governmental responses to the condominium conversion crisis. The discussion will finally turn to the legal attacks resulting from these new regulations concerning their impact upon private property ownership.

II. BACKGROUND

Although their origin dates back hundreds of years, condominiums were essentially unheard of in the United States until the 1960's.[20] Condominiums are a form of real property ownership, whereby each condominium owner holds a fee simple interest in his dwelling unit within a building. In addition, each unit owner has an undivided interest in the common areas and amenities, combining fees with the

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version: Capital Gains or Ordinary Income, 11 TAX ADVISOR 609 (1980); Miller, *Can a Straight Condominium Conversion Produce a Capital Gain?* 54 J. TAX. 8 (1981). *See generally* Kaster, *Residential Co-ops and Condominium Development Projects and Conversions: Promoter's Tax Techniques*, 38 N.Y.U. INST. FED. TAX. § 13.1 (1980).

19. *See* Shapiro & Lemlach, *Tax Planning the Condominium Conversion—An Analysis of Capital Gain Potential*, 1 J. REAL EST. TAX. 184 (1974). The authors recommend that the investor consider conveying the building to an "unrelated corporation" (a corporation in which the former building owner owns less than 80% of the voting stock). *Id.* at 186-87. Such a sale would trigger capital gains treatment. The corporation (controlled by the conversion developer and the former owner) would pay taxes on the ordinary income or the conversion, taxed at the lower corporate rate. The developer would receive the ordinary income as compensation, while the owner would already have received the desired capital gains treatment. *See also* note 117 *infra*.

20. *See* P. KEHOE, COOPERATIVES AND CONDOMINIUMS (1974), for a discussion of the historical development of condominiums. *See generally* Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987, 987-90 (1960).

other unit owners for building maintenance.[21] A condominium conversion merely takes an existing rental structure and adapts it for unit ownership. Generally, the conversion process occurs while rental tenants still reside in the building, thereby providing continuous income to the developers.[22] As the tenancies terminate, the developer prepares the units for their ultimate sale and distribution.

When Congress enacted the Fair Housing Act of 1961,[23] it did not anticipate condominium conversion problems. Congress, believing that condominiums were a suitable alternative form of ownership, promoted the concept under Section 234 of the Act.[24] That section attempted to extend to the apartment owner the same access to federal funding that was available to the single-family homeowner.[25] Smaller than houses, and therefore presumably more affordable, condominiums promised many people an ideal alternative to owning a house.[26] Congress, promoting homeownership, invited states to pass

21. *See* Note, *Condominium Regulation: Beyond Disclosure*, 123 U. PA. L. REV. 639 (1975). This article describes each unit owner's common interest in the condominium property as a "tenan[cy] in common in the structural parts and other facilities." *Id.* at 641. The article is also a good source for examining condominium development in the United States.

22. *See* K. ROMNEY, CONDOMINIUM DEVELOPMENT GUIDE (2d ed. Supp. 1980). The author, in this practitioner's guide, recommends continuous operation of the apartment building to aid financing the conversion. *Id.* at § 10-44-47. There is another motive underlying this piecemeal method of conversion: a hope of favorable tenant response. Many developers attempt to persuade present tenants to buy their units whenever possible because they are both the best natural market for condominium purchasers and the best advertisement for attracting others. *See also* Schwab, *Factors to be Considered*, in CONDOMINIUMS AND COOPERATIVE CONVERSIONS, *supra*, note 18, at 12.

23. National Housing Act of 1961, Pub. L. No. 87-70, § 104, 75 Stat. 160 (codified at 12 U.S.C. §§ 1701 to 1750(g) (1976)).

24. *Id.* at § 1715y. That section made Federal Housing Authority mortgage insurance available to persons interested in purchasing condominiums. *See generally* Berger, *supra* note 20.

25. [1961] U.S. CODE CONG. & AD. NEWS 1922, 1937.

26. *See* Merrill, Cooper, and Papell, *An Overview of California Condominium Law*, 6 S.W. L. REV. 487 (1974); Quirk & Wein, *Homeownership for the Poor: Tenant Condominiums, the Housing and Urban Development of 1968, and the Rockefeller Program*, 54 CORNELL L. REV. 811 (1969); Teaford, *Homeownership for Low-Income Families: The Condominium*, 21 HASTINGS L.J. 243 (1970); Comment, *Condominiums and the 1968 Housing and Urban Development Act: Putting the Poor in Their Place*, 43 S. CAL. L. REV. 307 (1970). Some commentators have suggested that condominiums for the poor are a desirable alternative to present low-income rental housing. Private landlord and government subsidized housing have failed to adequately provide for low-income tenants, and the quantity and quality of such housing is deteriorating.

enabling legislation permitting and encouraging condominium development.

Following Congress' suggestion, all fifty states and the District of Columbia enacted enabling statutes recognizing condominium ownership.[27] These statutes, often referred to as "first generation" statutes, simply established a registration requirement for the creation of condominiums.[28] Little thought was given to the implications of this new type of ownership. The condominium concept lay dormant until the early 1970's with the exception of a limited interest in resort and luxury condominiums.[29] As the economic picture changed, however, urban condominium development emerged.

Condominium conversions became a desirable housing alternative in mature urban centers and their neighboring suburbs because of the scarcity of improvable land.[30]

Further, urban renewal has deprived many low- and moderate-income persons of their prior housing. Therefore, assisting low-income persons in the purchase of condominiums would have the double benefit of providing home ownership for those traditionally so deprived, and rehabilitating cities by giving everyone a special interest in preserving the property.

27. *See* 1980 HUD STUDY, *supra* note 1, at XI-1; Rohan, *supra* note 5, at 586. For a list of citations to state condominium statutes, see 1 A.P. ROHAN & M. RESKIN, CONDOMINIUM LAW AND PRACTICE app. 9 (1979).

28. States such as Florida and Arizona first enacted "second generation" statutes. These markets, known as second home markets, became subject to purchaser abuse. Frequently, fly-by-night developers defrauded innocent buyers or sold them poor quality buildings. The "second generation" was a response to such abuses. *See* 1975 HUD STUDY, *supra* note 1, at IV-16.

29. *See* 1980 HUD STUDY, *supra* note 1, at summary i. The summary notes that the condominium phenomena is a product of the 1970's. 366,000 rental housing units were converted between 1970 and 1979, with the bulk of those units being converted in the 1977-1979 period. *Id.* According to a recent government survey, an estimated 723,000 condominium units exist in the United States. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE AND OFFICE OF POLICY DEVELOPMENT AND RESEARCH, U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, ANNUAL HOUSING SURVEY, 1977, pt. ACT 1. *See also* Note, *Municipal Regulation of Condominium Conversions in California*, 53 S. CAL. L. REV. 225, 225 (1979).

30. *See* D.C. STUDY, *supra* note 1, at 32-35; 1975 HUD STUDY, *supra* note 1, at IV-8-12. These studies note that increased costs in new housing, restrictions on new construction, decreased profitability for investments in rental properties, and high demand for condominiums are factors leading to conversion.

Some commentators suggest there are at least seven factors underlying the conversion phenomenon: 1) scarcity of available land near and in cities; 2) increased construction costs for new houses and condominiums; 3) changing life styles; 4) lower cost of condominiums vis-a-vis houses; 5) tax benefits in homeownership; 6) desirability of homeownership as an end in itself and as an investment; and 7) greater availa-

For cities, conversion provided numerous benefits. Through the recycling of older rental properties, the conversion process provided a form of urban renewal. Moreover, the change from tenancy to homeownership stabilized some neighborhoods.[31] Individual ownership broadened the tax base as each unit was independently taxable, and the value of the building as a whole increased.[32] For developers and those interested in inner-city revitalization, conversion was desirable, providing efficient, inexpensive, and marketable housing, especially when compared with new construction.

For the building owner, profit was the fundamental reason for conversion. He or she received greater immediate profit from the sale of the building than was obtainable from operating it on a rental basis.[33] Additionally, as the demand for homeownership rose from entry of the baby boom generation into the housing market, the pressure to convert grew.[34] The profit motive and the increased de-

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bility of condominium financing. Snyderman & Morrison, *supra* note 11, at 974 n.6. The authors also note four factors which induce landlords to sell out or convert: 1) a quicker and more profitable yield on their investments; 2) loss of tax benefits; 3) threats of disadvantageous legislation concerning rental housing; and 4) inflationary pressures that have increased operating costs of rental buildings. *Id.*

31. *See, e.g.*, SHLAES & Co., CONDOMINIUM CONVERSION IN CHICAGO: FACTS AND ISSUES 61-64 (1979), *reprinted in* ALI-ABA STUDY MATERIALS—LAND USE LITIGATIONS 516-518 (1979) (noting that conversions have had the effect of stabilizing some Chicago neighborhoods through slower resident turnover and higher building maintenance). *See also* Rohan, *supra* note 5, at 599; Comment, *The Condominium Conversion Problem: Causes and Solutions*, 1980 DUKE L.J. 306, 314-17.

32. Many critics of condominium conversion regulation have accepted the notion that conversions *per se* would increase local tax revenues. *See* sources cited in note 31 *supra*. *But see* 1980 HUD STUDY, *supra* note 1, at VIII-11 (noting that with some exceptions conversions do not appear to generate substantial tax windfalls for local jurisdictions). *See also* G. Longhini & D. Lauber, Tenant Protections from Condominiums (1979) (unpublished issue paper for American Planning Association). The authors noted that in some instances, conversions have a negative effect on the local tax base. *Id.* For instance, in Cook County, Illinois, the property tax base for an apartment building with seven or more units is thirty-three percent. *Id.* Single-family and condominium units, however, are taxed at a base of sixteen percent. *Id.* Thus, it is not always clear that conversions will increase local property tax revenues.

33. For a discussion of the profitability of condominium conversion, see Wilson, *Profit Potential in Condominium Conversion*, 4 REAL EST. REV. 62 (1974). *See also* note 15 *supra*.

34. *See* National Ass'n of Realtors, The Conversion of Rental Apartments to Condominium or Cooperative Ownership (1979) (Unpublished issues paper):

> The increased demand for home ownership is being fueled by:
>
> 1) The coming-of-age of the post-World War II babies, who started to reach home-buying age in the early 1970s. This surge of young households will

mand for homeownership does not, however, entirely explain the causes of condominium conversion.

In the last decade, numerous legal and economic factors have contributed to the diminishing supply of private rental housing. Federal tax laws, for example, have deterred retention of rental units by reducing the depreciation available to the owner.[35] Along with this loss of a tax shelter, a recent amendment to the Internal Revenue Code actively encourages owners to dispose of rental properties by providing them with favorable capital gains treatment.[36] Additionally, the economy has created maladies for the landlord. High interest rates have prevented necessary refinancing. Costs of operation and maintenance have escalated more rapidly than either controlled or uncontrolled rent. Moreover, rent control or the threat of rent control has lessened the owner's prospects for a desirable investment return.[37] Faced with these problems, as well as increasing tenants' rights,[38] tenant militancy, and buildings depreciating in value, sellout has been a rational choice for landlords.

Although condominium conversion does not diminish the housing stock in a community, it reduces the amount of available rental housing.[39] The effect of conversion on a community depends upon the

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continue into the very late 1980's, and will continue to be accompanied by later marriages and fewer children born later in life. The result is an explosion of one- and two-person households; . . .

Id. at 1.

35. *See* I.R.C. § 167(J)(2)(5). *See also* notes 18-19 *supra*. For a more exhaustive treatment of the tax issues, see notes 107-131 and accompanying text *infra*.

36. *See* notes 18-19 *supra*; notes 107-131 and accompanying text *infra*.

37. *See, e.g.*, Utt, *Rent Control: History's Unlearned Lesson*, 8 REAL EST. REV. 87 (1978). The author examines the history of rent control in New York City. The article notes that from 1970 to 1975 operation costs for apartment building owners rose fifty-six percent, while rental revenue increased by only thirty-six percent. *Id.* at 85. Further, the New York program, unlike some others, permitted owners to pass on tax increases to tenants. Despite this benefit, the author illustrates that operating rental housing is unprofitable, concluding that inflation will make matters even worse. *Id.* at 90. *See also* notes 90-103 and accompanying text *infra*.

38. *See* notes 55-89 and accompanying text *infra*.

39. By definition, the condominium conversion process, which alters the status of rental units to ownership units, naturally reduces the supply of available rental units and increases the supply of ownership units. *See, e.g.*, SAN DIEGO STUDY, *supra* note 1, at 4 (noting that conversions have contributed to decreasing rental supply); C. RHYNE, W. RHYNE, & P. ASCH, MUNICIPALITIES AND MULTIPLE RESIDENTIAL HOUSING: CONDOMINIUMS AND RENT CONTROL 62 (1976) (stating that conversion accelerates an already existing rental housing shortage).

particular local situation. While developers were restricting conversions to high-income rental units, relocation problems were minimal because displaced tenants with high incomes have high mobility. As developers shifted to moderate- and low-income rental buildings for renovation and conversion, however, tenant displacement resulted.[40] Most often, these conversions have forced the elderly and others on fixed incomes and those with low incomes to relocate. These persons generally cannot afford the sizeable down payment nor the increased monthly payments required to purchase converted units which usually cost more than their rental counterparts.[41] Further, even when these persons can afford a condominium, many have found neither the condominium form of ownership nor their particular apartment especially attractive. As the rate of conversion has increased, however, many tenants have resorted to purchasing, fearing constant relocation.[42] The pressure to purchase amplifies the acute shortage of suitable replacement housing, as the increased demand has induced more conversions. Absent regulation of conversions, the least mobile and most affected have borne the burden of relocation.

Tenant displacement has thus emerged as a prevalent urban problem. In effect, the displacement problem consists of three factors: the lack of comparable housing alternatives, the specific characteristics of the displaced tenants, and the insufficient time and notice provided

40. *See* note 7 *supra*. *But see* 1980 HUD STUDY, *supra* note 1, at VIII-36 (suggesting that most conversions occur in economically viable neighborhoods, rather than low- and middle-income neighborhoods).

41. *See* Note, *Tenant Protections in Condominium Conversions: The New York Experience*, 48 ST. JOHN'S L. REV. 978 (1974), for a discussion of one major conversion market. *See generally* PALO ALTO STUDY, *supra* note 1, at 17; SAN DIEGO STUDY, *supra* note 1, at 11. Both sources note certain consistencies. First, the homeowner-unit purchaser generally earns a higher income than the renter. PALO ALTO STUDY, *supra* note 1, at 1; SAN DIEGO STUDY, *supra* note 1, at 11, 55. Second, the costs of conversion tend to appreciate the land value substantially, usually raising prices above the lower- and moderate-income person's budget. PALO ALTO STUDY, *supra* note 1, at 1; SAN DIEGO STUDY, *supra* note 1, at 49. *See also* Note, *Government Regulation of Condominium Conversion*, 8 B.C. ENVT'L AFF. L. REV. 919, 926, 926 n.35 (1980). The displacement problem is particularly acute in Brookline, Massachusetts, the town with the highest percentage of elderly in that state).

42. Implicit in the more aggressive tenant responses to conversion is that the tight housing market drives many persons to buy in. The building industry is noting a stronger tenant purchase rate, which it attributes to tenant desires for homeownership benefits. The problem with that analysis is that it fails to consider the number of persons who prefer renting for reasons of mobility. *See generally* 1980 HUD STUDY, *supra* note 1, at IX-8.

for relocation. When the national rental housing vacancy level recently fell to five percent, it alarmed many experts. That level, according to housing analysts, signified the lowest level which will still permit tenant mobility,[43] and suggested a serious housing problem was imminent. Many cities then experienced vacancy rates dramatically lower than the five percent minimum.[44]

The sudden growth in conversion activity concerned many local governments as they found some of their citizens displaced. Many cities responded by enacting legislation to protect their tenant citizens.[45] In doing so, they and other policymakers have had to analyze the causes of conversion. In the next section, this article will similarly analyze the factors which have generated the boom of condominium conversions.

III. STRUCTURAL CAUSES OF CONDOMINIUM CONVERSIONS

A. *Recent Developments in Landlord-Tenant Law*

1. Historical Background of Landlord-Tenant Law

Until the mid-twentieth century, most states followed the traditional common law view of the landlord-tenant relationship.[46] At common law, the lease enabled one to occupy the real property of another for a specified period of time. Courts did not consider the lease a contract, rather it was a conveyance of real estate, subject only to the law of real property.[47] Under a lease at common law, a landlord and tenant owed very few duties to one another. Unless otherwise agreed, the landlord's sole duty to the tenant was to allow him to

43. *See* U.S. GENERAL ACCOUNTING OFFICE, RENTAL HOUSING: A NATIONAL PROBLEM THAT NEEDS IMMEDIATE ATTENTION 5 (1979); *Condominium Housing Issues: Hearings on S. 612 Before the Subcomm. on Banking, Housing and Urban Affairs*, 96th Cong., 1st Sess. 103 (1979). *See also Apartment Crunch Alters Manhattan Living*, N.Y. Times, Jan. 21, 1980, at A1, col. 1.

44. *See, e.g.*, LOS ANGELES STUDY, *supra* note 1, at 11 (indicating city vacancy rate was below 3%); MONTGOMERY COUNTY STUDY, *supra* note 1, at 2 (vacancy rate in 1979 was 3.3%); PALO ALTO STUDY, *supra* note 1, at 17 (noting vacancy rate of 1.18% leads to reduced mobility within the community, limited range of housing choice, and an increased burden on other communities to provide rental housing).

45. *See* notes 140-208 and accompanying text *infra*.

46. *See* notes 47-89 and accompanying text *infra*.

47. *E.g.*, Bunner v. Spiegel, 116 Ohio St. 631, 157 N.E. 491 (1927). *See generally* 1 AMERICAN LAW OF PROPERTY § 3.11 (A. Casner ed. 1952) [hereinafter cited as LAW OF PROPERTY]; 2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 221[1] [hereinafter cited as POWELL].

have "quiet enjoyment" of the leased property.[48] Only a breach of the "quiet enjoyment" covenant or a fraud committed by the landlord would permit the tenant to terminate the lease.[49] Gradually, leases favored landlords to an even greater extent, providing that the landlord's duty to perform the lease covenants was conditioned upon performance of the tenant's duties under the lease. Thus, for example, a tenant's failure to pay rent would lead to eviction.[50]

It was not until the 1960's that courts began to interpret and enforce leases as contracts.[51] Courts struck down lease provisions that waived supposedly unwaivable rights or were "unconscionable" under contract law.[52] They embraced a theory that the residential lease was an adhesion contract, thereby construing all ambiguities in the lease against the landlord. Furthermore, courts set aside many duties and remedies stipulated in the lease as being contrary to contract law or the Constitution.[53] Courts even went further, implying

48. *See* Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidance for the Future*, 38 FORDHAM L. REV. 225, 227 (1969). The original leaseholds were made to facilitate farming rather than provide residence. Like other real estate transactions, they were subject to the doctrine of *caveat emptor* or "let the buyer beware." Under this doctrine, the tenant was responsible for inspecting the property to insure he or she received what was bargained for. Thus, after the landlord delivered the property, the lease would stand, unless fraudulently made. *See generally*, Grimes, *Caveat Lessee*, 2 VAL. U.L. REV. 189 (1968). *See also* Lesar, *The Landlord-Tenant Relationship in Perspective: From Status to Contracts and Back in 900 Years?* 9 U. KAN. L. REV. 369 (1961).

49. *See* LAW OF PROPERTY, *supra* note 47, at § 3.11.

50. The tenant could be evicted even if the landlord breached his or her covenants. *Id.*

51. *See* Lesar, *supra* note 48, at 375. Even before courts began to construe leases as contracts, they protected tenants by enforcing housing codes. Housing codes, which have existed since the early 1900's, offer a new residential tenant a means of insuring himself or herself of adequate, standard housing. Traditionally, however, housing code enforcement has been unsuccessful in providing tenants with adequate housing. *See generally* Gribetz & Grad, *Housing Code Enforcement: Sanction and Remedies*, 66 COLUM. L. REV. 1254 (1966); Rutzick & Hoffman, *The New York Housing Court: Trial and Error in Housing Code Enforcement*, 50 N.Y.U. L. REV. 738 (1975). *See also* Bennett, *The Modern Lease—An Estate in Land or a Contract (Damages for Anticipatory Breach and Interdependence of Covenants)*, 16 TEX. L. REV. 45 (1938).

52. *E.g.*, Old Town Dev. Co. v. Langford, 349 N.E.2d 744, 782-83 (Ind. Ct. App. 1976).

53. *See, e.g.*, Gross v. Fox, 349 F. Supp. 1164 (E.D. Pa. 1972) (holding that distraint for rent denies tenant due process of law under Fourteenth Amendment); Swarb v. Lennox, 314 F. Supp. 1095 (E.D. Pa. 1970), *aff'd*, 405 U.S. 191 (1972) (strik-

other duties or remedies as being part of the lease.[54] In general, the legal climate changed. The tenant was placed in a more favorable position, better protected, and armed with a legal opportunity to take advantage of the landlord.

2. Landlord's and Tenant's Duties and Remedies

a. *Implied Warranty of Habitability*

Perhaps the most important revolution in landlord-tenant law has been the development of the implied warranty of habitability.[55] Previously, the century old doctrine of *caveat emptor*[56] dominated the landlord-tenant relationship. The landlord was not responsible for defects in the dwelling which the tenant failed to discover before occupying it or which arose during tenancy. This doctrine does not make sense under present housing conditions. A tenant usually does not have the ability to determine whether an apartment for daily living is free of defects nor the wherewithal to repair new defects upon discovery.[57] Enforcement of the *caveat emptor* rule thus operates as an unreasonable hardship upon the innocent, unprotected tenant.

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ing down confession of judgment clause in lease as unconstitutional with respect to tenants earning less than $10,000 per year).

54. *See* notes 55-89 and accompanying text *infra*.

55. The significance of the development of the implied warranty of habitability is illustrated by the vast amount of scholarship on the subject. The following is a good, but by no means extensive, list of articles on the subject: Cunningham, *The New Implied Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URBAN L. ANN. 3 (1979); Daniels, *Judicial and Legislative Remedies for Substandard Housing: Landlord-Tenant Reform in the District of Columbia*, 59 GEO. L.J. 909 (1971); Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443 (1972); Lone, *Implied Warranties of Habitability and Fitness for Intended Use in Urban Residential Leases*, 26 BAYLOR L. REV. 161 (1974); Note, *Contract Principles and Leases of Realty*, 50 B.U. L. REV. 24 (1970); Note, *Judicial Expansion of Tenants' Private Law Rights: Implied Warranties of Habitability and Safety in Residential Urban Leases*, 56 CORNELL L. REV. 849 (1971); Comment, *Landlord and Tenant—Implied Warranty of Habitability—Demise of the Traditional Doctrine of Caveat Emptor*, 20 DE PAUL L. REV. 955 (1971); Comment, *Implied Warranty of Habitability: An Incipient Trend in the Law of Landlord and Tenant?* 40 FORDHAM L. REV. 123 (1971).

56. *Caveat Emptor* is loosely translated to mean "let the buyer beware." This common law, judicially-created maxim states that a purchaser must investigate and test that which he or she purchases. This hard rule has been mitigated by warranties, strict liability, and consumer protection laws. BLACK'S LAW DICTIONARY 202 (5th ed. 1979).

57. Modern apartments are much more complicated than their agrarian counterparts. The technical skill necessary is not available to the ordinary tenant. Thus, it would be absurd to continue to require that a tenant inspect his apartment for techni-

Under these circumstances and a public policy favoring adequate housing, courts began to offset the inequities of *caveat emptor* by reading an implied warranty of habitability into residential leases. The difficulty with breaking the century old legal principle is evident in *Pines v. Perssion*.[58] There, the Wisconsin Supreme Court declared that no general implied warranty of habitability could be construed in connection with a lease. The court nevertheless found for the tenants, holding that there was an implied warranty of habitability that an apartment would comply with the local housing code.[59] By using the phrase "implied warranty of habitability" instead of just citing a violation of the code, the Wisconsin court created a new area of law.

During the 1970's, the doctrine of the implied warranty of habitability in residential leases gained wide acceptance by courts and state legislatures.[60] Through this warranty, courts imposed greater duties on landlords to keep leased premises in good repair and in a habitable condition.[61]

Increasingly, courts extended landlord liability beyond violations of local housing codes. Landlords became responsible to their tenants for latent and patent defects in leased apartments.[62] Under the

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cal defects before occupying the premises. *See* RESTATEMENT (SECOND) OF PROPERTY OF LANDLORD AND TENANT § 5.1, Comment 6 (1977).

58. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

59. *Id.* at 595-96, 111 N.W.2d at 412-13.

60. *See* Cunningham, *supra* note 55, at 7-8. The author notes that at least eleven jurisdictions have judicially recognized the implied warranty of habitability, *id.* at 8 n.14, and at least sixteen others have enacted statutes adopting the warranty. *Id.* at 7 nn.9-11.

61. *See, e.g.*, Javins v. First National Realty Corp. 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970). *Javins* held that the landlord had a duty to keep an apartment in good repair, in compliance with local housing codes, and in a habitable condition throughout the lease period. *Id.* at 1077-80. The court also noted, analogizing to the Uniform Commercial Code, that the warranty was contractual in nature and not waivable. *Id.* at 1075, 1079. *See also* Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970), where the court discussed this new implied warranty:

> It is a mere matter of semantics whether we designate this covenant one "to repair" or "of habitability and livability fitness." Actually it is a covenant that at the inception of the lease, there are no latent defects in facilities vital to the use of the premises for residential purposes because of faulty original construction or deterioration from age or normal usage. And further it is a covenant that these facilities will remain in usable condition during the entire term of the lease. In performance of this covenant the landlord is required to maintain those facilities in a condition which renders the property livable.

Id. at 144, 265 A.2d at 529.

62. Early warranty cases recognized there was an implied warranty of habitability

warranty, the tenant was required to notify the landlord of defects in the premises. Thereafter, the landlord had a duty to make the necessary repairs. Failure to repair entitled the tenant to pursue legal remedies.[63] Further, many courts developed more flexible standards, finding breaches of the implied warranty when the apartment was not "habitable or fit for living."[64] Landlord liability was found even though there were no technical violations of specific housing code provisions. Some courts went even further, imposing an affirmative duty on landlords to protect their tenants from foreseeable criminal activity on the premises.[65] This recent extension of the implied war-

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for defects existing at the beginning of the tenancy. *E.g.*, Lund v. McArthur, 51 Hawaii 473, 462 P.2d 482 (1969); McKenna v. Begin, 362 N.E.2d 548 (Mass. App. 1977). Recently, courts have held landlords liable for latent and patent defects that become apparent after the tenancy had already begun. Thus, courts and now legislatures have imposed the duty to repair throughout the tenancy. *See generally* Cunningham, *supra* note 55, at 86-95. *See also* Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U. L. REV. 1 (1976); Moskovitz, *The Implied Warranty: A New Doctrine Raining New Issues*, 62 CAL. L. REV. 1444 (1974).

63. *See, e.g.*, McKenna v. Begin, 325 N.E.2d 507 (Mass. App. 1975) (allowing landlord time to cure the breach before tenant can pursue his remedies); *cf.* UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT §§ 4.103, .401 (1972) [hereinafter cited as URLTA] (permitting landlord to make repairs before tenant may seek legal remedies, but apparently allowing tenants damages for the defects). *See also* MODEL RESIDENTIAL LANDLORD-TENANT CODE §§ 2-205 to -207 (Tent. Draft 1969) [hereinafter cited as MODEL CODE]. For a general discussion of URLTA and the MODEL CODE, see Blumburg & Robbins, *Beyond URLTA: A Program for Achieving Real Tenant Goals*, 11 HARV. C.R.-C.L. L. REV. 1 (1976); Comment, *Tenants' Rights and Remedies Under Delaware's New Landlord-Tenant Code*, 78 DICK. L. REV. 247 (1976).

64. Kline v. Burns, 111 N.H. 87, 92, 276 A.2d 248, 252 (1971). Courts and legislatures have expanded the implied warranty doctrine beyond housing code violations. In fact, many jurisdictions have made housing code violations the minimum standard of habitability, imposing liability even where there has been no technical housing code violation. *See* Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974) (en banc); Boston Housing Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973). *See also* URLTA, *supra* note 63, at § 2-104. Still, courts require that there must be some material defect which renders the premises unsafe, unsanitary, or inadequate because the landlord has failed to provide essential services. Berzito v. Gambito, 63 N.J. 460, 469, 308 A.2d 17, 22 (1973).

65. *See* Kline v. 1500 Mass. Ave. Corp., 439 F.2d 477 (D.C. Cir. 1970); Scott v. Watson, 278 Md. 160, 359 A.2d 548 (1976); Johnston v. Harris, 387 Mich. 569, 198 N.W.2d 409 (1972); Trentacost v. Brussel, 82 N.J. 214, 412 A.2d 436 (1980). *See generally* Bazyler, *The Duty to Provide Adequate Protection: Landowner's Liability for Failure to Protect Patrons from Criminal Attack*, 21 ARIZ. L. REV. 727 (1979); Henszey & Weisman, *What is the Landlord's Responsibility for Criminal Acts Committed on the Premises?* 6 REAL EST. L.J. 104 (1977); Comment, *The Landlord's Emerging Responsibility for Tenant Security*, 71 COLUM. L. REV. 275 (1971); Recent Development, 33 VAND. L. REV. 1493 (1980). Most jurisdictions still adhere to the traditional rule that

ranty illustrates the onerous burdens befalling landlords of residential buildings.[66]

Concomitant with the increase in landlord duties, courts have provided tenants with greater rights and remedies. Reading lease agreements as contracts, courts have given tenants access to contractual remedies, expanding their opportunities to receive compensation for injuries caused by defects.[67] For instance, some courts have recognized a repair and deduct remedy, which allows tenants to repair defects and deduct the cost from rent.[68] Other courts have permitted rent withholding if the tenant reasonably believes the premises are uninhabitable.[69] Further, a third generally accepted remedy has been rent abatement.[70] This remedy reduces the rent owed by the tenant to the actual rental value of the property in its defective condition. All of these remedies deprive the landlord of rental income. Moreover, they all are affirmative defenses.[71] Ironically, therefore,

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the landlord owes no duty to his or her tenants to protect them from criminal acts committed on the leased premises by third parties. Trice v. Chicago Housing Auth., 14 Ill. App. 3d 97, 302 N.E.2d 207 (1973).

66. Another legal theory may also soon become more common in landlord-tenant law: strict liability. Although thus far most courts have not applied this harsh doctrine (harsh for the landlord at least), *e.g.*, Dwyer v. Skyline Apartments, Inc., 123 N.J. Super. 48, 301 A.2d 463 (App. Div. 1973) *aff'd mem.*, 63 N.J. 577, 311 A.2d 1 (1973), one court already has, Kaplan v. Coulston, 85 Misc. 2d 745, 301 N.Y.S. 2d 634 (1976). If strict liability becomes more readily accepted, the plight of the landlord would become even more severe as he would be subject to liability for many things which he could not anticipate. Consequently, his insurance and repair costs would rise, there would be even a greater propensity of litigation, and housing problems would be exacerbated.

67. *See* notes 68-88 and accompanying text *infra*.

68. *See, e.g.*, Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970) (providing that tenant may repair and deduct the costs from rent if landlord fails to make repairs after notification); Jackson v. Rivers, 65 Misc. 2d 468, 318 N.Y.S.2d 7 (Civ. Ct. N.Y. 1971) (allowing tenant to deduct for repair of toilet). *See also* URLTA, *supra* note 63, at § 4-103.

69. This remedy differs from the repair and deduct remedy in that it requires the landlord to make the repairs before he will receive the rent due. *E.g.*, Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168 (1974); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Rowe v. Walker, 38 Mich. App. 458, 196 N.W.2d 850 (1972). *See generally* Comment, *Implied Warranty of Habitability in Pennsylvania*, 15 DUQUESNE L. REV. 459, 488 (1977). *See also* URLTA, *supra* note 63, at § 4.105.

70. *See generally* Bruns, *Rent Abatement: A Reasonable Remedy for Aggrieved Tenants*, 2 SETON HALL L. REV. 357 (1971); Note, *Retroactive Rent Abatement*, 19 URBAN L. ANN. 161 (1980). *See also* Cunningham, *supra* note 55, at 113-26; URLTA, *supra* note 63, at § 4-104(a).

71. *See, e.g.*, Houston Realty Corp. v. Castro, 94 Misc. 2d 115, 118, 404 N.Y.S.2d

the landlord must sue to recover withheld rent, expending money to do so, and then face the possibility of not only losing the lawsuit but also having to make costly repairs.

b. *The Elimination of Landlord Protections*

Many courts have added to the landlords' problems caused by development of the implied warranty of habitability and its attendant remedies. Consistent with their contractual view of leases, these courts have examined and struck down statutory remedies, landlord conduct, and lease clauses that have unreasonably benefited landlords or otherwise harmed tenants. They have curtailed such traditional landlord protections as distraint,[72] retaliatory eviction,[73] and confessions of judgment.[74]

Distraint, otherwise known as distress for rent, was a statutory remedy that allowed a landlord, upon his or her unilateral claim that the tenant owed rent, to levy on property found in the tenant's premises.[75] The underlying purpose of distraint statutes was to permit landlords to quickly recoup their losses or mitigate damages. In 1972, a federal district court, in *Gross v. Fox*,[76] struck down a distraint statute as unconstitutional. Relying on *Fuentes v. Shevin*,[77] the court ruled that the statute denied the tenant due process because the landlord could deprive him of property without a proper proceed-

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796, 798 (N.Y. City Civ. Ct. 1978) (noting that traditionally the implied warranty is raised as an affirmative defense to eviction proceedings); Fair v. Negley, 257 Pa. Super. Ct. 50, 54, 390 A.2d 240, 240-41 (1978) (stating that implied warranty is an affirmative defense against landlord's action for possession for nonpayment of rent). *See generally* Cunningham, *supra* note 55, at 98-126 (discussing the instances where the warranty is an affirmative defense, but also noting that the tenant may vacate the premises because of an implied warranty breach). *See also* Note, *supra* note 70, at 161 (retroactive rent abatement is an affirmative suit against landlord for breach of implied warranty of habitability).

72. *See* notes 75-78 and accompanying text *infra*.

73. *See* notes 79-83 and accompanying text *infra*.

74. *See* notes 84-88 and accompanying text *infra*.

75. The distress for rent remedy was, in effect, a landlord's lien arising from its common law analogue, the innkeeper's lien. Since, at common law, the innkeeper was required to accommodate all guests, the law entitled him to restrain his guests' belongings until all bills were paid. N. COURNOYER, INTRODUCTION TO HOTEL AND RESTAURANT LAW 7 (1968).

76. 349 F. Supp. 1164 (E.D. Pa. 1972).

77. 407 U.S. 67 (1972) (holding Pennsylvania statute authorizing replevin by summary *ex parte* proceeding violates due process clause of Fourteenth Amendment).

ing.[78]

Other landlord protections have met similar fates. Both courts and legislatures have denounced the landlord conduct known as retaliatory eviction.[79] Retaliatory eviction was an action permitting a landlord to deny a tenant a lease renewal or even to attempt an eviction in order to punish the tenant for exercising a legal right.[80] Frequently, retaliatory actions arose when a tenant would report housing code violations[81] or other breaches of duty by the landlord to authorities.[82] The retaliatory action would rid the landlord of a troublemaker and discourage other tenants from making similar complaints. To prevent such conduct on the part of landlords, many state courts and/or legislatures have precluded retaliatory use of the landlord's right to terminate periodic tenancies by notice without cause.[83]

With the emergence of tenant rights, even lease provisions became subject to close judicial scrutiny. One provision, the confession of judgment clause,[84] was struck down as a denial of due process by the

78. 349 F. Supp. at 1168. Although the court recognized that distraint only deprived the tenant of property temporarily, he or she nevertheless suffered the deprivation without a proper proceeding. The court found that a trespass action for damages did not provide sufficient relief because the civil action would, as a practical matter, take considerable time. *Id.*

79. *See, e.g.*, Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968) (holding that landlord action which prevented lease renewal because tenant reported housing code violation was unconstitutional); URLTA, *supra* note 63, at § 5.101 (providing that landlord may not retaliate by increasing rent, decreasing services, or threatening action for possession if tenant complains to a government agency concerning possible housing code violations, complains to the landlord regarding breaches of warranty, or forms or joins a tenant organization). *See also* MODEL CODE, *supra* note 73, at § 2-407 (providing similar protection to URLTA, but in a more even balance between landlord and tenant). For a list of the jurisdictions providing statutory protection against retaliation eviction, see Cunningham, *supra* note 55, at 7 nn.10-11, 131 n.581.

80. *See* Cunningham, *supra* note 55, at 126.

81. *E.g.*, Edwards v. Habib 397 F.2d 687 (D.C. Cir. 1968); Dickhut v. Norton, 45 Wis. 2d 389, 175 N.W.2d 297 (1970).

82. *See, e.g.*, Note, *Retaliatory Eviction Protection in New York—Unraveling Section 2236*, 48 FORDHAM L. REV. 861 (1980) (generally discussing the retaliatory eviction problem).

83. *See* note 79 *supra*.

84. Also known as the cognovit judgment clause, a confession of judgment is written authority by the debtor to direct judgment against him if he defaults on his payment. *See* BLACK'S LAW DICTIONARY 236 (5th ed. 1979). When inserted in a lease, the clause permitted the landlord to appear before court, upon non-payment of rent, and conferred judgment against the debtor. The clause directly conflicts with such tenant protection as rent withholding provisions. Thus, confessions of judgment have been abolished in most jurisdictions. *See generally* Note, *Confession on Judgment*, 102

United States Supreme Court in *Swarb v. Lennox*.[85] Before *Swarb*, landlords commonly inserted confession of judgment clauses into leases in order to prevent default by the tenant.[86] The clause's purpose was to insure that the tenant would not forego payment of rent. Most often low-income persons found such clauses in their leases.[87] The Supreme Court noted the leases were essentially adhesion contracts because of the unfair bargaining position between the parties.[88] It thus found the confession of judgment clause unconstitutional for persons earning less than $10,000 per year.[89]

The shift in landlord-tenant law dramatically illustrates why many landlords have opted for conversion and why many builders have avoided new rental housing construction. Still, the shift toward tenants' rights alone does not account for conversions. If rental housing was profitable enough, surely landlords and builders would withstand these changes in the law. While these changes have affected profitability, rent control has also had a substantial effect upon it and has provided impetus for conversions.

3. Rent Control

Municipalities first imposed rent controls in the United States following World War I, in response to the severe housing shortage caused by the war.[90] Although most controls terminated during the

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U. PA. L. REV. 524 (1954). *See also* Hopson, *Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit*, 24 U. CHI. L. REV. 111 (1961).

85. 405 U.S. 191 (1972).

86. *See* Swarb v. Lennox, 314 F. Supp. 1094-95 (E.D. Pa. 1970), *aff'd*, 405 U.S. 191 (1972); Schoshinski, *Public Landlords and Tenants: A Survey of Developing Law*, 1969 DUKE L.J. 399, 471. *See also* Note, *Standard Form Leases in Wisconsin*, 1966 WIS. L. REV. 583, 590.

87. *See* Schoshinski, *supra* note 86, at 471.

88. 405 U.S. at 201.

89. *Id.* at 199-202. The court noted that its decision was a very narrow one. *Id.* at 201.

90. Rent controls were enacted as emergency measures with a temporary duration. Landlords, who suffered directly from these government regulations, immediately sought to have them overturned. In the earliest challenges, Block v. Hirsch, 256 U.S. 135 (1921) and Marcus Brown Co. v. Feldman, 256 U.S. 170 (1921), the United States Supreme Court upheld rent control ordinances. In *Block*, the court upheld a due process challenge to a statute which extended an expired lease and established a commission to set fair rent, finding that the rental was "clothed . . . with public interest so great [as] to justify regulation by law." 256 U.S. at 155. *Marcus Brown*, on the other hand, was an equal protection challenge due to discrimination between residential and business rentals under the rent control statute. The court upheld the distinc-

1920's, rent controls were reinstated during the Second World War.[91] These rent controls were considered only temporary measures adopted in response to war-created housing crises. Courts upheld them, but only as "emergency" measures.[92] They clearly warned that under ordinary circumstances such measures would be unlawful.[93]

After World War II, most areas repealed their rent controls. Until 1968, New York was the only state to continue both state and local rent controls.[94] Since that year, tenants, particularly in the northeast, have pressed for rent controls.[95] Many of the proponents have been middle-class renters outraged by their rents. Massachusetts and New Jersey followed New York and enacted non-emergency rent control legislation.[96] Washington, D.C., Miami Beach, Florida and numer-

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tion, noting "the classification was too obviously justified to need explanation. . . ." 256 U.S. at 199. For a general overview of the history of rent control, see M. LETT, RENT CONTROL: CONCEPTS, REALITIES, AND MECHANISMS (1976); C. RHYNE, W. RHYNE, AND P. ASCH, MUNICIPALITIES AND MULTIPLE RESIDENT HOUSING: CONDOMINIUMS AND RENT CONTROL (1976); Barr, *Rent Control in the 1970's: The Case of the New Jersey Tenants' Movement*, 28 HASTINGS L. J. 631 (1977).

91. *See* 56 Stat 23, 50 U.S.C. App. § 924 (1942). *See generally* LETT, *supra* note 90. *See also* Woods v. Cloyd W. Miller, 333 U.S. 138, 142 n.6 (1948); Bowles v. Willingham, 321 U.S. 503 (1944); Willis, *State Rent Control Legislation, 1946-1947*, 57 YALE L.J. 351 (1948).

92. *See* note 90 *supra. See also* Note, *Rent Control and Landlords' Property Rights: The Reasonable Return Doctrine Revived*, 33 RUTGERS L. REV. 165, 170-77 (1980).

93. The emergency doctrine has probably been abandoned for all intents and purposes. Two recent decisions by the highest courts of Maryland and California have upheld rent control ordinances without the emergency requirement. *See* Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 550 P.2d 1001 (1976); Westchester West No. 2 Ltd. Partnership v. Montgomery County, 276 Md. 448, 348 A.2d 856 (1976). *See generally* Barr & Keating, *The Last Stand of Economic Substantive Due Process—The Housing Emergency Requirement for Rent Control*, 7 URB. LAW 447 (1975).

94. *See* Barr, *supra* note 90, at 634-35, noting that until 1969, all rent controls were limited to periods of war-related housing problems. In addition, the author states that only New York City has retained rent control after the Second World War, although a few states retained such controls into the 1950's. *See, e.g.*, Teeval v. Stem, 301 N.Y. 346, 93 N.E.2d 884 (1950) (challenging the validity of the New York State rent controls); Wagner v. City of Newark, 24 N.J. 467, 132 A.2d 794 (1957) (challenging the validity of a rent control ordinance); Warren v. City of Philadelphia, 387 Pa. 362, 127 A.2d 703 (1956) (challenging another rent control ordinance). *See also* Comment, *Residential Rent Control in New York City*, 3 COLUM. J.L. & SOC. PROB. 30 (1967).

95. *See* Baar, *supra* note 90, at 636.

96. Massachusetts' early effort at rent control, ch. 797, Mass. Acts of 1969, merely authorized the City of Boston to enact rent controls. *Id.* One year later, however, the state legislature provided enabling legislation for rent control throughout Massachu-

ous cities in California are among the municipalities that enacted rent control ordinances absent state legislation.[97] Although a count of these jurisdictions indicates that rent control is not widespread, it continues to loom as a possible response to spiraling inflation and the continuing housing crisis. The decline of low- and moderate-income housing has increased the demand and fueled the clamor for controls.[98]

Rent controls operate as a hardship on landlords. Regulating rent increases, they deny landlords the opportunity to realize the full economic potential of their investments.[99] Concurrent with rent control, many landlords have experienced operating costs that have climbed

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setts. Act of Aug. 31, 1970, ch. 842, 1970 Mass. Acts 732, *reprinted in* MASS. GEN. LAWS ANN. ch. 40 app. at 249 (West Supp. 1979). The statute, which was to expire on April 1, 1975, was extended by the Act of June 13, 1974, ch. 360, 1974 Mass. Acts 237, and the Act of Dec. 31, 1975, ch. 851, 1975 Mass. Acts 1233, until April 1, 1976.

In New Jersey, on the other hand, the state did not enact a general rent control statute. Rather, New Jersey municipalities have regulated rents under their broad home rule powers since 1973 when the New Jersey Supreme Court ruled that those powers would sustain rent control ordinances. *See* Inganamort v. Borough of Fort Lee, 62 N.J. 521, 303 A.2d 298 (1973). For review of New Jersey municipal rent controls through 1976, see Baar, *supra* note 90.

97. In 1973, Congress authorized the District of Columbia to enact rent control. District of Columbia Rent Control Act of 1973, Pub. L. No. 93-157, 87 Stat. 624 (1973). Thereafter, the District City Council adopted rent controls by regulation. 21 D.C. Reg. 289 (1974).

The City of Miami Beach adopted a rent control ordinance in 1969. This ordinance, MIAMI BEACH, FLA., ORDINANCE 69-1791 (October, 1969), was not acted pursuant to any state authorization. It was struck down in Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801 (Fla. 1972).

Aside from Miami Beach and Washington, D.C., several cities in Maryland, including Baltimore, and such cities as Los Angeles, Davis, Berkeley, San Jose, El Monte, Santa Monica, Beverly Hills and Santa Barbara, California have initiated either rent controls or rent freezes in the middle and late 1970's. *See* SAN DIEGO STUDY, supra note 1, at 28, 43-45.

98. *See* W. Keating, Rent Control as a Response to the Rental Housing Crisis: Policy Alternatives for California 1-3 (Draft March 1980) (unpublished article submitted to American Planning Association; available on file at *Urban Law Annual*). *See generally*, Goldwitz, *Preparing for the Possibility of National Rent Controls*, 13 CLEARINGHOUSE REV. 268 (1979).

99. During the 1960's, operating costs in New York City outstripped revenues. Studies of rent controls showed a large gap between revenues and costs, and recommended that existing rent controls be scrapped. G. STERNLIEB, THE URBAN HOUSING DILEMMA, THE DYNAMICS OF NEW YORK CITY'S RENT CONTROLLED HOUSING (1976). *See generally* LETT, *supra* note 90, at 180-196; 1980 HUD STUDY, *supra* note 1, at V-15; Harter, *Rent Controls Forcing Condo Conversions: Inflation Pushes Rents Higher*, 39 MORTGAGE BANKER, at 46-52 (July, 1979); Utt, *supra* note 37, at 90.

dramatically, without receiving corresponding rent increases.[100] As a result, they have found not only that their profits have dropped, but also that they are, in fact, losing money. The New York City experience exemplifies this dilemma as many rent control landlords skimp on building maintenance, default on local property taxes, and ultimately abandon their buildings rather than trying to salvage their investment.[101]

In light of housing crises and the effects of rent control, many landlords have feared that massive rent regulation proposals may be enacted under the guise of consumer protection. To avoid this, they have considered conversion.[102] Although the spectre of rent control may not be the major motivating factor behind conversion activities, landlords' gloom brought on by the prospect of control cannot be ignored as one factor in the decision to convert and escape the rental housing market.[103]

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100. *See, e.g.*, 1980 HUD STUDY, *supra* note 1, at V-14 n.17 (noting that since 1967, fuel costs rose 350% and utility costs 179%, yet residential rents rose only 79%); G. STERNLIEB & J. HUGHES, AMERICA'S HOUSING: PROSPECTS AND PROBLEMS 269-70 (1980) (between 1970 and 1977, overall consumer price index rose by 65.2% while rents rose only 39.4%); Utt, *supra* note 37, at 89 (citing a New York City Housing and Development Administration report, the author notes that between 1970 and 1975 operating costs of controlled units increased by 56.3% while rents increased by only 35.6%).

It is important to note that even without rent control, rental housing is encountering similar problems. Thus, it is not surprising that some of the major cities that have experienced substantial conversion activity; for example, Chicago, Illinois, Philadelphia, Pennsylvania, and Houston, Texas, are *not* rent control cities. 1980 HUD STUDY, *supra* note 1, at V-16.

101. *See, e.g.*, 1980 HUD STUDY, *supra* note 1, at I-12 (as of early 1980, at least 390,000 buildings have been abandoned in New York City alone); *See generally*, Sternlieb, *Bulldozer Renewal*, 25 J. HOUSING 180 (1968); NATIONAL ASS'N OF REALTORS, RENT CONTROL: A NON-SOLUTION 38-39 (1977) (between 1965 and 1975 New York City lost approximately 200,000 buildings to abandonment, with rent control clearly a, if not the, major factor).

102. A choice by the landlord to convert is a rational one. As the benefits of remaining in rental housing diminish, it is often foolhardy for the private landlord to remain in the market. One commentator has suggested that rental housing has taken on the characteristics of a *public* utility. See Berger, *A Public Utility View of Rental Housing*, 50 PA. B.A.Q. 234 (1979). Limitations on profit-making, quality restrictions, and constantly greater tenant strength provide strong incentives for the landlord to convert. *Id.* at 240.

103. *See generally* 1980 HUD STUDY, *supra* note 1, at V-1-32. *See also* Camp, *Condominium Eligibility Soaring*, Washington Post, Mar. 2, 1979, § A, at 1, col. 1.

4. Implications

Rental housing is not the desirable investment it previously was. In the past twenty years, courts have advanced the theory that the residential lease is a contract, resulting in whirlwind changes in the rights and remedies of both tenants and landlords.[104] Many state legislatures also have acted to strike a new balance of power between the conflicting parties.[105] Under such legislation, tenants have vastly greater rights and remedies than were ever previously ascribed to them. These changes have left landlords in a position they did not anticipate when buying into the rental housing market. Moreover, the spectre of rent control clouds the prospects for landlords even more.[106] Thus, the landlord, troubled by difficult legal constraints and high costs, may view conversion as a profitable way to dispose of his rental units, especially given the favorable tax treatment he may receive.

B. *Federal Income Tax Factors that Promote Conversions*

As previously suggested, the impetus for conversions derives from the tight housing market, especially in rental units. Much of the blame for this may be laid directly at the feet of the federal government.[107] The government's housing[108] and tax policies[109] have

104. *See* notes 51-89 and accompanying text *supra*.

105. *See* sources cited at note 63 *supra*.

106. *See* note 94 *supra*.

107. *See* notes 108-09 *infra*.

108. Much of the decline of multi-unit rental properties can be attributed directly to federal housing policies. After the Second World War, the Federal Government initiated the Federal Home Administration (FHA) and Veteran's Administration (VA) housing programs. These programs, supervised by the Federal Home Loan Bank Board, made construction financing so much easier, in some instances by subsidizing developments, that investors shifted their attention away from cities toward the suburbs. *See* M. MAYER, THE BUILDERS 112-13, 336 (1978); J. JACOBS, THE DEATH AND LIFE OF AMERICAN CITIES 295, 308 (1961). *See also* C. STOKES & E. FISHER, HOUSING MARKET PERFORMANCE IN THE UNITED STATES 6-13 (1976). Although some housing was developed, the goals anticipated under the Housing Act of 1949, 42 U.S.C. §§ 1401-1436 (1976), were not met even twenty years after the passage of the Act. J. FRIED, HOUSING CRISIS 60 (1971). *See also* Symposium, *Housing for the Urban Community*, 39 GEO. W. L. REV. 657-899 (1971); Symposium, *Urban Housing and Redevelopment*, 21 ST. L. L. REV. 595-882 (1977).

109. *See* Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970). The author notes that the Internal Revenue Code is filled with numerous tax incentives designed to stimulate certain investments and encourage desired activities, in-

played critical roles in the housing crisis.

In a nutshell, Congress' federal income tax policies have promoted housing construction through the creation of tax shelters.[110] While housing has been created, these same shelters often have encouraged rapid turnover of properties from taxpayer to taxpayer, resulting in little continuity of ownership.[111] With little interest in long-term ownership, most property owners rarely have used their depreciation benefits to make necessary capital repairs on their buildings.[112] As a consequence, many buildings have deteriorated, receiving little or no maintenance, and landlords have ultimately abandoned them.[113] The resulting reduction in housing stock has forced many urban tenants, living in tight housing markets, to consider the possibility of condominium ownership to insure themselves adequate housing.[114] When a landlord chooses to sell an apartment building or personally convert it, he or she is responding as much to the tax consequences of this decision as to the difficulties in operating rental housing.[115] Many landlords, like other real estate investors, turn over their property when it has lost tax shelter benefits.[116] Once depreciation and

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cluding housing. *Id.* at 705, 711. *See generally* H. AARON, SHELTERS AND SUBSIDIES: WHO BENEFITS FROM FEDERAL HOUSING POLICIES (1972); Shoenfeld & Sternberg, *"The Federal Income Tax Relationship to Housing:" A Commentary*, 24 TAX LAW. 347 (1971). *See also* Note, *Tax Reform and Real Estate Tax Shelters: Consequences for Low-Income Housing*, 48 U. CINN. L. REV. 99 (1979); *Federal Tax Policy and Urban Developoment: Hearings Before the Subcomm. on the City of the House Comm. on Banking Finance and Urban Affairs*, 95th Cong., 1st Sess. (1977).

110. For a general overview of the use of tax shelters to promote housing construction, see Tucker, *Real Estate Depreciation: A Fresh Examination of the Basic Rules*, 6 J. REAL EST. TAX. 101, 124-31 (1979); Weidner, *Realty Shelters: Nonrecourse Financing, Tax Reform, and Profit Purpose*, 32 S.W. L.J. 711 (1978); Weisner, *Tax Shelters—A Survey of the Impact of the Tax Reform Act of 1976*, 33 TAX L. REV. 5 (1978).

111. *See* Shoenfeld & Sternberg, *supra* note 109, at 349.

112. *Id.* at 350.

113. *See* note 101 *supra. See also* Comment, *Tenant Protection in Condominium Conversions: The New York Experience*, 48 ST. JOHN'S L. REV. 978, 991 n.72 (1974).

114. *See* note 42 *supra*.

115. *See* notes 17-19 *supra*. Aside from the negative tax consequences of 1976 tax reforms, such as lost tax shelters, the building owner benefits indirectly from other tax consequences. Specifically, the building owner benefits from tax laws that encourage homeownership by individuals. *See generally* notes 118, 123-124 and accompanying text *infra*.

116. Income is sheltered, in large part, because of the investor's ability to take depreciation on the capital asset, the real estate and the fixtures. I.R.C. § 167. Additionally, the investor-landowner may also receive certain tax credits for certain new

interest deductions have reached the cross-over point,[117] the expenses and losses associated with the premises are not sufficient to shelter income from that project or other sources. No longer profitable, the time is ripe to sell the investment and reap long-term capital gains.[118]

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assets when they are placed into service. I.R.C. §§ 7, 8. *See also* note 345 *infra*. The depreciation, which is often seen as an artificial loss to the taxpayer (because he does not incur any out-of-pocket expenses), is subtracted from the taxpayer's income, while the tax credit permits subtraction of the credit amount directly from the calculated tax.

When a taxpayer sells real estate, he generally can reap a capital gain. To the extent that some of the gain is represented by depreciation taken that resulted in a lower adjusted basis the taxpayer has converted ordinary income into long-term capital gain. For example, if Mr. Burgher invested $40,000.00 in a single-family dwelling and rented it to a professional couple he is entitled to take $1,000.00 of depreciation per year using the straight line method. I.R.C. § 167(b)(1). If he is in the 50% bracket, that $1,000.00 produces a tax benefit of $500.00, that is, Mr. Burgher can offset $500.00 of income from other sources. If Mr. Burgher sold the house after ten years for $50,000.00 his adjusted basis was reduced by $10,000.00 (ten years' depreciation). I.R.C. § 1001(a)(2)(b). His gain is $20,000.00, as gain equals sales price $50,000.00 minus adjusted basis [$40,000.00 (the original sale price)-$10,000.00 (the depreciation to him)]. I.R.C. § 1001(a). Because he is an investor he receives capital gains treatment. I.R.C. § 1221. Note that the depreciation, taken earlier to shelter income, now transforms into a capital gain. Real estate investors who use the straight line method depreciation for their assets are able to do this. I.R.C. § 1250. All other capital assets experience the recapture of depreciation taken at ordinary income rates. I.R.C. § 1245.

Thus real estate investments are twice blessed by the depreciation allowance as the owners may use depreciation to offset current income and may transform depreciation loss adjustments to basis to long-term capital gain that will shelter even more income.

117. The cross-over point is the point in time when the taxpayer's income, from both his realty and other sources, no longer receives adequate protection from the tax shelter and thus he suffers tax liability for this ordinary income. The principal components of the tax shelter are often interest deductions (I.R.C. § 163(a)) and depreciation (I.R.C. § 167). During the early years of the project the interest deduction is great because of the employment of the self-amortizing loan. As the project grows older the interest payment shrinks. Often accelerated or component depreciation is used by the taxpayer as these methods permit a disproportionate share of depreciation to be taken in the early years. As both the depreciation and interest expenses shrink, cash flow from the project may become taxable as the smaller write-offs are not sufficient to offset the cash flow. Obviously, income from other sources would also lose shelter. When this occurs, usually somewhere between the fifth and the tenth years, the investor will sell the project for capital gains and reinvest in a new shelter.

118. *See* I.R.C. § 1231. This section provides favorable capital gains treatment in most circumstances. *See generally* Richardson, *supra* note 15, at 122-24; Bourdon, Richard, *Federal Tax Laws and Condominium Conversions: Possible Changes to Discourage Conversions and Assist Rental Housing*, Cong. Rec. H2981, H2983-84 (daily ed. April 24, 1980).

Thus, such favorable tax treatment provides strong incentives for the landlord to convert to condominiums.

But how is it possible for the tenant, who formerly could barely afford to pay the rent, to become a condominium owner when the asking price seems to be beyond his or her means? The answer, of course, is to be found in the tax code. As with the property seller, the Internal Revenue Code provides strong tax advantages for the buyer, favoring the "homeowner" and facilitating the tenant's conversion from renter to condo owner.[119]

The following hypothetical will demonstrate a typical situation. Mr. and Mrs. Burgher and their minor daughter, Gigi, live in a fifty-unit luxury garden apartment building in Valhalia, State of Euphoria. The gross income of the Burgher family is $35,000.00 a year. They pay $600.00 per month rent, excluding utilities. Their landlord has lost his tax shelter and has been approached by a developer to sell the complex.[120] The developer would like to convert the complex into condominiums because the housing market in Valhalia is tight. The developer believes that she will make a handsome profit by converting the Lorelei Apartments.

The developer has offered the Burgher's landlord $2,550,000 for the apartments.[121] The developer hopes to sell the fifty units to people like the Burghers for approximately $90,000.00 per unit, or $4,500,000 for the entire fifty units.[122] The developer is willing to

119. *See* notes 123-129 and accompanying text *infra*. The Internal Revenue Code provides numerous incentives for homeownership by former renters. The principal tax incentives are the availability of deductions for real property taxes, I.R.C. § 164(a)(1), and mortgage interest, I.R.C. § 163(a). In addition, there are other incentives such as favorable capital gains treatment; a one-time $10,000 exclusion of capital gains from the sale of a principal residence of a taxpayer aged 55 or older, I.R.C. § 121; a deferral of recognition of gain on the sale of a home if another home is purchased within 18 months after the sale, I.R.C. § 1034; and other favorable treatment if the taxpayer owns his home at the time of death, I.R.C. § 1014.

120. *See* notes 115-18 and accompanying text *supra*.

121. The developer has based his offering price on a capitalization rate of 14%, or seven times the apartment complex annual gross revenue of $360,000. This rate reflects the riskiness of rental projects as investments. For instance other real estate investments, such as regional shopping centers, are currently selling at approximately twenty times the annual gross revenues. Speech of Hans Monter, President of CPI, a New York real estate firm, at the Wharton School in Philadelphia, Pa. (February 25, 1980).

122. This increase of $2,000,000 demonstrates that in condominium conversions, the sum of the parts is often greater than the whole. *See Condominium Housing Issues: Hearings Before the Senate Subcomm. on Banking, Housing and Urban Affairs*, 93rd

provide purchase money mortgages for eighty percent of the purchase price. A typical mortgage will be for $72,000, for thirty years at thirteen percent interest. The Burghers will have to use most of their certificates of deposit for the down payment of $18,000. They will have to pay $796.46 a month in debt service.

A breakdown of the Burghers' projected housing costs looks like this:

$ 9,557.56	debt service
1,000.00	local taxes
500.00	insurance
1,000.00	maintenance & association fees[123]
$12,057.56	total expense

Before conversion, the Burghers were paying $7,200.00 in rent and struggling. The difference between the two costs is a staggering $4,857.56. How can they afford to "go condo?"[124] The answer lies in the Internal Revenue Code. By becoming homeowners, the Burghers will be subsidized by various personal deductions that permit them to spend more money on the condo than they thought they could.[125]

The year before conversion, the Burghers paid $6,617.00 in federal income taxes. The computation was made as follows:

$35,000	gross income
- 1,000	business expenses
$34,000	adjusted gross income

Cong., 2nd Sess. 112-19 (1974) (Testimony of D. Clurman, Assistant Attorney General of New York); Comment, *Tenant Protection in Condominium Conversions: The New York Experience*, 48 ST. JOHN'S L. REV. 978, 982 (1974). There is a handsome profit for a developer, even though some of the $2,000,000 mark-up goes to renovation, marketing, and maintenance.

123. *See* note 21 *supra*. Payments to the management association for fees, assessments, and other related expenses may be deductible, in part, for the taxpayer. I.R.C. § 528. *See also* Lippmann, *Tax Aspects of Cooperative and Condominium Conversions, Real Est. Rev.* 39, 43-44 (1980).

124. *See* notes 125-30 and accompanying text *infra*. The Burghers may have little choice in the matter because of the tightness of the real estate market in their city. In most instances, although alternative rental housing may be available, the new rent will generally be higher, and the tenant will have to endure the costs of searching for and relocating to a new apartment. *See generally* 1980 HUD STUDY, *supra* note 1, at IX-21 to 27.

125. The Burghers are permitted to take the following deductions for personal expenses: mortgage interest, I.R.C. 163(a); property taxes, I.R.C. § 164; charitable expenses, I.R.C. § 213. Before purchasing the condominium, the Burghers lacked sufficient itemized expenses to reduce their taxes. *See* text accompanying note 125 *infra*. After the purchase, their available deductions increased dramatically. Additionally,

Their deductions were:

$2,000	state and local taxes
400	charity
500	medical
200	interest
$3,100	total deductions

They could not itemize and therefore took the zero bracket and used the tax tables.[126] Thus, their federal tax liability was $6,617.00.

After they become unit owners their deductions will increase dramatically:

$ 2,000	state and local taxes
400	charity
500	medical
9,347.80	interest[127]
$13,247.80	
-3,400	zero bracket
$ 9,847.80	excess deductions
$35,000	gross income
-1,000	business expenses
34,000	

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the taxable income and *tax liability* are diminished by these now itemizable personal expenditures. *See* text accompanying notes 126-27 *infra*.

Below are the typical taxpayers' deductions.

Adjusted Gross Income	Medical, Dental	Taxes	Contributions	Interest	Casualty Theft
$ 8,000-$ 10,000	$1,100	$1,147	$ 524	$1,507	$ 658
$10,000-$ 12,000	$ 882	$1,179	$ 527	$1,589	$ 871
$12,000-$ 14,000	$ 806	$1,242	$ 475	$1,706	$ 652
$14,000-$ 16,000	$ 669	$1,421	$ 479	$1,868	$ 935
$16,000-$ 20,000	$ 632	$1,640	$ 545	$1,946	$ 598
$20,000-$ 25,000	$ 505	$1,954	$ 563	$2,085	$ 646
$25,000-$ 30,000	$ 520	$2,300	$ 676	$2,271	$ 502
$30,000-$ 50,000	$ 551	$3,124	$ 893	$2,637	$ 752
$50,000-$100,000	$ 748	$5,488	$1,965	$4,230	$1,402

Tax Deductions, U.S. News & World Report, Feb. 18, 1980, at 84.

126. The zero bracket amount is $3,400 for a joint return. I.R.C. § 63(d)(1); *1979 Tax Table B—Married Filing Joint Return*, FEDERAL INCOME TAX FORMS 36 *(Tax Tables)*.

127. Interest is a permitted personal deduction. I.R.C. § 163. With all the interest expenses from their condo, the Burghers may become more conscious of the expense and remember to account for their credit card charges, auto loan interest, etc.

-3,000	personal exemptions
31,000.00	
-9,847.80	excess itemized deductions
$21,152.20	taxable income

The Burghers' federal tax liability is now $3,539.62.[128] The home ownership was worth $3,077.38. They can use their refund in federal taxes to offset the increased housing cost. The Burghers are still short $1,780.14. They will have a very tight budget. But the rental market was very tight and had they been forced to move, moving costs and increased rent would probably have caused their housing costs to increase by approximately the same amount.[129] Further, had they moved, they would not have built up the equity[130] nor had the satisfaction that comes from owning their own home.

This scenario demonstrates how the Internal Revenue Code not only spurs the landlord to convert, but also assists the tenant with enough of a subsidy to make purchase of a converted unit feasible, and often even attractive. Nevertheless, not all tenants are as fortunate as the Burghers. In fact, some estimate that over sixty percent of all rental tenants earn less than $12,500 a year.[131] Recognizing that these less fortunate persons do not have the Burghers' options, many states and municipalities have enacted regulations to protect tenants from the harmful effects of conversion.

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128. *Tax Tables, supra* note 125, at 34.

129. Note that the landlord might have raised the rent by ten percent (10%) to make up for inflation. Had he done so, they would have needed $720 more to meet the rent. Thus, the Burghers need come up with an additional $1,028. As the housing market is very tight, they probably lack alternatives.

130. As the condominium owner makes each mortgage payment, he acquires greater equity in the property through his principal payments. Equity is defined as "[t]he remaining interest belonging to one who has pledged or mortgaged his property, or the surplus of value which may remain after the property has been disposed of for the satisfaction of loans." BLACK'S LAW DICTIONARY 484 (5th ed. 1979). Later, if the condominium owner sells his property, probably at an appreciated price, he recovers his equity investment plus the benefits of the appreciation. The renter, on the other hand, obtains no equity in his apartment, receives no tax benefit from his rent payments, and will not recapture any of the money expended to shelter himself.

131. *See* 1980 HUD STUDY, *supra* note 1, at VI-14. The study indicates that 69% of all renters nationally earn less than $12,500 per year. Further, only 12% of all former renters actually purchase their converted units. *Id.*

IV. LEGISLATIVE RESPONSES

A. *Introduction*

This section provides an overview of the various legislative actions and proposals designed to address the problem of condominium conversion. The discussion begins with an examination of the general governmental responses to protect tenants. Next, this section evaluates certain specific, more innovative efforts developed by some legislatures. Discussion of municipal legislation predominates this section because the problem, like that addressed by rent control, is peculiarly local.

An examination of the legislative responses to the condominium conversion problem requires an understanding of the constitutional foundation for such regulation. The basis for this regulation is the "police power," and its justification is to protect the "health, safety, morals and general welfare of the community."[132] The police power is an inherent, residual power found at the lower levels of American government. This power, which escapes simple definition,[133] is not unlimited.[134] A sovereign, whether it be a state or local government, may exercise its police power only if its use is rationally related to the promotion of a legitimate government objective.[135]

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132. *See* E. FREUND, THE POLICE POWER §§ 2-3 (1904); Stoebuck, *Police Powers, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1057-59 (1980). *See generally* 16A AM. JUR., *Constitutional Law* § 372 (1979).

133. *See* Sax, *Takings and the Police Power*, 74 YALE L. J. 36 (1964):

> No precise definition may be given for the term "police power:" It is used by the courts to identify those state and local governmental restrictions and prohibitions that are valid and that may be involved without payment of compensation. In its best known and most traditional uses, the police power is employed to protect the health, safety, and morals of the community.

Id. at 36 n.6.

134. The police power, existing at state and local government levels, has no express limitations. Rather, that power is subject to some implied constitutional restraints. First, a government exercise of police power must, to some extent, advance the public interest. The regulation must comport with the requirements of substantive due process; it can not be arbitrary, capricious or unreasonable. *See* Stoebuck, *supra* note 131, at 1057-58. Next, a valid exercise of police power can not contravene the fifth and fourteenth amendments by taking property without just compensation. Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 239 (1897). *See also* notes 291-316 and accompanying text *infra*.

For the purposes of this article, the examination of the police power and its limitation will be limited to land use regulations and the related regulations affecting private property rights.

135. *See* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Goldblatt v. Town of

Condominium conversion regulations derive from the police power of the sovereign.[136] Both state and local governments have enacted these regulations to combat, as with rent controls, difficult housing problems.[137] These ordinances and statutes have imposed restrictions on both the building owner and the unit purchaser, sometimes even suspending certain property rights.[138] Further, although the regulations promote the public welfare, some regulatory requirements so severely interfere with an owner's property that the exercise may be improper. In some situations, a regulation's operation may constitute a deprivation of property without due process.[139] An examination of the various conversion ordinances and statutes illustrates the range of interference presently tolerated under the auspices of the police power.

B. *Basic Tenant Protections*

The Uniform Condominium Act[140] (UCA), which has served as a model for many conversion ordinances, has established some of the

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Hempstead, 369 U.S. 590 (1960); Nebbia v. New York, 291 U.S. 502 (1934). The Supreme Court in *Nebbia* stated the general tenets of the police power:

> So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever . . . policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adopted to its purpose. The courts are without authority either to declare such policy, or . . . override it. If the laws passed . . . have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied. . . . [T]he legislature is . . . the judge of the necessity of such an enactment . . . [E]very possible presumption is in favor of its validity . . . , it may not be annulled unless palpably in excess of legislative power.

Id. at 537-38.

136. For a discussion of the source of condominium conversion regulations and analogous rent controls, see C. RHYNE, W. RHYNE, & P. ASCH, MUNICIPALITIES AND MULTIPLE RESIDENTIAL HOUSING: CONDOMINIUMS AND RENT CONTROL (1976). *See also* Snyderman & Morrison, *supra* note 11, at 981; Soloway, *supra* note 1, at 25.

137. *See* notes 39-45 and accompanying text *supra*.

138. *See* notes 208-330 and accompanying text *infra*.

139. *See* notes 274-316 and accompanying text *infra*.

140. The National Commission on Uniform State Laws promulgated the Uniform Condominium Act in 1977. Thus far, three states, West Virginia, Minnesota, and Pennsylvania have adopted the Act with some minor variations. Several other states, however, are considering adoption of the Act in some form. These states include: Arizona, Colorado, Hawaii, Idaho, Vermont and Wyoming. *See generally* J. SILVER & C. SHREVE, CONDOMINUM CONVERSION CONTROLS, U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT (1979).

basic tenant protection mechanisms found in jurisdictions regulating conversions.[141] The principal elements of protection are a notice requirement[142] and an exclusive right to purchase.[143] Some states have also included some form of anti-harassment provision.[144] The notice requirement mandates that a converter notify tenants in writing at least 120 days before requiring them to vacate of his intent to convert.[145] The purpose behind the notice requirement is to apprise tenants of the need to locate new accommodations and to provide them with sufficient time to do so. Both state and local governments have

141. See notes 142-43, 147-53 and accompanying text *infra*.

142. Uniform Condominium Act § 4-110(a) (requires 120 days' written notice).

143. Uniform Condominium Act § 4-110(b) (grants tenant a sixty day exclusive right to purchase his or her unit, plus a 180-day restriction against the developer offering the unit on more favorable terms to another purchaser).

144. *See* notes 151-53 and accompanying text *infra*.

145. *See* note 142 *supra*. The following states have adopted a 120-day written notice requirement: Arizona, ARIZ. REV. STAT. ANN. § 33-1326(b)(2) (West Supp. 1980); District of Columbia, D.C. CODE ANN. § 5-1268(b)(1) (Supp. V 1978) (the converter must give this notice of conversion within ten days after his application for registration of an offering statement concerning conversion before he can give his tenants notice to vacate); Georgia, GA. CODE ANN. § 85-1623.1(a) (Supp. 1980) (requires that notice set forth tenant rights); Illinois, ILL. ANN. STAT. ch. 30 § 330(a) (Smith-Hurd Supp. 1980) (setting maximum notice requirement at one year); Michigan, MICH. COMP. LAWS ANN. § 559.204 (Supp. 1980) (providing 120-day minimum even if tenant had a month to month tenancy); Minnesota, MINN. STAT. ANN. § 515A.4-110 (West Supp. 1980) (requiring 120-day notice of *either* intent to convert or conversion; and that notice contain a statement of tenants rights); Virginia, VA. CODE ANN. § 55-79.94 (Mich. Supp. 1980); West Virginia, W. VA. CODE § 36B-4-110(a) (Supp. 1980) (requiring 120-day notice which includes statement of tenant rights); Wisconsin, WIS. STAT. ANN. § 703.08(1) (West 1980) (requires 120-day written notice of proposed conversion, although unclear whether declaration must be filed before notice period begins). A number of cities have also imposed the 120-day notice period: Los Angeles, CAL., MUN. CODE § 12.5.2-E(2) (Nov. 10, 1979); San Francisco, CAL., MUN. CODE, ch. XIII at § 1391(a) (July 2, 1979) (must be filed within five days after filing of application to convert with Department of Public Works); Atlanta, GA. CODE ch. 2 art. F, § 8-2183(a) (December 17, 1979); Minneapolis, MINN. CODE § 250.40 (October 26, 1979) (requiring extension of notice to vacate to 180 days if 1) a tenant is 65 years of age or older; 2) any tenant is below 18 years of age; or 3) if any tenant in the unit is handicapped). The following cities also have a 120-day notice requirement: in California—Chula Vista, Concord, La Mesa, Long Beach, Oakland (120 days from issuance of final report), and Walnut Creek; in Colorado—Boulder (with special notice requirements to tenants 62 years of age or older); in Indiana—Indianapolis; in Ohio—Lakewood and Lyndhurst; in Washington—Lynnwood (notice required upon approval of conversion by City Council), Mercer Island (notice required within 36 hours of filing condominium declaration), and Seattle (notice required before offering unit for sale, also must notify tenants within 5 days of filing). *See* 1980 HUD STUDY, *supra* note 1, at App. 2-X.

adopted the notice requirement, many tapering it to meet the demands of their particular rental housing markets.[146]

Nearly every jurisdiction regulating conversions also follows the UCA by providing tenants with either an exclusive right to purchase or a right of first refusal.[147] In general, a right to purchase provision grants a tenant an exclusive right to purchase his or her apartment for

146. *See, e.g.*, COLO. REV. STAT. § 38-33-112(3) (Supp. 1980 (requiring only 90 days' notice); CAL. GOV'T CODE § 66427.1(c) (Deering Supp. 1981) (requiring 180 days' notice); CONN. GEN. STAT. § 47-883(4)(b) (1981) (requiring 180 days' notice); FLA. STAT. ANN. § 718.606(1)(b) (West Supp. 1980) (granting 180-day notice of intended conversion to all tenants) and *id.* § 718.606(1)(a) (270-day notice to tenants residing in their apartments over 270 days); MD. REAL PROP. CODE ANN. § 11-102.1(a) (1979 Cum. Supp.) (requiring notice 180 days before the property is subjected to the condominium regime); N.H. REV. STAT. ANN. § 356-B:56 (Supp. 1979) (requiring 90 days' notice); N.J. STAT. ANN. § 2A:18-61.8) (West Supp. 1980) (requiring 2 months' notice, subject to 3-year notice requirement before instituting eviction proceedings); 68 PA. CONS. STAT. ANN. §§ 3410(a), (f) (Purdon 1980) (must give one-year notice to all tenants and subtenants, and two years' notice to persons 62 years of age or older or disabled persons who have occupied their units for more than two years); WASH. REV. CODE ANN. § 59.18.200(2) (granting 90 days' notice) (West Supp. 1980). Thus, as a practical matter, Colorado and New Hampshire have the least restrictive state notice requirements, while New Jersey and Pennsylvania have the most protective.

The variation in municipal and county notice requirements is just as great. Denver, Colorado requires only 90 days' notice of intent to convert. DENVER, COLO. REV. MUN. CODE § .2-1(8) (1979). The intermediate notice requirements are between 180 and 210 days. MONTGOMERY COUNTY, MD. CODE ch. 11A-5A (180 days unless a tenant is 65 years of age or older or handicapped, these tenants receive 360 notice of intent to convert); WEBSTER GROVES, MO., CODE § 30.315(3)(c) (1980) (requiring 180 days' notice); EVANSTON, ILL. ORDINANCE Art. IV, § 4-101 A. (210 days' notice). The most restrictive local ordinances require a minimum of one year's notice. BOSTON, MASS. ORDINANCE Ch. 4 § 204 (1979) (requiring 1 year notice on rent controlled or vacancy decontrolled units; and two years' notice for the elderly and the handicapped); PHILADELPHIA, PA. CODE § 9-1203 (1980) (requires 1 year's notice). *See also* notes 173-178 and 189-191 and accompanying text *infra* (the ordinances discussed therein usually have no notice requirement as conversions are regulated in a different manner).

147. *E.g.*, OK. REV. STAT. § 91.526(1)(a) (1979) (with the shortest right of refusal of only 30 days after notice of intent to convert); FLA. STAT. ANN. § 718.612(1)(a) (West Supp. 1980) (grants tenants residing in building at least 180 days before notice of conversion 45 days to consider a developer offer, the time commencing when all required purchase materials are delivered); WIS. STAT. ANN. § 703.08(1) (West 1980) (60-day option to purchase which commences before delivery of notice to convert); N.Y. GEN. BUS. LAW § 352eee (McKinney Supp. 1980) (gives tenant 90 days of exclusive right to purchase); ILL. ANN. STAT. ch. 30, § 330(a) (Smith-Hurd Supp. 1980) (grants 120-day right of first refusal); 68 PA. CONS. STAT. ANN. § 3410(b) (Purdon Supp. 1980) (granting tenant 6-month right to purchase after receipt of notice of conversion). The following other states have some form of right of first refusal: Arizona,

a limited time, often sixty days.[148] In addition, even if the tenant refuses the offer, the converter is commonly prohibited, for a prescribed period of time, from extending a more favorable offer to a third party.[149] The right to purchase provision has two primary pur-

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California, Connecticut, Georgia, Minnesota, New Hampshire, New Jersey, Ohio, Virginia, and West Virginia. *See* 1980 HUD STUDY, *supra* note 1, App. 2-X.

Numerous municipalities and counties have similar provisions: CONCORD, CAL. ORDINANCE § 4479.B (1979) (90 days from date Final Public Report is filed); LOS ANGELES, CAL. MUN. CODE § 12.5.2.(c)(3) (1979) (60 days from issuance of subdivision report); SAN FRANCISCO, CAL. MUN. CODE Ch. XIII § 1387(b) (1979) (60 days from date tenant is offered unit by developer in writing); ATLANTA, GA. CODE Ch. 2, art. F. § 8-2184(a) (1979) (60 days after delivery of the offer to tenant); EVANSTON, ILL. CODE art. IV, § 4-102A (1979) (providing 120 day right to purchase or 30 days after condominium instruments are filed, whichever is longer); WEBSTER GROVES, MO., CODE § 30.320(2) (February, 1980) (60 days after notice of intent to convert).

148. *See, e.g.*, Uniform Condominium Act § 4-110(b) (granting 60 exclusive right of purchase to tenant); GA. CODE ANN. § 85-1623e.1(b) (1980 Supp.) (60 days from delivery of offer); VA. CODE § 55-79.54(4)(b) (Michie Supp. 1980) (60 days exclusive right to contract); W. VA. CODE § 36B-4-110(b) (60 days exclusive right to purchase by tenant). *See also* note 146 *supra*.

149. *See, e.g.*, Uniform Condominium Act § 4-110, which states in relevant part: "If a tenant fails to purchase the unit during that [60]-day period, the declarant may not offer to dispose of an interest in that unit during the following [180] days at a price or on terms more favorable to the offeree than the price or terms offered to the tenant . . .;" FLA. STAT. ANN. § 718.612 (West Supp. 1980) (only tenants residing for 6 months or more in their unit have a 45-day right of first refusal; thereafter if developer offers the unit at a price lower than to tenant, developer must notify tenant and give him at least 10 days from notice to accept the offer); GA. CODE ANN. § 85-1623e.1(b) (Supp. 1980) (after 60-day offer period, for 120 days, the developer may not extend a better offer to a third party without giving the tenant at least 10 days to consider the new offer); OR. REV. STAT. § 91.526(3) (1979) (prohibits declarant from extending a more favorable offer to a third person for the 60 days following the termination of the exclusive right-to-purchase period); 68 PA. CONS. STAT. ANN. § 3410(b) (Purdon 1980) (preventing developer from making more favorable offer to third party for six months after the exclusive right to purchase period has expired); a number of cities also provide such protections; ATLANTA, GA. CODE Ch. 2, art. F, § 8-2184(a) (1979) (preventing developer from making better offer to the public for 120 days after the expiration of the right of first refusal period for tenants and subtenants); EVANSTON, ILL. CODE art. IV, § 4-102A (1979) (precluding developer from offering more favorable terms to third parties for 180 days after expiration of right of first refusal); MINNEAPOLIS, MINN. ORDINANCE § 250.50(a) (Oct. 26, 1979) (precluding more favorable offer for 180 days after expiration of notice period).

Numerous states and cities with conversion statutes and ordinance have not provided such protections for the tenant; these states are: Arizona, California, Colorado, Connecticut, Illinois, Maryland, Michigan, New Hampshire, New Jersey and Ohio; among the cities are: Los Angeles, California, San Francisco, California: Denver, Colorado, Boston, Massachusetts; and Webster Groves, Missouri.

Thus far, the right of first refusal has been referred to generally. Actually there are two separate right to purchase provisions employed by states and some municipalities.

poses. First, it gives the tenant an opportunity to insure him or herself of adequate housing when alternative housing is not readily available. Second, the provision discourages developers from forcing out tenants by making unreasonable offers. It also has the side effect of encouraging developers to offer tenants discount prices in order to have ready cash on hand to complete their conversions. Again, as with the notice provisions, the states and cities that have adopted right to purchase requirements have conformed them to the availability of alternative housing in their jurisdictions.[150]

Finally, many jurisdictions have enacted legislation regulating developer conduct during the period before and during the conversion process.[151] Generally, developers are prohibited from unreasonably

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One type of right of first refusal is merely that, a right of first refusal. The developer may make a public offer, and when he obtains a potential purchaser, the present tenant must decide. The second right of first refusal is often referred to as the exclusive right to contract. That provision provides the tenant with no competition in dealing with the developer; it is more protective of the tenant's interest.

Along with these provisions, a number of jurisdictions have added provisions permitting tenants to "cool off" after contracting to purchase their units. Such a provision insures against tenant coercion. For example, in Concord, California, a tenant may rescind a contract to purchase his unit if the developer has not conveyed it within six months of the contracting. *See generally* 1980 HUD STUDY, *supra* note 1, App. 2-X. This article, however, will not examine the purchaser protection available.

The right of first refusal, however, does not apply to tenants in all conversions. Generally, such provisions are applicable only if: 1) the unit was residential before conversion; and 2) the unit was not substantially altered from its original form. Thus, if a developer combined two units, neither tenant should be entitled to the first refusal right. This limitation has been adopted by the Uniform Condominium Act § 4-110(b) and followed in many states and cities: FLA. STAT. ANN. § 718.612(1) (West Supp. 1980); GA. CODE ANN. § 85-1623e.1(d) (West Supp. 1980); MINN. STAT. ANN. § 515A.4-110(b) (Supp. 1980); 68 PA. CONS. STAT. ANN. § 3410(b) (West Supp. 1980) (limited to rental units which before conversion were nonresidential); VA. CODE § 55-79.94(4)(b) (Michie Supp. 1980); W. VA. CODE § 368-4-110(b) (West Supp. 1980); ATLANTA, GA. CODE Ch. 2, art. F, § 2184(c) (1979); EVANSTON, ILL. CODE art. IV, § 4-102B (1979). Additionally, this right is generally waivable by the tenant. *Cf.* LOS ANGELES, CAL. MUN. CODE § 12.5.2E (3) (1979) (providing in the event two units are combined, all former tenants of the units combined shall receive notification of an exclusive right to purchase; the tenant excluded from purchasing his unit is entitled to an alternative unit to the extent possible).

150. *See* notes 147-49 *supra*.

151. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 33-1326D, 33-1327 (West Supp. 1980) (requiring landlord to: 1) honor the terms of the present lease; 2) obtain tenant consent before commencing conversion work on the premises; 3) maintain the premises in a manner comparable to its condition before notice of conversion; and 4) protect tenants' quiet enjoyment of the premises); CONN. GEN. STAT. §§ 47-88b-4(4)(b), (f) (1981) (limiting increases in rent and preventing evictions for failure to purchase connected units); FLA. STAT. ANN. § 718.612 (West Supp. 1980) (requiring that

raising rents, withholding services, or otherwise harassing their tenants.[152] The underlying purpose of such provisions is to protect tenants from developer coercion. A tenant is entitled to both quiet enjoyment during tenancy and an opportunity to freely decide whether to purchase his or her apartment. This provision attempts to control developer abuses which have occasionally arisen during conversion.[153]

The UCA and its progeny furnish a minimum of tenant protection. They simply mitigate the hardship of sudden surprise that often results when conversions go unregulated. The statutes provide little aid in rectifying the tenant displacement problem and offer virtually no assistance in preserving an adequate rental housing stock.

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nonpurchasing tenants receive equal access to present services); ILL. ANN. STAT. ch. 30, § 330 (Smith-Hurd 1980) (developer limited to showing unit to prospective purchasers on a reasonable number of times only during the last 90 days of an expiring tenancy); MINN. STAT. ANN. § 515A.4-110(a) (West Supp. 1980) (precludes altering of lease terms and prohibiting remodeling of the premises during the statutory notice period unless adequate safety precautions are taken); 68 PA. CONS. STAT. ANN. § 3410(e)(3) (Purdon 1980 Supp.) (generally prohibiting developer coercion); OR. REV. STAT. § 91.526(3) (1979) (prohibits showing of tenant's apartment before termination of tenancy unless tenant grants permission); N.Y. GEN. BUS. LAW § 352eee-3 (McKinney Cum. Supp. 1980) (requiring that nonpurchasing tenants receive all services on a nondiscriminatory basis); VA. CODE § 55-79.94(4)(b) (Michie 1980) (prohibiting during notice period unless developer gives 45-day written notice); SAN FRANCISCO, CAL. MUN. CODE Ch. XIII §§ 1389, 1390 (July 2, 1979) (requiring developer to relocate tenant, at developer's expense (over and above tenant's rent), during renovation of the unit; and limiting rent increases for a maximum of two years, except that after one year landlord may receive a rent increase proportionate to the cost of living index). A number of other cities and counties have imposed similar tenant protections: Oakland, California (no remodeling during tenancy; no rent increases); Los Angeles County, California (no remodeling unless tenant vacates or purchases his unit); Marin County, California (no repairs or remodeling until 30 days after final report); Walnut Creek, California (no rent increase for two years after application of conversion, unless unit is sold or application withdrawn); Arlington Heights, Illinois (prohibiting landlord from showing unit without tenant consent for 75 days before lease termination or during right to purchase period, whichever is longer); Evanston, Illinois (no remodeling of an occupied unit); Beachwood, Ohio (no rent increase greater than consumer price index for previous 12 months); Lakewood, Ohio (limiting landlord access to display the unit to twice every 7 days); Lyndhurst, Ohio (limiting landlord access to display the unit to twice every 7 days); Everett, Washington (limiting rent increases); and King County, Washington (limiting rent increases before filing declaration to 10% of based rent; and prohibiting rent increases during 120-day notice period). *See generally* 1980 HUD STUDY, *supra* note 1, App. 2-X.

152. *See* note 151 *supra*.

153. *See* Mursten, *supra* note 11, at 1110. *See also* SILVER & SHREVE, *supra* note 140, at 40-1.

C. *Increasing the Tenant's Rights*

The second level of condominium conversion statutes and ordinances incorporates the basic tenant protections, but extends them, in part, by making the developer bear a greater cost. In some cases, the added protections are merely extensions of the notice and exclusive right to purchase periods.[154] Such provisions are only negligibly more burdensome on developers desiring quick conversions with sizeable profits. Other provisions, however, clearly give tenants greater rights against developers.

These more stringent tenant protections include such considerations as lease-breaking provisions,[155] lease extensions,[156] and relocation assistance for displaced tenants.[157] Lease-breaking provisions, for example, grant the tenant an affirmative right to terminate his or her lease without penalty before it expires.[158] Usually, these provisions require a tenant to give written notice of an intent to terminate thirty to sixty days in advance of relocating.[159] Similarly, some statutes cover tenants who enter leases after notice of conversion.[160] These tenants may also terminate their new leases within a shortened

154. *See* notes 142-43 and 145-50 *supra*.

155. *See* notes 158-60 and accompanying text *infra*.

156. *See* notes 161-64 and accompanying text *infra*.

157. *See* notes 165-69 and accompanying text *infra*.

158. *See* ARIZ. REV. STAT. ANN. § 33-1328 (West Supp. 1980) (applicable to all leases entered into after effective date of statute); CONN. GEN. STAT. § 47-88b-(4)(b) (1981); MD. REAL PROPERTY CODE ANN. § 11.102.1(e) (Supp. 1980); MINN. STAT. ANN. § 515A.4-110(a) (West Supp. 1980); 68 PA. CONS. STAT. ANN. § 3410(e)(2) (Purdon Supp. 1980); MONTGOMERY COUNTY, MD. CODE § 11A-7(B) (1980); WEBSTER GROVES, MO. CODE § 30.300(8)(e) (1980); PHILADELPHIA, PA. CODE § 9-1204(4) (1979) *superseded by* 68 PA. CONS. STAT. ANN. § 3410(e)(2) (Purdon Supp. 1980).

Numerous other cities and counties provide similar lease-breaking provisions: in California—Cupertino, Garden Grove, Oakland; In Illinois—Skokie; in Ohio—Lakewood, Lyndhurst; in Washington—Seattle. 1980 HUD STUDY, *supra* note 1, App. 2-X. *Cf.* FLA. STAT. ANN. § 718.606(3) (West Supp. 1980) (permitting only termination of any statutory tenancy extension). *But see* N.H. REV. STAT. ANN. § 356-B:56 (Supp. 1979) (expressly precluding any alteration of existing landlord-tenant relationships).

159. *E.g.*, CONN. GEN. STAT. § 47-88b(4)(b) (1981); MD. REAL PROP. CODE ANN. § 11-102.1(e) (Supp. 1980); MINN. STAT. ANN. § 575 A.4-110 (Supp. 1980); MONTGOMERY COUNTY, MD. CODE § 11A-7(B) (1980); WEBSTER GROVES, MO. CODE § 30.300(8)(3) (1980). *Cf.* ARIZ. REV. STAT. ANN. § 33-1328B (West Supp. 1980) (requiring tenant to notify landlord of termination within 30 days of notice of conversion); COLO. REV. STAT. § 38-33-112 (Supp. 1980) (permitting termination of lease extension at any time if developer pays moving expenses); 68 PA. CONS. STAT. ANN. § 3410(e) (Purdon Supp. 1980) (requiring 90 days' written notice).

160. *See, e.g.*, MINN. STAT. ANN. § 515A.4-110(a) (West Supp. 1980) (granting

period. The lease-breaking provisions give tenants greater flexibility in relocating. A tenant may search for and lease a new apartment during his or her present lease.

Lease extension provisions, on the other hand, anticipate that some tenants may have difficulty locating suitable replacement housing. These provisions usually take one of two forms. One type of lease extension provision relates to the notice requirement previously discussed.[161] A tenant who receives notice of an intent to convert may continue to occupy his unit for the specified statutory notice period or for the remainder of the existing lease, whichever is longer.[162] The second type of lease extension provision grants a tenant a fixed period extension on his present tenancy, irrespective of the lease requirement.[163] Thus, even after the developer has notified a tenant of conversion, and the notice period has lapsed, a tenant whose lease has expired may continue to rent his apartment for the additional statutory period. Cities with large elderly populations frequently employ these protections.[164]

The last of the common, but more stringent tenant protections is relocation assistance. Although the general elements of relocation assistance provisions are similar, their specific contents vary from ju-

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subtenant, as well as tenant, the right to terminate tenancy with thirty days' written notice).

161. *See* notes 155-160 *supra*.

162. *See* COLO. REV. STAT. § 38-33-112.(3); CONN. GEN. STAT. § 47-88(b)(4)(b) (1981); ILL. ANN. STAT. ch. 30 § 330(a) (Smith-Hurd Supp. 1980); 68 PA. CONS. STAT. ANN. § 3410(e)(1) (Purdon Supp. 1980) (implicit in terms which precludes declarant from terminating lease in violation of its terms); SAN FRANCISCO, CAL. MUN. CODE Ch. XIII § 1391(a) (1979); BOSTON, MA. ORDINANCE § 204 (1979).

163. At the end of the fixed period, the tenant may be forced to vacate. *See* ARIZ. REV. STAT. ANN. § 33-1326B (Supp. 1980); FLA. STAT. ANN. § 718.606(1)(a), (b) (West Supp. 1980); GA. CODE ANN. § 85-1623e. 1(a) (West Supp. 1980); MD. REAL PROP. CODE ANN. § 11-102.1(d) (Supp. 1980); MINN. STAT. ANN. § 515A.4-110(a) (West Supp. 1980); TENN. CODE ANN. § 64-2723(b) (Supp. 1980); VA. CODE § 55-79.94(4)(b) (Michie 1980); MINNEAPOLIS, MINN. ORDINANCE § 250.40 (1979); WEBSTER GROVES, MO. CODE § 30-320(e) (1980). *Cf.* LOS ANGELES, CAL. MUN. CODE § 12.5.2 G.6 (1979) (providing a flexible extension requirement not to exceed one year in most circumstances, except for: 1) people over 62 years of age; 2) the handicapped; 3) families with minor dependent children; and 4) residents of a low- or moderate-cost housing unit.

164. *See* 1980 HUD STUDY, *supra* note 1, at App. 2-X, noting the following cities have provided special lease extensions for the elderly: in California—Duarte, Los Angeles, Oakland, San Francisco, and Walnut Creek; in Illinois—Chicago and Skokie; in Indiana—Indianapolis; in Massachusetts—Boston, Brookline and Cambridge; in New York—New York City; in Ohio—Lakewood and Lyndhurst.

risdiction to jurisdiction.[165] Many municipalities require developers to pay the relocation expenses of displaced tenants.[166] Most ordinances either fix the maximum amount a developer must pay[167] or specify that assistance is limited to actual moving costs.[168]

Some ordinances limit relocation assistance to elderly or low- to medium-income tenants.[169] Nevertheless, the relocation assistance programs serve two important purposes. First, they compensate displaced tenants for expenses incurred in relocating. Second, the payment requirement operates, to some extent, as a deterrent. In large multi-unit buildings, the additional costs of relocation assistance may prevent owners from opting to convert; they simply may not have enough ready cash available to both renovate their property and relocate their present tenants.

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165. *See* notes 166-69 and accompanying text *infra*.

166. Only five states have expressly discussed relocation payments in their conversion statutes. Colorado provides that the developer might pay moving costs to a tenant if the tenant agrees to move during the statutory notice period. COLO. REV. STAT. § 38-33-112(4) (Supp. 1980). Connecticut contemplates relocation assistance up to $500 for low-income tenants. Conn. Gen. Stat. § 47-88d (1981). New Jersey provides for one month rent payment as moving expenses, except after a one year stay of eviction, the owner can give 5 months' rent to prevent further stays of eviction. N.J. STAT. ANN. § 2A:18-61.10.

Tennessee, the third state considering relocation assistance, requires the developer to pay moving costs only if the tenant is unlawfully forced to move during the statutory notice period. TENN. CODE ANN. § 64-2723(c) (Supp. 1980). Florida provides for an optional payment of one month's rent if the tenant will agree to reduce his 270-day period to 180 days. FLA. STAT. ANN. § 718.606(4) (West Supp. 1980).

According to the most recent HUD Study, the following cities have provided for relocation assistance requirements for their displaced tenants: in California—Los Angeles City, Los Angeles County, Mountain View, Oceanside, San Diego, San Francisco, Santa Ana, and Walnut Creek; the District of Columbia; in Illinois—Evanston and Skokie; in Washington—Everett, King County and Seattle. 1980 HUD STUDY, *supra* note 1, at App. 2-X.

According to a survey by the Office of Planning and Research/Housing & Community Development in California, the following additional California cities require the developer to assist or pay for tenant relocation: Alameda, Belmont, Fullerton, Menlo Park, Fremont, San Mateo and Santa Clara. *See* Soloway, *supra* note 1, at 12-13.

167. *See, e.g.*, LOS ANGELES, CAL. MUN. CODE § 12.5.2 G. 7, 8 (1979) (providing that converter should pay actual moving costs up to $500 plus provide an unconditional relocation fee up to $500); SEATTLE, WASH. ORDINANCE 107707 § 3.9 (1978) (fixing maximum relocation assistance at $350).

168. *See, e.g.*, SAN FRANCISCO, CAL. MUN. CODE Ch. XIII, § 1392(a) (1979) (providing for payment of actual moving costs up to $1,000).

169. *See* 1980 HUD STUDY, *supra* note 1, at App. 2-X (noting that Evanston and Skokie, Illinois will pay relocation assistance to persons receiving Section 8 housing subsidies).

All the mechanisms of tenant protection discussed thus far reflect governmental concern with the tenant displacement problem. The function of these provisions is to insure that tenants have an opportunity to seek alternative housing with a minimum of inconvenience. Ordinances containing these provisions neither prevent conversions nor attempt to preserve sufficient rental housing. Though these protections mitigate the hardships caused by conversion, they do not solve the problem of inadequate housing alternatives. Thus, even if a tenant has all these protections available, he or she still has no assurance that other comparable apartments will be available in his or her present neighborhood, or elsewhere in the city.

D. *Protecting Tenants by Preserving Rental Housing*

Some municipalities have enacted ordinances that more directly address the real conversion problem: inadequate rental housing.[170] These ordinances have the objective of insuring that rental housing is available to all tenants who want it. This objective is achieved by preventing developers from converting their buildings absent an adequate supply of comparable rental units in the community.[171] Only one municipality has expressly imposed an absolute and permanent ban on conversion activity.[172] Many other municipalities, however, have enacted ordinances that have this *de facto* effect, although they technically permit conversion.[173] These municipalities have deterred conversions through a variety of methods.

1. Rent and Eviction Controls

Some state and local governments have preserved available rental housing by regulating the eviction of tenants from rent-controlled apartment buildings.[174] Rent controls, like condominium conversion

170. *See* notes 43-44 and accompanying text *supra*.

171. *See* notes 171-208 and accompanying text *infra*.

172. The City of San Carlos, California is the sole city to permanently ban conversions. *See* Myers, *Litigating the Regulation of Condominium Conversions*, in ALI-ABI STUDY MATERIALS—LAND USE LITIGATION 528 (1979).

173. Such cities include: Santa Monica, California, and Brookline and Cambridge, Massachusetts. *See also* notes 300-15 and accompanying text *infra*.

174. *See* N.J. STAT. ANN. 2A:18-61.1-.13 (West Supp. 1979); N.Y. GEN. BUS. LAW § 352eee (McKinney Supp. 1980) (regulating conversions through eviction in N.Y. City through New York City Rent and Eviction Regs. § 55 (found following N.Y. Unconsol. Law § 8700 (McKinney 1974)); NEW YORK, N.Y. ADMIN. CODE §§ 451-1.0-18.0 (1975 & Supp. 1979); NEW YORK, N.Y. ADMIN. CODE §§ 4451-1.0 to -8.0

legislation, are designed to contend with the problems caused by tight housing markets. These regulations attempt to assure adequate housing at reasonable prices. Because of the similarities, a number of cities have used their rent control laws as a mechanism for regulating condominium conversion.

Some jurisdictions have modified their rent control laws in contemplation of the conversion problem.[175] The modifications deny a developer a certificate of eviction for "just cause" if he or she merely wishes to convert his or her building.[176] The developer may evict tenants only for failure to pay rent or commission of another bad act otherwise proscribed by the rent control ordinance.[177] Additionally,

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(1975 & Supp. 1979); BOSTON, MASS ORDINANCE §§ 200 to 210 (1979); CAMBRIDGE, MASS. *Code* No. 929 §§ 1 (1980); SANTA MONICA, CALIFORNIA Art. XVIII § 1800 to -10 (1979). For an excellent discussion of the complex New York City eviction controls, see Note, The Regulation of Rental Apartment Conversions, 8 FORDHAM URB. L.J. 507, 543-54.

175. *See* note 174 and accompanying text *supra*.

176. *E.g.*, N.J. STAT. ANN. § 2A:18-61.1 K (West Supp. 1980). This statute was upheld in *Fishman v. Pollack*, 165 N.J. Super. 235, 237, 397 A.2d 1144, 1145 (1979).

Before these recent eviction controls were implemented, landlords could remove their rent-controlled buildings from the rental housing market for the purposes of conversion. Consequently, they circumvented the rent control protections, and added pressure to the local rental housing markets. *See also* Baker v. City of Santa Monica, WEC 058763 (Los Angeles County Sup. Ct., July 19, 1979) (memorandum opinion) *reprinted in* ALI-ABA STUDY MATERIALS—LAND USE LITIGATION 577 (1979); Stein v. City of Santa Monica, WEC 059251 (Los Angeles County Sup. Ct., July 19, 1979) (memorandum opinion) *reprinted in* ALI-ABA STUDY MATERIALS—LAND USE LITIGATION 579 (1979) (upholding the eviction control ordinance that precluded removal of rent control units for conversion purposes); Zussman v. Rent Control Board of Brookline, 367 Mass. 561, 326 N.E.2d 876 (1975); Grace v. Town of Brookline, 79 Mass. Adv. Sh. 2257, 399 N.E.2d 1038 (1979).

177. *E.g.*, SANTA MONICA RENT CONTROL CHARTER art. XVIII, § 1806 (1979), which provides:

> Section 1806. Eviction: No landlord shall bring any action to recover possession or be granted recovery of possession of a controlled rental unit unless:
>
> a) The tenant has failed to pay the rent to which the landlord is entitled under the rental housing agreement and this Article.
>
> b) The tenant has violated an obligation or covenant of his or her tenancy other than the obligation to surrender possession upon proper notice and has failed to cure such violation after having received written notice thereof from the landlord in the manner required by law.
>
> c) The tenant is committing or expressly permitting a nuisance in, or is causing substantial damage to, the controlled rental unit, or is creating a substantial interference with the comfort, safety or enjoyment of the landlord or other occupants or neighbors of the same.
>
> d) The tenant is convicted of using or expressly permitting a controlled rental unit to be used for any illegal purpose.

a few rent control jurisdictions go further and regulate the removal of any rent-controlled unit from the rental housing market.[178] Such provisions prohibit removal by conversion, demolition, or other means unless approved by the local rent control board.[179] While these provisions impose great restrictions on a property owner, they do not absolutely bar conversion. The rent control regulations merely insure present tenants they will have rental housing.

2. The Tenant Approval Requirement

A small number of states and municipalities allow conversions,

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e) The tenant, who had a rental housing agreement which has terminated, has refused, after written request or demand by the landlord, to execute a written extension or renewal thereof for a further term of like duration and in such terms as are not inconsistent with or violative of any provisions of this Article and are materially the same as in the previous agreement.

f) The tenant has refused the landlord reasonable access to the controlled rental unit for the purpose of making necessary repairs or improvements required by the laws of the United States, the State of California or any subdivision thereof, or for the purpose of showing the rental housing unit to any prospective purchaser or mortgage.

g) The tenant holding at the end of the term of the rental housing agreement is a subtenant not approved by the landlord.

h) The landlord seeks to recover possession in good faith for use and occupancy of herself or himself, or her or his children, parents, brother, sister, father-in-law, mother-in-law, son-in-law, or daughter-in-law.

i) The landlord seeks to recover possession to demolish or otherwise remove the controlled rental unit from rental residential housing use after having obtained all proper permits from the City of Santa Monica.

Notwithstanding the above provisions, possession shall not be granted if it is determined that the eviction is in retaliation for the tenant reporting violations of this Article, for exercising rights granted under this Article, including the right to withhold rent upon authorization of the Board under Section 1803(a) or Section 1809 or for organizing other tenants. In any action brought to recover possession of a controlled rental unit, the landlord shall allege and prove compliance with this Section.

178. *See, e.g.*, CAMBRIDGE, MASS. CODE No. 929 § 1(b)(4) (1980) (removal regulation covers occupancy of unit by landlord, demolition, and rehabilitation in preparation for conversion).

179. *See* CAMBRIDGE, MASS. CODE No. 929 § 1(c), (d) (1980); SANTA MONICA RENT CONTROL CHARTER art. XVIII, § 1803(t) (1979). Both ordinances empower the local rent control boards to issue permits for removing rental units from the housing markets. Issuance of the permit is based on examination of the housing situation in the locality, thus giving the board discretion to permit some conversions. The board will consider such factors as the hardship on the present tenants, the condition of rental housing supply in the present market, and whether persons protected under the ordinance would benefit from retaining the owner's building in the rental market.

even in tight housing markets, by developers who obtain tenant consent for their projects. These jurisdictions require approval by a fixed percentage, usually thirty-five percent, of tenants residing in a building.[180] Tenant approval provisions come in two forms: one requires that a fixed percentage of tenants agree to purchase their units;[181] the other requires only consent by the tenants for conversion.[182]

Approval provisions, which sometimes are attached to rent control or other types of conversion regulations, operate both as a sword and a shield for tenants. On the one hand, they guarantee present tenants available rental housing so long as the requisite percentage of them find conversion undesirable. On the other hand, approval requirements give tenants a fairly powerful bargaining tool against their building's owner. If an owner is anxious to convert, a tenant approval requirement is strong inducement for him or her to sweeten the pot for the tenants. Frequently, the owner will give tenants sub-

180. *See* notes 181-92 and accompanying text *infra*.

181. *See, e.g.*, N.Y. GEN. BUS. LAW § 352eee1(b), (c) (McKinney Supp. 1980) (applicable to New York State generally) (requiring 15% of present tenants' consent to purchase on a non-eviction plan before a conversion application will be declared effective; and requiring 35% of present tenants' consent to purchase on an eviction plan); N.Y. GEN. BUS. LAW § 352eeee 1(b), (c) (McKinney Supp. 1980) (applying same percentage requirements); SAN FRANCISCO, CAL. MUN. CODE Ch. XIII § 1388 (requiring 40% of tenants to submit written intent to purchase forms before City approval of the conversion or indicate they are eligible for lifetime leases).

Without digressing too deeply into the malaise of the New York conversion regulations, the distinction between the eviction and non-eviction plans is in order. An eviction plan, requiring the 35% tenant agreement to purchase, permits the developer to commence eviction proceedings against the present, nonpurchasing tenants two years after the plan becomes effective. N.Y. GEN BUS. LAW"352eee2(d) (McKinney, Supp. 1980). Under this plan, the developer may then convey the remaining 65% of the units fairly rapidly. A non-eviction plan, however, requires the lesser percentage because the developer agrees *not* to commence eviction proceedings against the remaining, non-purchasing tenants unless the tenants breach their obligations to their landlords. *Id.* at 352eee2(c). Under this plan, absent voluntary terminations or tenant misconduct, the developer will probably be a landlord for a considerably longer period.

182. *See, e.g.*, D.C. CODE ENCYCL. § 5-1281(b)(2) (Supp. V 1978) (permitting conversion of low- or moderate-rent housing accommodations if a majority of the tenants approve, even if the vacancy rate is below the statutory minimum for conversion); PALO ALTO, CAL., MUN. CODE ch. 2133, § 21.33.050(c) (1974) (requiring consent of two-thirds of tenants for conversion). *See* Note, *Municipal Regulation of Condominium Conversion*, 53 S. CAL. L. REV. 225, 235, 235 n.68 (1979). *See also* 1980 HUD STUDY, *supra* note 1, at App. 2-X (noting that in California, Newport Beach (67%), and San Bernadino (67% if below 6% vacancy rate) also require tenant approval).

stantial discounts on their units or offer them a premium for vacating.[183] Either way, most tenants will be in a better position to obtain housing. Additionally, if the owner refuses to make major compromises, he or she will be unable to convert, thus preserving available housing.[184]

3. The Moratorium as a Means of Preserving Rental Housing

Many jurisdictions, at one time or another, have imposed moratoria prohibiting all condominium conversions. Moratoria preserve the status quo and thus protect tenants from the adverse impacts of sudden displacement.[185] Moratorium ordinances vary in both type and duration.

a. *Temporary Conversion Moratoria*

Cities facing rapidly increasing conversion activities often enact temporary moratoria to halt that activity.[186] The purposes of such

183. *See* Comment, *Conversion of Apartments to Condominiums and Cooperatives: Protecting Tenants in New York*, 8 U. MICH. J. L. REV. 705, 709-12 (1975).

184. Under the New York conversion regulations, for example, the developer is subject to rather dramatic time limits. To convert his or her apartment, the developer must submit a conversion plan to the New York Attorney General's office. Once submitted, the plan will be declared effective only if the fixed percentage, be it thirty-five or fifteen percent of the tenants, *agree* to purchase their apartments within six months of the offering. If the developer fails to reach that percentage within the allotted time, the plan must be abandoned. Thereafter, the developer must wait eighteen months before he may submit a new plan. *See* Note, *The Regulation of Rental Apartment Conversions*, 8 FORDHAM URB. L.J. 507, 546-47 (1980). *See also* Note, *Government Regulation of Condominium Conversion*, 8 B.C. ENV. AFF. L. REV. 919, 943-46 (1980); Comment, *The Condominium Conversion Problem—Causes and Solutions*, 1980 DUKE L.J. 306, 324-25.

185. *See* Soloway, *supra* note 1, at 11-14; Silver & Shreve, *supra* note 140, at 42; Snyderman & Morrison, *supra* note 11, at 978-80. For an example of such a moratorium, based in part in displacement problems, see PHILADELPHIA, PA. CODE § 9-1206 (September 27, 1979) (imposing 18-month moratorium on filing of Declarations of Condominium with and notifying tenants of intent to convert). This ordinance was subsequently preempted by 68 PA. CONS. STAT. ANN. §§ 3101 to 3414 (Purdon Supp. 1980).

186. Over thirty-one cities have imposed temporary moratoria to halt conversion activities. The major cities employing such moratoria include Chicago, Illinois (40 days); Miami Beach, Florida; Philadelphia, Pennsylvania (18 months); San Francisco, California (imposing two separate moratoria, the first in 1974 for 13 months, the second in 1979 for 3 months); San Jose, California; Seattle, Washington; and Washington, D.C. (imposing three separate emergency moratoria). *See* 1980 HUD STUDY, *supra* note 1, at XII-4. One state has imposed a de facto 8-month moratorium. *See* CONN. GEN. STAT. § 47-88(c) (1981).

moratoria are two-fold. First, cities attempt to ameliorate potential housing shortages by preventing displacement for the duration of a moratorium.[187] Second, cities employ moratoria to give them time to investigate their conversion problem and its ramifications.[188] During temporary moratoria, which usually last from thirty days to a year,[189] localities develop permanent legislation to regulate conversions. Temporary moratoria thus have a limited duration and merely serve as stop-gap provisions.

b. *Moratoria Related to Vacancy Rate*

In an effort to preserve existing rental housing and insure an adequate housing supply, some cities have promulgated moratoria of a more permanent nature. These ordinances prohibit all conversion activity unless the vacancy rate of rental housing in the city or county exceeds a certain percentage of the total housing stock of that area, commonly three to five percent.[190] They do not completely ban conversions; rather they attempt to preserve an adequate and available

187. *See* 1980 HUD STUDY, *supra* note 1, at XII-6. *See also* note 185 *supra*.

188. *Id. See also* 126 CONG. REC. S2003 (daily ed. Feb. 28, 1980) (remarks of Sen. Williams).

189. The shortest moratoria have had thirty-day durations. They were imposed in Miami Beach, Florida in February, 1980 and in Glastonbury, Connecticut in December, 1979. The longest moratoria were imposed by Philadelphia, Pennsylvania and Mountain View, California, each prohibiting conversion for eighteen months. Most moratoria last no longer than one year. *See* 1980 HUD STUDY, *supra* note 1, at XII-4.

190. *See, e.g.*, CAMBRIDGE, MASS. CODE No. 929 § 1(e)(1) (Feb. 14, 1980) (4% vacancy rate requirement applies only to rent-controlled apartments); D.C. CODE ENCYCL. § 5-1281(b)(1)(B) (Supp. VII 1980) (setting a vacancy rate of 3% for all apartments not considered "high rent" under § 1281(b)(1)(B)(c)); LOS ANGELES, CAL. MUN. CODE § 12.5.2F(b) (1979) (5% vacancy rate); MARIN COUNTY, CAL. CODE tit. 20, ch. 2072 § 20.72.053 (1979) (5% vacancy rate); PALO ALTO, CAL. MUN. CODE §§ 21.33.020-.050 (1974) (3% vacancy rate).

In Washington, D.C., the term "high rent housing accommodation" has been defined as:

> . . . any housing accommodation in the District of Columbia for which the total monthly rent exceeds an amount computed for such housing accommodation as follows:
>
> i) multiply the number of rental units in the following categories by the corresponding rents established by the United States Department of Housing and Urban Development for the District of Columbia as the current fair market rents for existing housing under Section 8 Housing Assistance Payments Program for Elevator or Non-Elevator (as appropriate) Buildings: I) efficiency rental units; II) one bedroom rental units; III) two bedroom rental units; IV) three bedroom rental units; V) four or more bedroom rental units; so that the rates are

housing supply. Once the housing stock surpasses the minimum percentage, conversions may occur until available rental housing again drops below the fixed percentage.[191] While this regulation appears to balance the needs of the community and the individual owner, in actuality, it frequently operates as a total ban on conversions: the higher the fixed percentage, the more difficult it is for the developer to convert.[192]

E. *Other Regulations to Insure Adequate Low- and Middle-Income Housing*

Recently, a number of jurisdictions joined the State of New York[193] and a small number of cities in California[194] in designing special conversion legislation to deal with some of the problems of

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not lower than $267 for one bedroom, $314 for two bedroom, $408 for three or more bedroom and $221 for efficiency rental units; and

ii) total the results obtained in clause i) above; and

iii) increase the result obtained in clause ii) by the maximum percentage of any upward rent adjustments found to be warranted by the District of Columbia Rental Accommodations Commission pursuant to section 45-1687(b), beginning with the 1978 Annual Report.

D.C. CODE ENCYCL. § 5-1281(B)(i)-(iii) (Supp. VII 1980). Washington D.C. and Michigan are the only jurisdictions with a provision that restricts conversions on the basis of rental cost. *See* MICH. STAT. ANN. § 26.50(c)(i)(2046) (1981). These provisions more accurately balance the rights of property owners and tenants as they more narrowly define the protected class under the ordinance. *See also* note 195 *infra*.

191. One of the difficulties with vacancy rate regulation is determining whether the rate exceeds the fixed percentage. As studies are compiled, there usually is great fluctuation in vacancy levels. Another problem with these regulations is defining "vacancy rate." Los Angeles, California establishes vacancy rates by relying upon its Department of City Planning's Biannual Housing Inventory and Vacancy Estimate and other surveys found satisfactory by an Advisory Agency. LOS ANGELES, CAL. MUN. CODE § 12.5.2 F.6 (1979). Cambridge, Massachusetts, on the other hand, sets an alternative standard to the vacancy rate requirement, permitting conversion if the total number of private rental units in the city exceeds the January 1, 1970 figure. CAMBRIDGE, MASS. CODE No. 929 § 1(e)(2) (1980).

192. *See* Silver & Shreve, *supra* note 140, at 42. *See generally* GENERAL ACCOUNTING OFFICE, RENTAL HOUSING: A NATIONAL PROBLEM THAT NEEDS IMMEDIATE ATTENTION i, 19 (Nov. 1979) (noting national vacancy rate of 4.8%). With a national vacancy rate below 5%, and with the rate probably even lower in major urban areas with conversion activity, it is obvious that a 5% vacancy rate requirement would generate as a de facto moratorium.

193. N.Y. GEN. BUS. LAW §§ 352eeee 2(a)-(c) (McKinney Supp. 1980). *See* note 196 *infra*.

194. *See* Soloway, *supra* note 1, at 12-13 (noting that Santa Barbara, San Francisco, Walnut Creek, Los Angeles and Oakland provide special relief to the elderly and low- to moderate-income tenants). *See also* SAN DIEGO STUDY, *supra* note, at 63

the elderly, the handicapped and low- and middle-income tenants. Concern for these groups has grown because they are affected most adversely by condominium conversions.[195] Generally, these groups have less flexibility in locating alternative housing. They also may encounter considerable difficulty in locating suitable housing, requiring assistance in making their search. Consequently, the special regulations address such problems by requiring developers to either set aside a specified number of units for these special classes of tenants[196] or in some way replacing the converted building with other

(noting that Del Mar, Escondido, La Mesa, San Diego, and Vista have special provisions related to socio-economic standards).

195. *See* note 8 *supra*.

196. *See, e.g.*, MICH. STAT. ANN. §§ 26.50(204a)-(204c) (1980) compiled in MICH. COMP. LAWS §§ 559.204(a)-206(c) (1980 Supp.) (providing special protections for persons over 65 years of age or any handicapped person residing in non-high rent buildings; limiting rent increases, providing lease renewals (65 years-69 years: 4 years; 70-74 years: 6 years; 75 years-79 years: 7 years; 80 years old and above: 10 years), and compensating the developer for such restricted tenancies); N.Y. GEN. BUS. LAW §§ 352eeee 2(a)-(c) (McKinney Supp. 1980) (granting lifetime tenancies to persons over 62 years of age, who earn less than $50,000 per year and have resided in the building longer than two years (applies to permanently handicapped who have resided in the building for two or more years regardless of income)); 68 PA. CONS. STAT. ANN. § 3410(f) (Purdon Supp. 1980) (granting tenants over 62 years of age 2-year lease extensions if they have occupied the unit for at least two years); LOS ANGELES, CAL. MUN. CODE §§ 12.5.2 G(3), (4), (6) (1979) (protecting persons over the age of 62, the handicapped, families with minors, and residents of low- to moderate-cost rental units by requiring relocation assistance (locating new housing); and long-lease extensions; SAN FRANCISCO, CAL. MUN. CODE ch. XIII §§ 1341.(b), (c), (d), (e), (f), 1385, 1391(c) (1979) (requiring preservation of a portion of converted units for low- and moderate-income tenants and guaranteeing permanent lease extensions for persons sixty years of age or older).

The scope of these provisions can best be demonstrated by including a sample provision from SAN FRANCISCO, CAL. MUN. CODE, art. XIII § 1385 (1979) providing:

> Sec. 1385. *Preservation of Low and Moderate Income Housing*. The City Planning Commission shall determine whether any units to be converted are part of the City's low or moderate income housing stocks. If the Commission determines that any unit to be converted is part of the City's low or moderate income housing stocks, then the price of the unit upon conversion shall not be such as to remove it effectively from said low or moderate income housing stocks and shall be no greater than two and one half (2.5) times the highest income level for low and moderate income households as defined in Section 1309(1) and (m). The resulting sales prices established pursuant to this formula may be increased consistent with any increases in the housing component of the "Bay Area Cost of Living Index, U.S. Dept. of Labor," during the period between the most recent establishment of the above highest income levels and the date of commencement of sales. If the tenant does not exercise the contract right to purchase the unit which has been determined to be part of the low or moderate income housing

comparable alternative housing.[197] Such provisions are usually in addition to the increased protections these groups already receive under the more basic tenant protection measures.

Regulations that require developers to set aside converted units in their buildings usually take two forms. One type of regulation permits developers to convert their entire buildings if they provide a designated percentage of the converted units at a low price to these classes of tenants.[198] The other form of regulation grants particular tenants, usually only the elderly and the handicapped, lifetime leases in their apartments in the converted buildings.[199] In either case, a developer can convert his or her building, although not at a maximum profit, while maintaining the interests of the tenant and the public.

The second method of insuring an adequate housing supply for "disadvantaged" tenants requires developers to replace each unit

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stock, *then the unit shall be made available exclusively for purchase by qualified households of low or moderate income on a first-come, first-served basis for a period of not less than twelve (12) months from the date of recordation* of the Parcel Map or Final Map at a price no greater than that allowed under the low and moderate income price guidelines set forth above. *Priority, however, shall be given to low or moderate income households who can demonstrate that they had previously relocated from a dwelling in a building which had been approved for condominium conversion*. The reconveyance of any unit purchased pursuant to the price restrictions as set forth in Section 1341(b). In cases where no low or moderate income household has purchased or contracted to purchase such unit within this twelve (12) month period, after good faith efforts by the subdivider, the subdivider may offer the unit to the general public with no price limitation.

This regulation is a strong attempt to both protect low-income housing and to carry out the city's comprehensive plan. This plan is provided with more leverage by § 1388 which requires 40% approval. The result of successful conversion is to give the developer some profit, to provide an adequate supply of low- and moderate-income housing, and to have a balanced diverse community in a rehabilitated setting.

197. *See, e.g.*, LOS ANGELES, CAL. MUN. CODE § 12.5.2K (1979) (requiring the applicant for conversion pay the city a $500 fee, before Final Map Approval, to be applied to new rental housing production); SAN FRANCISCO, CAL. MUN. CODE art. XIII §§ 1341(g), (h), 13431-5 (providing a developer, as an alternative to providing available units for low-income tenants, can pay the City 10% of the difference between the aggregate total of proposed market sales and the aggregated total of sales prices if sold at § 1385 formula rate). *See also* Note, *Municipal Regulation of Condominium Conversions*, 53 S. CAL. L. REV. 225 (1979); Comment, *Conversion of Apartments to Condominiums: Social and Economic Regulations Under the California Subdivision Map Act*, 16 CAL. W. L. REV. 466 (1980).

198. *See* SAN FRANCISCO, CAL. MUN. CODE art. XIII § 1385 (1979).

199. *Se* N.Y. GEN. BUS. LAW § 352eeee 2 (McKinney Supp. 1980); SAN FRANCISCO, CAL. MUN. CODE art. XIII § 1391(c) (1979).

they convert with another rental unit. Some ordinances state that a developer may construct or otherwise provide the same number of alternative rental units as he or she wishes to convert.[200] Usually, the developer must deliver these units near the time the conversion process begins.[201]

Other ordinances provide a variation on the replacement requirement. Some jurisdictions permit conversions by developers who pay the governing unit either a fixed fee or a percentage of the sale price for each converted unit.[202] Funds collected under these ordinances are applied to new housing construction for displaced low- or moderate-income tenants.[203]

The above-described set aside and replacement provisions come closest to realistically addressing the entire conversion problem. These provisions neither merely protect tenants nor ban conversions. Cities employing them have attempted to balance the interests of the tenant, the owner, and the potential condominium unit purchaser. Conversion is possible when the owner makes some concessions. If developers comply with the ordinances, they will receive their profits and their city will have an adequate supply of comparable alternative rental housing for the tenants who need it most.

F. *Miscellaneous Regulations*

Jurisdictions that regulate condominium conversions often combine various protections, incorporating them into ordinances or other forms of legislation. In enacting these measures, many jurisdictions add their own gloss, certain nuances that more accurately reflect local problems.

While most of the nuances are interesting, two variations are particularly noteworthy. A few jurisdictions have included provisions that permit tenants to form an association to purchase their build-

200. *See* Comment, *Conversion of Apartment to Condominiums: Social and Economic Regulations Under the California Subdivision Map Act*, 16 CAL. W. L. REV. 466, 488-89 (1979) (discussing the enactment of such an ordinance in La Mesa, California).

201. *See* SAN FRANCISCO, CAL. MUN. CODE art. XIII § 1341(f) (1979) (permitting developer to construct housing especially for low-income tenants within 18 months of filing for conversion, in lieu of providing tenants 10% of the converted units).

202. *See* note 197 *supra*.

203. *See* note 197 *supra*.

ing.[204] Frequently, a tenant association provision is linked with the previously discussed right of first refusal provision. The tenant association may have an exclusive right, for example for ninety days, to purchase the building from their landlord.[205] This provision may make it easier for the individual tenant to purchase his unit. It would be the organization, not the individual, that obtains financing for the purchase. Additionally, this regulation serves to prevent displacement.

The second interesting nuance involves a method of approving conversions, even in tight housing markets. Some municipalities, notably in California, have granted local agencies the power to permit conversions.[206] Unlike the more arbitrary rental vacancy rate provisions, agency discretion provisions permit accurate reflection on the actual housing climate in the area. Thus, an agency can allow conversions where the other more mechanical ordinances would not. The agency may consider, among other things, whether the present tenants have the wherewithal and desire to purchase their units, what type of relocation assistance is offered by the developer, and whether the apartments are high-income units.[207] If the local agency determines that the community would not be injured by the conversion, permission would be granted.[208] Such provisions are beneficial because they permit desirable conversion activity. They neither affect developers arbitrarily nor deny those tenants who need protection the assurance of an adequate housing supply.

Obviously, the mechanisms discussed in the section affect the rights of developers, tenants, and potential purchasers. Interference with these rights is sometimes quite severe. As a result, many people have challenged municipal conversion regulations as being unjust or insufficient. To more fully appreciate the conversion problem, an examination of the litigation is necessary.

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204. *See* D.C. CODE ENCYCL. § 1695.9(a) (Supp. VI 1979); MONTGOMERY COUNTY, MD. CODE § 11A-8 (1980).

205. *E.g.*, D.C. CODE ENCYCL. § 1699.9(b) (Supp. VII 1980) (90 days to close the deal); MONTGOMERY COUNTY, MD. CODE § 11A-9(a), (b) (1980) (120 days to close the purchase).

206. *See* LOS ANGELES, CAL. MUN. CODE § 12.5.2 F(1)-(6) (1979); SANTA MONICA, CAL. RENT CONTROL CHARTER art. XVIII § 1803t (1979).

207. *See* Comment, *supra* note 200, at 491-92, discussing Vallejo City, California ordinance which provides such consideration.

208. *See* note 178 *supra*..

V. LITIGATION—TESTING THE VALIDITY OF CONVERSION REGULATION

This section will discuss and analyze the litigation that has arisen from the increasingly rigorous regulation of condominium conversions by many municipalities. Challenges to conversion control ordinanaces have focused on two major areas: first, the power of a municipality under state law to regulate a form of ownership; and second, the constitutionality of these regulations. Some litigants have successfully attacked municipal conversion regulations as being either preempted by state law or beyond the scope of municipal "home rule" powers. Other challengers, raising due process and equal protection issues, have persuaded courts to invalidate ordinances on constitutional grounds. Generally, however, condominium conversion laws have withstood both state and constitutional challenges.

A. *The Municipality's Authority to Regulate Under State Law*

1. State Preemption

A number of states have recently enacted "second generation" condominium statutes.[209] These statutes reflect the general acceptance of the condominium form of ownership and often include buyer and tenant protections previously omitted from the original enabling acts.[210] The statutory tenant protections provided are seldom as severe as their municipal counterparts.[211] Consequently, when devel-

209. *See* COLO. REV. STAT. §§ 38-33-102 to -112 (Supp. 1980); CONN. GEN. STAT. §§ 47-68(a) to -90(c) (1981); D.C. CODE ENCYCL. §§ 5-1201 to -1297 (West Supp. 1978); FLA. STAT. ANN. §§ 718.101-.622 (West 1976 & Supp. 1980); GA. CODE ANN. §§ 85-1601(e) to -1645(e) (1975 & Supp. 1980); HAW. REV. STAT. §§ 514A-1 to -108 (1977 & Supp. 1980); ILL. STAT. ANN. ch. 30 §§ 301-331 (Smith-Hurd 1978 & Supp. 1980); IND. CODE ANN. §§ 32-1-6-1 to -31 (Burns 1977 & Supp. 1980); LA. REV. STAT. ANN. §§ 9:1121.102 to .115 (West 1979 & Supp. 1980); MD. REAL PROP. CODE ANN. 11.102 (1974 & Supp. 1980); MICH. STAT. ANN. §§ 26.50(101) to (272) (1978 & Supp. 1981); MINN. STAT. ANN. 515A 1-101 to 4-414 (West Supp. 1980); N.J. STAT. ANN. § 46:8A-1 to -28 (1978); N.M. STAT. ANN. §§ 47-7-1 to -28 (1978); OHIO REV. CODE ANN. §§ 5311.01 to .27 (Anderson 1981); OR. REV. STAT. §§ 91.500 to .671 (1979); 68 PA. CONS. STAT. ANN. §§ 3101-3414 (Purdon Supp. 1980); TENN. CODE ANN. §§ 64-2701 to -2723 (1976 & Supp. 1980); VA. CODE §§ 55-79.39-.103 (1974 & Michie 1980); W. VA. CODE §§ 363-1-101 t -4-115 (1980 Cum. Supp.); WIS. STAT. ANN. §§ 703.01 to .38 (1977 & 1980 Special Pamph.).

210. *See generally* 1980 HUD STUDY, *supra* note 1, at XI-1 to -30 for a thorough discussion of buyer and tenant protections.

211. *Compare* Mursten, *supra* note 11, (noting the extensive tenant protection of the "third generation" Florida Condominium Statute) *with* Ritter, *supra* note 13,

opers and unit purchasers have encountered restrictive municipal conversion regulations, they have often argued that state condominium legislation has preempted the field, precluding any conflicting municipal action.[212]

In New Jersey, for example, a number of courts have accepted the preemption argument as a basis for striking down moratoria and other condominium conversion regulations.[213] In *Hampshire House Sponsor Corp. v. Borough of Fort Lee*,[214] a lower state court noted the state had so comprehensively regulated conversions through eviction controls[215] that there was "no room for individual municipalities to helter-skelter adopt regulations. . . ."[216]

Since *Hampshire House*, two other courts interpreting New Jersey law have adopted the preemption doctrine. In *Claridge House One v. Borough of Verona*,[217] a federal district court struck down a municipal moratorium similar to the one at issue in *Hampshire House*. The court found not only preemption, but also direct conflict between the state eviction provisions and the municipal ordinance.[218] Similarly, in *Plaza Joint Venture v. City of Atlantic City*,[219] a state appellate court declared a municipal conversion regulation void.[220] The court

(pointing out the inadequacies of the Florida Statute, and the need for municipal regulation to deal with local housing problems.

212. *See* notes 213-28 and accompanying text *infra*.

213. *See* notes 214-21 and accompanying text *infra*.

214. 172 N.J. Super. 426, 412 A.2d 816 (Super. Ct. Law. Div. 1979).

215. *Id.* at 434, 412 A.2d at 821. The State of New Jersey has regulated condominium conversions through eviction controls under its Anti-Eviction Act, N.J. STAT. ANN. §§ 2A:18-61.1 to .12 (West Supp. 1981), rather than under its condominium enabling legislation. The eviction controls have provided substantial and comprehensive protection of tenants throughout the state. *See also* notes 173-78 and accompanying text *supra*.

216. 172 N.J. Super. at 430, 412 A.2d at 818. The Fort Lee ordinance, BOROUGH OF FORT LEE ORDINANCE No. 79-30 (Nov. 1, 1979), was a vacancy rate moratorium which permitted conversions when the borough apartment vacancy rate exceeded five percent. 172 N.J. Super. at 430, 412 A.2d at 818.

217. 490 F. Supp. 706 (D. N.J. 1980).

218. *Id.* at 710. The Verona ordinance, BOROUGH OF VERONA ORDINANCE No. 15-79 (August 13, 1979), prohibited any conversion activity for one year. This prohibition denied landlords the opportunity to evict tenants for conversion purposes. *Id.* at 708. This ordinance directly conflicted with a New Jersey statute that permitted removal of tenants for the purpose of converting rental units into condominiums. *See* N.J. STAT. ANN. § 2A:18-61.1k (West Supp. 1980).

219. 174 N.J. Super. 231, 416 A.2d 71 (Super. Ct. App. Div. 1980).

220. *Id.* at 242, 416 A.2d at 77.

noted that even when a municipality properly enacts an ordinance under its police power, the ordinance will be held invalid if it *intrudes* on an area exclusively regulated by the state.[221] This is the general rule of preemption.

No state supreme court has considered the preemption issue as it applies to condominium conversions. In *Rockville Grosvenor, Inc. v. Montgomery County*,[222] the Maryland Court of Appeals did consider an analogous issue: whether local ordinances are invalid because they *conflict* with state law. In *Rockville Grosvenor*, the court invalidated portions of the Montgomery County conversion ordinance[223] that provided tenants with relocation assistance and the right of first refusal.[224] The court found the provisions conflicted with certain zoning and building regulations in the Maryland Horizontal Property Act[225] which prohibited discrimination against the condominium form of ownership.[226] The court found two tenant provisions im-

221. *Id.* at 238, 416 A.2d at 75.

222. 422 A.2d 353 (Md. 1980).

223. MONTGOMERY COUNTY, MD. CODE ch. 11A (May 26, 1980). When plaintiffs commenced this lawsuit, a predecessor ordinance was in effect. 422 A.2d at 357-59. Consequently, before the Maryland Court of Appeals heard the *Rockville Grosvenor* case, two issues, the validity of a 120-day moratorium on conversions and a moratorium on the sale of rental units, became moot. *Id.*

The court invalidated MONTGOMERY COUNTY, MD. CODE ch. 11A-5(c), which required developers to reimburse displaced tenants for up to $750 of their relocation costs. 422 A.2d at 364. It also struck down ch. 11A-9, which provided certain tenant organizations the first right to buy their apartment building if the owner contracted to sell it to a converter. *Id.* at 365-67. The court found these provisions treated condominiums differently than apartment buildings, thus directly conflicting with the statute. *Id. See* note 223 *infra*.

224. In the *Rockville Grosvenor* appeal, three provisions of the Montgomery County Code were at issue. Aside from the relocation assistance and right to purchase provisions, plaintiffs challenged a provision that prohibits developers from selling units unless a property report is filed sixty days before first offering such units for sale. *Id.* at 367-69. The court upheld this section, MONTGOMERY COUNTY CODE, MD. ch. 11A-4(a), finding it supplemental to, not in conflict with, the state condominium regulation. *Id.* at 367.

225. MD. REAL PROP. CODE ANN. §§11-101 to 128 (1974 & Supp. 1980). This statute is a second generation statute, enacted in 1974 to supersede the original condominium statute enacted in 1963.

226. The court focused on MD. REAL PROP. CODE ANN. § 11-120 of the Horizontal Property Act. § 11-120 provides in part:

(b) No county, city or other jurisdiction may enact any law, ordinance, or regulation which would impose a burden or restriction on a condominium that is not imposed on all other property of similar character not subjected to a condominium regime. Any such law, ordinance, or regulation is void.

posed burdens on condominiums not imposed on other buildings of similar character.[227] In invalidating portions of the local regulation, the *Rockville Grosvenor* court, unlike the courts in the New Jersey cases, did not rely upon the preemption doctrine.[228] The Maryland court did not find comprehensive state regulation of condominium conversions.

Although these cases suggest that the preemption doctrine can provide an effective means of challenging conversion ordinances, in reality the doctrine has limited application. Generally, a preemption attack will succeed only where a *state* has enacted comprehensive conversion regulations.[229] Many states, however, still retain their

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Id. at 360-61. The court, distinguishing § 11-120(b) from § 11-120(a) which prohibited discriminatory land use treatment of condominiums, construed § 11-120(b) as precluding all conflicting local regulation of condominiums. *Id. See also* notes 228-237 *infra* and accompanying text for consideration of the land use issue. The court, however, negated any argument that the Horizontal Property Act had preempted the field, expressly rejecting that contention. *Id.* at 363. Instead, Judge Rudowsky examined each challenged provision to see whether it was in conflict with § 11-120(b). Absent such a conflict, he upheld the statute.

227. 422 A.2d at 364.

228. *See* note 226 *supra*. Under preemption analysis, local regulation of condominium conversions is absolutely barred. Under conflict analysis, on the other hand, local regulation is possible so long as the local regulation does not conflict with state statutes and policies. *See also* notes 247-252 and accompanying text *infra*.

229. Recently, one jurisdicton has had an opportunity to explore both the state preemption and conflicting regulation issues. In *City of Miami Beach v. Rocio Corp.*, No. 80-626, slip. op. (Fla. Dist. Ct. App., 3rd Dist., April 7, 1981), an appellate court affirmed a decision that struck down a local condominium conversion ordinance. The ordinance contained a 90-day moratorium on conversions and provided an 18-month lease extension provision. *Id.*

In *Rocio*, the City of Miami appealed, arguing that the ordinance was neither preempted by, nor in conflict with, the Florida Condominium Act, FLA. STAT. ANN. §§ 718.101-.622 (1976 & Supp. 1980). Specifically, the City claimed that absent express preemption by the legislature, under its Home Rule Powers, the city was free to enact ordinances restricting conversions. The city further contended that its ordinance merely supplemented the state condominium conversion regulations and was thus a permissible municipal enactment. *Id.*

The appellate court agreed with the City on the preemption issue. Construing the Municipal Home Rule Act, FLA. STAT. ANN. § 166.021 (1979), the court noted that absent *express* preemption by a Florida statute, the city could also regulate in an area already regulated by the state. The court acknowledged that under traditional preemption analysis, preemption could be implied from comprehensive state coverage of the subject, but stated that the § 166.021(3)(c) required an express intent to preempt. *Id.* The court then examined the state condominium statute, and found nothing that precluded a municipal exercise of power.

The court, however, did reject the City's claim that its ordinance supplemented the state condominium law. *Id.* Noting that an otherwise valid exercise of municipal

original enabling legislation, devoid of conversion regulations.[230] Thus, a party challenging a moratorium or other conversion regulation on preemption grounds will probably fail.

2. Attacks on other sources of municipal regulatory power

Even absent a possible preemption argument, some litigants have asserted that state law precludes municipal regulation of condominium conversion.[231] These attacks focus on the statutory bases for municipal attempts to include conversion activity under eviction control laws or prevent it through use of zoning powers and subdivision control. These attacks have been somewhat successful, but, as with use of the preemption doctrine, they have had only limited effectiveness.

a. *Land Use as a Method of Conversion Regulation*

The earliest litigation involving condominium conversion regula-

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power is invalid if in conflict with state law, the court proceeded to compare the state and municipal conversion regulations. It noted, *inter alia*, that: 1) CITY OF MIAMI ORDINANCE No. 80-2197, which prohibited sales or conversions for 90 days, conflicted with FLA. STAT. ANN. § 718.402, which permits conversions; 2) CITY OF MIAMI ORDINANCE No. 79-2169, § 17A-29, which provided that no tenancy could expire later than 18 months after notice of conversion to the tenant, conflicted with FLA. STAT. ANN. § 718.402(2)(A), which limited the tenancy expiration period to a maximum of 180 days; and 3) CITY OF MIAMI ORDINANCE No. 79-2169, § 17A-30, which prohibits cancellation of leases without 18 months' notice, conflicted with FLA. STAT. ANN., which requires only 120 days' notice. Consequently, although the court did not find preemption, it concluded the ordinance was improper because it conflicted with state mandates on the same issue. *Id.*

In another interesting case, *Bowndes v. City of Glendale*, 113 Cal. App. 3d 875; 170 Cal. Rptr. 342 (1980), a California appellate court also rejected a preemption argument. In *Bowndes*, a tenant challenged the validity of a local government action. The Glendale City Council had approved applications to convert certain apartment buildings. The tenant sought mandamus to compel the city to set aside all approvals, contending that the housing element of the local subdivision plan was inadequate and thus inconsistent with the California Subdivision Map Act, CAL. GOV'T. CODE §§ 66410-66499.37 (West Cum. Supp. 1979), and that the local housing plan was also inconsistent with, and preempted by, guidelines promulgated by the California Office of Planning and Research pursuant to CAL. GOV'T. CODE § 65040.2. The court rejected these arguments, finding that the local plan was specific enough and concluding that there was no preemption because the guidelines did not have the effect of law. In reaching these conclusions, the court stated that "[i]f the Legislature desires to preempt the decision making power of local governments in the field [of conversions], it should specifically say so." *Id.* at 886, 170 Cal. Rptr. at 348.

230. *See* note 208 *supra*.

231. *See* notes 228-258 and accompanying text *infra*.

tion involved zoning and subdivision controls. Because state enabling acts omitted any discussion of the relationship between the new condominium form of ownership and the emergence of condominium conversions,[232] some tenants argued for manipulation of local land use ordinances to protect their communities from undesirable conversion activity.[233] Such a restrictive use of land use ordinances conflicted with the state objective of encouraging condominium development.[234] Consequently, some courts precluded use of planning legislation to prevent conversions, prohibiting cities and towns from discriminating against the condominium form of ownership.[235]

In *Bridge Park Co. v. Highland Park*,[236] one of the earliest cases

232. *See* notes 208-09 *supra*. While most states enacted enabling acts for condominium ownership by the mid-1960's, most state level consideration of condominium conversion has occurred in the last five years.

233. *See, e.g.*, City of Miami Beach v. Arlen King Cole Condominium Ass'n, Inc., 302 So.2d 777 (Fla. Dist. Ct. App. 1974) (attempt to prevent conversion by claiming change in type of ownership constituted nonconforming use); Maplewood Village Tenants Ass'n v. Maplewood Village, 116 N.J. Super. 372, 282 A.2d 428 (Super. Ct. Ch. Div. 1971) (attempt to prohibit condominium conversion by applying subdivision controls); Bridge Park Co. v. Borough of Highland Park, 113 N.J. Super. 219, 273 A.2d 397 (Super. Ct. App. Div. 1971) (attempting to regulate conversions through zoning powers); Gerber v. Town of Clarkstown, 78 Misc. 2d 221, 356 N.Y.S.2d 926 (1974) (denial of building permits to developer on basis that condominium is a subdivision subject to planning board approval).

234. *See* text accompanying notes 23-26 *supra*.

235. *See* notes 232-37 *infra*. One court, however, permitted a municipality to regulate condominium conversions through the use of zoning ordinances. In *Goldman v. Town of Dennis*, 78 Mass. Adv. Sh. 1236, 375 N.E.2d 1212 (1980), the Supreme Judicial Court of Massachusetts upheld a zoning bylaw that discriminated against condominium ownership. The bylaw in question forbade the conversion of summer cottages into year-round residences unless the building complied with the requirements for single-family dwellings.

Goldman can be harmonized with the cases prohibiting the use of zoning to regulate conversions. *See* note 229 *supra*. In the usual case, zoning was used merely to prohibit a naked change of ownership form; there was no change in physical use of the property. In *Goldman*, however, the change for periodic use to permanent use was important. First, there are structural differences between summer residences and permanent homes, for example heating and insulation requirements. Second, there are growth considerations. Although a change of an apartment into a condominium does not affect the demand for municipal resources, conversion of a temporary residence into a permanent home may have a significant impact on density, schools, traffic and the various resources available to the community.

For an argument that all conversion is a change of use, see Note, *Municipal Regulation of Condominium Conversions in California*, 53 S. CAL. L. REV. 225, 247-48 (1979).

236. 113 N.J. Super. 219, 273 A.2d 397 (Super. Ct. App. Div. 1971).

addressing the land use issue, a New Jersey appellate court prevented the defendant municipality from using a zoning ordinance to prohibit conversion of garden apartments into condominiums. The court reasoned that although the state permitted municipal regulation of the physical use and types of construction on real property, it did not authorize municipalities to regulate ownership.[237] Thus, without a change of land use during the conversion process,[238] the borough could not regulate conversion in this manner.

Other courts encountering similar zoning restrictions on conversion activity have followed the *Bridge Park* decision.[239] Similarly, courts have struck down municipal attempts to impair condominium development through application of subdivision controls.[240] In light of these decisions, most municipal regulations avoid the use of zoning and subdivision controls.[241]

b. *Implied Municipal Authority to Regulate Conversions*

Several lawsuits have challenged the basic authority of municipalities to regulate conversions. Those seeking to convert or purchase a converted unit have argued that the local government exceeded its power by enacting its particular conversion ordinance.[242] They have contended that the state did not empower the municipality to regulate conversions in the manner employed; thus, the municipal action

237. *Id.* at 222, 273 A.2d at 399.

238. The court concluded that conversion of the building into a condominium would not change the residential use of the building, and thus different zoning treatment was improper. *Id.* at 221-22, 273 A.2d at 398-99.

239. *E.g.*, Arlen King Cole Condominium Ass'n, Inc., 302 So. 2d 777 (Fla. Dist. Ct. App. 1974) (holding that change in type of ownership, from hotel-apartment into condominiums, does not destroy valid existing non-conforming use).

240. *E.g.*, Maplewood Village Tenants Ass'n v. Maplewood Village, 116 N.J. Super. 372, 282 A.2d 428 (Super. Ct. Ch. Div. 1971) (holding that municipality could not require subdivision approval for condominium conversion which conformed with town zoning ordinances because state condominium statute provided that land use restrictions be applied to use, not form of ownership). *Cf.* CAL. GOV'T CODE § 66424 (West Supp. 1980) (considers condominiums subdivisions of land, and thus subject to subdivision controls). For a discussion of California subdivision regulation of condominium developments, see Comment, *Conversion of Apartments to Condominiums: Social and Economic Regulations Under the California Subdivision Map Act*, 16 CAL. W. L. REV. 466 (1980). *See also* Note, *Municipal Regulation of Condominium Conversions in California*, 53 S. CAL. L. REV. 225, 230-31 (1979).

241. *See* notes 139-207 and accompanying text *supra*.

242. *See* notes 240-271 and 292-94 and accompanying text *infra*.

was *ultra vires*.[243]

The evolution of such challenges can best be examined by analyzing the responses of one jurisdiction. In Massachusetts, the Supreme Judicial Court has considered three separate attacks on the source of municipal power to regulate conversions. In the earliest case, *Zussman v. Rent Control Board*,[244] a landlord-convertor sued after the rent control board of the Town of Brookline denied him the certificates of eviction to which he was entitled. The landlord had complied with the original "guidelines" promulgated by the board to regulate conversions. Before he received the certificates, however, the local board, in an effort to protect the town's elderly citizens, issued additional "Emergency Regulations" under the state's general rent control statute.[245] The Supreme Judicial Court found that the

243. An *ultra vires* act by a municipality is defined as a municipal action that goes beyond the powers converred upon it by state law. BLACK'S LAW DICTIONARY 1365 (5th ed. 1979).

In cases challenging condominium conversions, the term *ultra vires* has not been used. Generally, the issue arises implicitly. For example, in El Patio v. Permanent Rent Control Bd., 110 Cal. App. 3d 915, 168 Cal. Rptr. 276 (1980), the court struck down a municipal action that attempted to impose additional conditions on a developer after he complied with state law. This action was *ultra vires*.

The developer in *El Patio* had properly obtained approval of a tentative subdivision map for a condominium conversion, meeting certain state law requirements. Thereafter, the voters in the City of Santa Monica approved a rent control charter amendment regulating conversions. Pursuant to the charter amendment, the developer requested a vested right waiver by the rent control board, which would permit him to continue his conversion free of the ordinance restrictions. Before the board considered his application, it amended its rules regarding vested rights in a manner prohibitive of the developer's conversion. Subsequently, the board denied the developer a vested right determination. In *El Patio*, the court found the local government had acted improperly. It held, therefore, "that the City could not impose additional conditions after the conditional approval of the tentative map." *Id.* at 927, 168 Cal. Rptr. at 283. Here, a direct conflict existed between the state law requirements and the local restrictions. The city sought to act beyond the scope of its authority.

244. 367 Mass. 561, 326 N.E.2d 876 (1975).

245. *Id.* at 563, 326 N.E.2d at 877. The "Emergency Regulations," promulgated on January 30, 1973 by the Brookline rent control board, provided that condominium conversion alone was no longer "just cause" for conversion. Before these regulations, a landlord wishing to convert his building need only apply for certificates of eviction in order to remove his building from rent control. Following enactment of the "Emergency Regulations," new, more severe restrictions were imposed:

> 1) a limitation on the annual cost of the condominium; 2) a surety bond for management and maintenance of the condominium; 3) purchase and sale agreements signed for at least fifty-one percent of all units in the building; and 4) such other requirements as the Board deems necessary according to the circumstances of each case.

"Emergency Regulations" were unreasonable in that they prevented condominium conversions.[246] Moreover, the court noted that the regulations were, in effect, *ultra vires* because they did not further the objectives of the state rent control act; they were not authorized by the statute and they conflicted with the statutory policy of encouraging condominium ownership.[247] The court, however, in holding for the landlord, did not preclude use of rent control mechanisms to protect tenants.

After *Zussman* undermined the Town of Brookline's efforts to protect its elderly, the town revoked its acceptance of the Massachusetts general rent control statute.[248] Instead, it began regulating rents and evictions pursuant to a special rent control statute enacted by the state legislature for it alone.[249] The special statute permitted Brookline to establish its own eviction controls through by-laws.[250] Thereafter, the town used by-law amendments to inhibit condominium conversion.[251]

In *Grace v. Town of Brookline*,[252] a developer, a unit owner, and a potential condominium purchaser challenged the validity of the by-laws and amendments.[253] The disputed by-laws rendered certificates of eviction unavailable to developers, but provided that unit purchasers, subject to certain limitations, could obtain them.[254] The plain-

Id. at 568, 326 N.E.2d at 880. *See also* Note, *Government Regulation of Condominium Conversion*, 8 B.C. ENV. AFF. L. REV. 919, 929-32 (1980).

246. 367 Mass. at 568, 326 N.E.2d at 880.

247. *Id.* at 566-67, 326 N.E.2d at 878-79. The court construed the Massachusetts Rent Control Act, MASS. GEN. LAWS ANN. c. 842 [term extended by MASS. GEN. LAWS ANN. c. 360 (1974) (no longer in force as of December 31, 1975)] (1970) and found that Brookline's regulations conflicted with several provisions of the Act that encouraged home ownership. *Id.* at 566, 326 N.E.2d at 878. Thus, under the state's general rent control statute, Brookline lacked authority to regulate conversions through use of that statute.

248. *See* Grace v. Town of Brookline, 399 N.E.2d 1038, 1039-40 (Mass. Sup. Jud. Ct. 1979). *See also* Note, *Government Regulation of Condominium Conversion*, 8 B.C. ENV. AFF. L. REV. 919, 932 (1980).

249. *See* Grace v. Town of Brookline, 399 N.E.2d 1038, 1039-40 (Mass. Sup. Jud. Ct. 1979). The new statute specifically granted Brookline the power to enact rent controls. Act of Aug. 31, 1970, ch. 843, 1970 Mass. Acts 740.

250. 399 N.E.2d 1038, 1039-40.

251. *Id.*

252. *Id.* at 1038.

253. *Id.* at 1039.

254. *Id.* at 1040, n.8. The amended provision in dispute provided:
Section 9. Evictions a) no person shall bring any action to recover possession of

tiffs argued, in part, that the by-laws were inconsistent with state law under *Zussman*, and that the town exceeded the scope of delegation intended by the legislature in enacting the special rent control statute.[255] The Supreme Judicial Court of Massachusetts rejected these arguments. The court distinguished *Zussman*, noting that the special enabling legislation authorized Brookline to act in accordance with its own housing problems.[256] Thus, the town had not exceeded its delegated authority by restricting conversions. In addition, the court compared the statute at issue in *Zussman* with the special legislation involved in *Grace*. The court found that the policy of encouraging home ownership present in the *Zussman* general statute was absent in the special act.[257] It therefore concluded that the by-laws in *Grace* were not inconsistent with the neutral state enabling act.[258] The court upheld the Brookline regulations as a proper exercise of the municipality's police power.[259]

Both *Zussman* and *Grace* challenged the source of a municipality's legal power to regulate condominium conversions. Neither case clearly analyzed the relationship between a municipality's control powers and its use of those powers in condominium regulation. The

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a controlled rental unit unless: 8) the landlord seeks to recover possession in good faith for use and occupancy of himself or his children, parents, brother, sister, father-in-law, mother-in-law, son-in-law or daughter-in-law *except that if the unit is a condominium unit occupied by a tenant who was in possession thereof at the time the landlord required ownership, then the Board shall not issue a Certificate of Eviction hereunder for a period of six months from the date when the Board determines that the facts attested to in the Landlord's Petition are valid and in compliance herewith; and if the Board determines that a hardship exists, then the Board may extend the period between the determination of validity and compliance hereunder and the date for issuance of the Certificate for an additional period of up to six months*. 10) The landlord seeks to recover possession for any other just cause, provided that his purpose is not in conflict with the provisions and purposes of this act. *The submission of a unit to Chapter 183A of the General Laws of Massachusetts* [the state condominium statute] *shall not be deemed just cause hereunder*. (Emphasis indicated language added pursuant to amendment).

255. *Id.* at 1042. Specifically, plaintiffs argued that Brookline's special rent control statute was functionally the same as the state's general rent control statutes. They reasoned that since *Zussman* struck down the Brookline "Emergency Regulations" as conflicting with the statutory policy of encouraging home ownership, the new amendments under the special statute should also fail. *See also* notes 242-43 *supra* and accompanying text.

256. 399 N.E.2d at 1042.

257. *Id.* at 1043.

258. *Id.* at 1042-43.

259. *Id.* at 1043.

Supreme Judicial Court, in *Flynn v. City of Cambridge*,[260] directly addressed this relationship and confirmed the municipality's implicit power to regulate conversions.

In *Flynn*, the plaintiffs contested the legal power and authority of the Cambridge city council to enact an ordinance regulating condominium conversion through eviction controls.[261] The city had enacted the ordinance pursuant to its home rule powers and a special state rent control statute which authorized it to regulate its rental housing.[262] The Supreme Judicial Court upheld the ordinance.[263] It found that the special statute implicitly authorized the city to enact the challenged regulation.[264] Under the court's reasoning, the special statute's express grant of power to protect tenants "carrie[d] with it all the unexpressed, incidental powers necessary to carry it into effect."[265] To conclude otherwise, stated the court, would have undermined the special rent control statute.[266] The court, therefore, held that the power to control removals, and thus regulate conversions, was incidental to rent control.[267]

c. *Home Rule as a Source of Municipal Power to Regulate*

While the Supreme Judicial Court in *Flynn* resolved the problem of determining the source of municipal power to regulate in Massachusetts, it expressly avoided the "home rule" issue.[268] For many challengers to condominium regulation, whether or not a municipality has home rule powers is crucial. Most localities do not regulate

260. 1981 Mass. Adv. Sh. 692, 418 N.E.2d 335 (1981).

261. *Id.* at 693, 418 N.E.2d at 335-36. Like Brookline, the City of Cambridge received a special grant of power to regulate rents by the state legislature. *Id.* at 694-95, 418 N.E.2d at 336-37. The special statute, 1976 Mass. Acts c. 36, authorized Cambridge to control rents and evictions. Further, section 5(c) of c. 36 permitted the City "to regulate the removal of controlled rental housing units from the market." 1981 Mass. Adv. Sh. at 695, 418 N.E.2d at 337. Additionally, this particular statute expressly addressed the problem of condominium conversion.

262. CAMBRIDGE, MASS., ORDINANCE No. 929 (March 3, 1980).

263. 1981 Mass. Adv. Sh. at 693, 418 N.E.2d at 336.

264. *Id.* at 695, 418 N.E.2d at 338.

265. *Id.* at 698, 418 N.E.2d at 338. The court found an implied power "to regulate the removal of rental housing stock from the market. . . ." *Id.* This implied power was an unexpressed grant of power to the City to carry out the purposes the special rent control act.

266. *Id.* at 699, 418 N.E.2d at 338.

267. *Id.* at 699, 418 N.E.2d at 338.

268. *Id.* at 695, 418 N.E.2d at 337.

conversions through state authorized eviction controls; rather, they enact independent ordinances to deal with their local problems.[269] To promulgate such ordinances, municipalities require a source of power. Most localities have based their regulation on home rule acts and the police powers derived thereunder.[270] The question, then, is whether home rule power is a legitimate basis for conversion controls.

A major home rule challenge arose in the District of Columbia following passage by its governing council of several successive ninety-day moratoria on condominium conversions.[271] By using its emergency home rule powers, the council circumvented the more stringent legislative process provided by Congress for the enactment

269. *See* notes 13 and 144-211 and accompanying text *supra*.

270. *See, e.g.*, City of Miami Beach v. Rocio Corp., No. 80-626, slip op. (Fla. Dist. Ct. App., 3rd Dist., April 7, 1981), (finding that Miami could regulate conversions under its home rule powers absent state preemption in the field, or a conflict between municipal and state laws). *Cf.* National Association of Realtors Newsletter, Condominium Conversion Update, at 1 (February 1, 1980) (noting an unreported case striking down a Glen Ellyn, Illinois conversion ordinance because the town was a non-home rule town, and was therefore without authority to act).

Home Rule is the source of municipal power for local initiatives. One basic definition of home rule is that:

> [m]unicipal home rule in its broadest sense means the power of local self-government. Any power of local self-government, therefore, in whatever manner arising, whether inherent as sometimes claimed, or conferred or recognized by constitutional or statutory grant, or powers emanating from the people of the local community themselves and set forth in a charter authorized by the state organic law, would be included. The phrase is usually associated with powers vested in cities and towns by constitutional or statutory provisions, particularly the former, and more especially organic authorization to the local inhabitants to frame and adopt their own municipal charters. Rights thus emanating by constitutional grant are viewed as constitutional rights protected from invasion or interference by the people of the state in their representative legislative capacity. Cities and towns having constitutional, freeholders or home-rule charters, in theory at least, derive their power of local self-government from the state constitution.

1 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 1.41 (3d ed. 1971) (footnote omitted).

271. District of Columbia v. Washington Home Ownership Council, Inc., 415 A.2d 1349, 1350 (D.C. 1980). The District of Columbia council had passed three emergency ordinances to prohibit conversion. D.C. Act 3-44, 25 D.C. Reg. 10363 (1979) (*eff.* May 29, 1979); D.C. Act 3-95, 26 D.C. Reg. 1014 (1979) (eff. Aug. 27, 1979); and D.C. Act 1-132, 26 D.C. Reg. 2436 (1979) (eff. Nov. 23, 1979). *See also*, Note, *The Regulation of Rental Apartment Conversions*, 8 FORDHAM URB. L.J. 507, 520-23 (1980).

of regular legislation.[272] In effect, the council gave the emergency regulations the effect of permanent legislation banning condominium conversions.[273]

In *District of Columbia v. Washington Home Ownership Council, Inc. (WHOC)*,[274] the plaintiffs brought a declaratory judgment action to invalidate the emergency legislation. The trial court ruled for the plaintiffs, enjoining enforcement of the then effective emergency regulation.[275] On appeal, the District of Columbia Court of Appeals affirmed.[276] The appellate court held that the council did not have authority "to pass another substantially identical emergency act in response to the same emergency.[277] The court construed the District's Home Rule Act[278] and concluded that the emergency power was "not an alternative legislative track" to enacting permanent legislation.[279] It therefore found that the council had exceeded its home rule powers.[280]

WHOC suggests that home rule attacks will not meet much success. The court of appeals upheld the declaratory judgment only because of the method chosen by the council, not because of the nature of the legislation itself. One can infer, therefore, that home rule power could be a proper basis for municipal regulation of condomin-

272. District of Columbia v. Washington Home Ownership Council, Inc., 415 A.2d 1349, 1353 (D.C. 1980). Congress delegated part of its legislative power to the District, and created a standard procedure for the District of Columbia council to promulgate and pass legislation. D.C. CODE ANN. § 1-146 (Supp. VI 1979). Under these procedures, to enact permanent legislation, the council may pass legislation by majority vote after two readings, a minimum of 13 days apart. *Id.* § 1-146(a). Then, if the passed legislation withstands a mayoral veto (or the council overrides the veto), the act becomes effective after 30 days of Congressional review. *Id.* §§ 1-144(e)-147(c)(1).

In contrast, Congress empowered the council to pass emergency legislation by vote of two-thirds of the members if the circumstances require it. *Id.* § 146(a). Only one reading is necessary, but the legislation has effectiveness for only ninety days. *Id.*

273. District of Columbia v. Washington Home Ownership Council, Inc., 415 A.2d 1349, 1353-54 (D.C. 1980).

274. 415 A.2d 1349 (D.C. 1980).

275. *Id.* at 1350. *See also id.* at 1353, *citing* Washington Home Ownership Council, Inc., 107 Wash. D.L. Reptr. 1985 (Nov. 9, 1979).

276. 415 A.2d at 1350.

277. *Id.* at 1359.

278. D.C. CODE ENCYCL. § 1-146(a) (West Supp. 1979).

279. 415 A.2d at 1359.

280. *Id.* at 1359-60.

ium conversion.[281]

B. *Constitutional Challenges to Conversion Regulations*

Along with state law claims, many litigants have challenged conversion ordinances on constitutional grounds. The underlying rationale is that conversion ordinances severely infringe upon the rights of property owners. Generally, the constitutional attacks have been based upon due process and equal protection grounds. Some commentators have argued that litigants could also bring challenges based upon impairment of contract[282] and unlawful delegation of legislative authority.[283] None of the arguments have met with much

281. *See* note 261 *supra*.

282. U.S. CONST. art. I, § 10, cl. 1. The Contract Clause prohibits states from enacting laws that materially alter contractual relationships. *E.g.*, Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978). Thus, developers and owners challenging a conversion ordinance might argue that such regulation impinges upon their freedom of contract by interfering with their ability to sell rental units, and altering their existing landlord-tenant relationships. In fact, such an argument was suggested in only one case, Claridge House One, Inc. v. Borough of Verona, 490 F. Supp. 706, 708 (D. N.J. 1980). The *Claridge House* court, however, never addressed this issue, deciding the case on other grounds. *See* notes 215-16 *supra*.

Two student commentators have correctly noted that Contract Clause argument is not terribly troublesome for a municipality. The courts do not apply this clause rigidly. Rather, application of the Contract Clause is limited by valid exercises of state police powers. *See* Home Building & Loan Ass'n. v. Blaisdell, 290 U.S. 398 (1934). In addition, until United States Trust Co. v. New Jersey, 431 U.S. 1 (1977), the Supreme Court had not invalidated an economic or social regulation in forty years. *Id.* at 60 (Brennan, J., dissenting). Then, following *United States Trust*, the Court reasserted its aversion to Contract Clause challenges, restating the principle that the Clause can not preempt a state's police power protection interests. Allied Structural Steel v. Spannaus, 438 U.S. at 240. *See also* Comment, *The Regulation of Rental Apartment Conversion*, 8 FORDHAM URB. L.J. 507, 526 n.117 (1980); Note, *The Validity of Ordinances Limiting Condominium Conversion*, 78 MICH. L. REV. 124, 127 n.19 (1979) [hereinafter cited as *Validity of Ordinances*].

283. One student writer has advanced an argument that some conversion ordinances are unlawful delegations of legislative authority. *Validity of Ordinances*, *supra* note 282, at 135-41.

This argument focuses on the tenant consent provisions of some statutes. The writer asserts that such statutes, requiring tenant consent before an owner may convert his building, unlawfully provides tenants with the alternate power to decide on conversions; thus the legislature arguably has abrogated its duty.

While the delegation argument is somewhat persuasive, as a practical matter, courts will probably reject it. When the legislature enacted the tenant consent provision, it made the legislative judgment regarding conversions. Conversions are possible, but only if the landlord strikes a bargain with his present tenants. Thus tenant consent merely waives the ban against conversion, and allows the developer an opportunity to

success in either state or federal courts.[284]

1. Due Process

Fifth and Fourteenth Amendment due process challenges have been the most successful constitutional challenges to local conversion regulation.[285] The due process arguments have taken three forms. The first argument is that a statute is unconstitutionally vague in violation of the Fourteenth Amendment due process clause.[286] Although this argument is useful, a litigant's victory might be short-lived; the ordinance may be unconstitutional as written, but there is nothing preventing the municipality from drafting another superseding ordinance. The second argument is based upon a municipality's exercise of its police power and tests whether the exercise was proper and reasonable. If it is not, the municipality has violated due process.[287] The third due process argument involves the restrictive nature of conversion regulations. Litigants have argued that a restrictive municipal conversion regulation constitutes a "taking" of property, requiring just compensation under the Fifth Amendment.[288] Although less successful than the others, this contention is more intriguing because many regulations interfere substantially with the rights of the landlord and the unit purchaser.

a. *Vagueness*

Two recent cases, *Chicago Real Estate Board, Inc. v. City of Chicago*[289] and *Claridge House One, Inc. v. Borough of Verona*,[290] have

convert when he ordinarily could not. *E.g.*, Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 531 (1917). *Accord*, Note, *Municipal Regulation of Condominium Conversions in California*, 53 S. CAL. L. REV. 225, 257-58 (1979).

284. *See* note 285-348 and accompanying text *infra*.

285. *See* notes 279-290 and accompanying text *infra*.

286. U.S. CONST. amend. XIV, § 1, provides in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." *See* notes 279-290 and accompanying text *infra*.

287. *See* notes 292-94 and accompanying text *infra*.

288. U.S. CONST. amend. V. The Fifth Amendment is applicable to the states through the Fourteenth Amendment. Chicago B. & Q. R.R. v. City of Chicago, 166 U.S. 226, 239 (1897). Additionally, all state constitutions have analogous, if not identical, due process provisions. *E.g.*, CAL. CONST. art. I, § 19; MASS. CONST. art. X, Pt. I; MO. CONST. art. I, § 26. *See* notes 296-320 and accompanying text *infra*.

289. No. 79 C 1284 (N.D. Ill. April 3, 1979) (order granting preliminary injunction), *reprinted in* ALI-ABA COURSE STUDY MATERIALS—LAND USE LITIGATION 469 (1979) [hereinafter cited as ALI-ABA MATERIALS].

considered whether a local conversion ordinance was so vague as to be in violation of the due process clause of the Fourteenth Amendment. In *Chicago Real Estate Board*, the plaintiffs[291] sought to enjoin enforcement of a forty-day moratorium prohibiting conversion in buildings with thirty or more rental units.[292] Plaintiffs charged, *inter alia*, that the city arbitrarily exercised its police power,[293] exceeded its home rule authority,[294] and violated plaintiff's due process rights because the statute was void for vagueness.[295] A federal district court granted a preliminary injunction, finding the statute impermissibly vague.[296] The court noted that "[w]e do not know precisely when a person contemplating conversion of a rental unit building would find himself under the authority of the ordinance. . . . [T]he ordinance does not make this clear."[297] The case was never tried on the merits.

290. 490 F. Supp. 706 (D. N.J. 1980).

291. Plaintiffs included property owners, property managers, and real estate brokers. Plaintiffs' Amended Complaint at 1, Chicago Real Estate Board, Inc. v. City of Chicago, 79 C 1284 (N.D. Ill. April 3, 1979), *reprinted in* ALI-ABA MATERIALS, at 431.

292. CHICAGO, ILL. MUN. CODE § 100.2-11 (enacted March 21, 1979).

293. In its six-count amended complaint, plaintiffs argued that: 1) the language of the ordinance was so vague that landowners could not determine what activity was prohibited, and thus violated the due process clause of the Fourteenth Amendment; 2) the ordinance constituted an impermissible restraint of alienation under the Fourteenth Amendment by improperly regulating the choice of ownership and not its use; 3) the conversion of the form of ownership does not pose a danger to city, thus the ordinance was arbitrary and capricious, denying landowners equal protection under the law; 4) the ordinance was arbitrary and capricious because it distinguished between buildings containing thirty or more units from other buildings without a rational basis, thus denying plaintiffs equal protection under the law; 5) the city exceeded its home rule powers in regulating a form of ownership which the state already regulates; and 6) the municipal ordinance violated a state statute which requires that newly enacted penalty provisions become enforceable no sooner than ten days after publication. *See* ALI-ABA MATERIALS, at 432-46.

294. *See* note 293 *supra*.

295. Under the void for vagueness doctrine, a statute need not be absolutely clear. It must, however, be sufficiently understandable. Persons must be able to conduct themselves in a manner which will not subject them to liability. Therefore, if a statute is "so vague that men of common intelligence must necessarily guess at its meaning . . . [the statute] violates the first essential of due process of law." Connally v. General Constr. Co., 269 U.S. 385, 391 (1976). The "void for vagueness" standard is well-settled in constitutional law. *E.g.*, Coates v. City of Cincinnati, 402 U.S. 611 (1971).

296. Partial Transcript of Proceedings at 7, Chicago Real Estate Board v. City of Chicago (N.D. Ill. April 20, 1979) (order granting preliminary injunction) *reprinted in* ALI-ABA MATERIALS at 475.

297. Partial Transcript of Proceedings at 5, Chicago Real Estate Board v. City of

In *Claridge House One*, plaintiffs[298] brought similar constitutional challenges to the federal courts.[299] The Borough of Verona had enacted a one-year moratorium on the conversion of any rental unit into a condominium. A building owner contended that the statute was unconstitutionally vague since he could not determine what steps, if any, he could undertake in the conversion process without violating the ordinance.[300] The district court judge indicated he concurred with the plaintiffs' assessment of the ordinance, but instead avoided the constitutional question by striking down the moratorium on state grounds.[301] This case is in line with the general principle of avoiding constitutional issues wherever possible.[302]

b. *Deprivation of Property Without Due Process of Law*

The second due process claim, that the municipality unreasonably exercised its police power depriving owners of property rights without due process of law under the Fourteenth Amendment, is even less

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Chicago (N.D. Ill. April 3, 1979) (order granting temporary restraining order); ALI-ABA MATERIALS at 458. Judge McGarr incorporated these remarks into his order granting the preliminary injunction. *See* Partial Transcript of Proceedings at 5, Chicago Real Estate Board v. City of Chicago, (N.D. Ill. April 20, 1979) (order granting preliminary injunction); *reprinted in* ALI-ABA MATERIALS at 473.

298. Plaintiffs were a corporation, which had purchased a luxury apartment building for the purpose of converting it into condominiums, and Anthony Ferragame, a tenant of the building who wished to purchase his apartment as a condominium unit. 490 F. Supp. at 708.

299. In this declaratory judgment suit, the plaintiffs alleged that Verona's ordinance was unconstitutionally vague, deprived plaintiffs of their property without due process of law; violated their equal protection rights under the fourteenth amendment, and impaired their freedom of contract rights. *Id.* at 707-08. These arguments are nearly identical to those advanced by the plaintiffs in *Chicago Real Estate Board*, note 283 *supra*.

300. 490 F. Supp. at 708. Plaintiff noted that converting apartment buildings involves approximately nine different steps. *Cf.* Plaintiffs' Amended Complaint at 4, Chicago Real Estate Board v. City of Chicago, No. 79C-1284, (N.D. Ill. April 2, 1979) (complaint seeking injunction) (Count I challenged the ordinance as vague, noting nine steps in the conversion process from the formulaion of plans to convert to the final sale of individual units); *reprinted in* ALI-ABA MATERIALS at 434.

301. District Judge Lacey expressed his concern about the constitutionality of the conversion ordinance, finding the plaintiffs' claims not frivolous. 490 F. Supp. at 708-09. Nevertheless, he decided the case on state preemption grounds. *Id.* at 713. *See* notes 215-16 and accompanying text *supra*.

302. *E.g.*, Schneider v. Smith, 390 U.S. 17 (1968); Greene v. McElroy, 360 U.S. 474 (1959).

likely to aid litigants.[303] Challengers relying upon this argument have asserted that the conversion regulation was arbitrary and without proper legislative purpose[304] because it merely regulated a form of ownership. These contentions are easily disposed of. First, municipalities enact conversion ordinances in response to critical housing situations, usually precipitated by a sharp drop in available rental housing.[305] The purpose behind the legislation is clearly proper be-

303. *See* notes 304-06 and accompanying text *infra*.

304. *See, e.g.*, Claridge House One, Inc. v. Borough of Verona, 490 F. Supp. 706, 708-09 (D. N.J. 1980) (arguing that the ordinance unlawfully deprived plaintiff of his property without due process because the City's exercise of police power merely affects the form of ownership); Amended Complaint for Plaintiff at 7, Chicago Real Estate Board v. City of Chicago, No. 79 C 1284 (N.D. Ill., filed April 2, 1979), *reprinted in* ALI-ABA MATERIALS, note 289, *supra*, at 437 (arguing that an ordinance regulating the form of ownership, invading the right to acquire and dispose of property, and restraining alienation deprives plaintiff of the due process under the fourteenth amendment); Collins v. City of Los Angeles, 116 Cal. App. 3d 463, 172 Cal. Rptr. 175 (1981) (arguing that denial of approval for conversion by city agency without sufficient findings for basis of decision denies plaintiff due process).

Collins v. City of Los Angeles, 116 Cal. App. 3d 463, 172 Cal. Rptr. 175 (1981), can be classified as a procedural due process case, as distinguished from the substantive due process cases, *Claridge House* and *Chicago Real Estate Board. Collins* does not focus the propriety of the municipal conversion ordinance as a valid excuse of police power. Rather, the *Collins* decision focuses on the deficiencies of the method by which the municipality implemented the ordinance. 172 Cal. Rptr. at 176.

In *Collins*, the plaintiffs, pursuant to Los Angeles conversion ordinance, applied with the proper local agency for approval to convert an apartment building into a condominium. *Id.* The City Council denied the application. In disapproving this application, the Council failed to make adequate findings regarding the basis for its decision. *Id.* at 177. The council concluded that the building as a condominium conversion would require more parking spaces than as an apartment building, but provided no explanation for this result. Consequently, the court found the council decision inadequate, stating:

[Since] we are here dealing with the constitutionally protected right of private property (Cal. Const., art. I, § 1 and art. I, § 19) and an exercise of the police power by the City which impinges on that right by denying to the owner a use of the property which would otherwise be perfectly legal and proper, we subject the City's findings to a stricter scrutiny than might be the case where approval had been granted. *Id.* at 178.

The court reversed the trial court decision upholding the City Council Action. It ordered the trial court to issue a writ of mandate directing the Council to rehear the matter and make adequate findings. *Id.*

305. *See, e.g.*, PHILADELPHIA, PA. CODE § 9-1201(1)-(8) (1979) (noting through its legislative findings that: 1) the building owners are experiencing high costs; 2) escalatory property values lead to high profits; 3) costs of purchasing converted units often greatly exceed rental fees for same unit; 4) conversion can lead to displacement of tenants; 5) apartment renters did not anticipate nor were they warned of conversions; 6) finding comparable rental housing is burdensome on tenants; 7) tenants

cause it attempts to control one of the principal contributors to the rental housing shortage.[306] Further, the enactment is not arbitrary, as the municipality's police powers are particularly useful in mitigating such problems. For these reasons, such a due process attack must inevitably fail.

c. *The Taking Argument*

Perhaps the most persuasive attack on a condominium conversion ordinance is that it operates to deprive property owners of their property without just compensation, in violation of due process.[307] This attack, otherwise known as the "taking" argument,[308] pits the police powers vested in a municipality to protect public interests against the private ownership interests of an individual.[309] In regulating conver-

need relief under the circumstances; and 8) the City may enact such regulations under its police power to protect the health, safety and welfare of its citizens).

306. The test applied by courts under these circumstances is the rational basis test. Under this test, the municipality need only show that the legislators had a rational basis for the regulation. *See* Village of Euclid v. Ambler Realty Co. 272 U.S. 365, 389 (1926). To do so, the municipality must establish that it: 1) adopted the regulation for a legitimate purpose; 2) that the regulation is necessary to reach that goal; and 3) that the regulation is not unduly burdensome. Lawton v. Steele, 152 U.S. 133, 137 (1894).

Conversion regulations are analogous to land use and rent control regulations, as they all interfere with the rights of the property owner under the rubric of police power. The latter regulations are almost always upheld by courts if they meet the rational basis test. *Cf.* Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962) (upholding a zoning ordinance that deprives property owner of his property's beneficial use) *and* Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922) (upholding a housing regulation during a housing shortage although the ordinance interfered with the property rights of the buiding owner). *See generally* Comment, *The Regulation of Rental Apartment Conversions*, 8 FORDHAM URB. L.J. 507, 530-34 (1980); *Validity of Ordinances, supra* note 272, at 128-32. *See also* Snyderman & Morrison, *supra* note 11, for an excellent discussion of the constitutional issues raised by conversion moratoriums.

307. U.S. CONST. amend. V provides in part: "nor shall private property be taken for public use, without just compensation."

308. For a general discussion of the "taking" argument, see Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057 (1980).

309. The relationship between the police power and eminent domain should be considered on a sliding scale. The police power permits public interference with private rights to a good extent. *See* notes 131-138 *supra* and accompanying text. Such interference requires no compensation. When, however, the restrictions on the individual increase, constitutional safeguards come into play. Thus, for example, if a landowner's rights in his property are impaired and nearly evaporate through the state's exercise of police power, he may be entitled to compensation because his land

sions, municipalities clearly interfere with the rights of property owners to use and dispose of their property in the manner in which they desire. The question is whether the regulation results in a *de facto* "taking" of the owner's building, in effect, by use of eminent domain. Thus far, no federal or state appellate court has found such a taking,[310] and only federal judges continue to suggest that a plaintiff might prevail on the "taking" theory.[311]

The crux of the taking argument is that application of the condominium conversion regulation directly takes property from a building owner through reallocating the property interests of tenants and landlords and prohibiting the landlord from removing his building from the rental market. An analogous argument has been made by unit purchasers denied access to their units because tenants still reside therein. Both arguments focus on the regulation's effects upon property owners rather than on the form of the ordinance itself.

Proponents of the taking argument have been unsuccessful. In probably the strongest due process case considered by any court, a federal district court in *Chan v. Town of Brookline*[312] denied the plaintiff's request for a preliminary injunction to prohibit municipal enforcement of a conversion ordinance. The plaintiff, a purchaser of a rental unit, was denied a certificate of eviction from the town rent control board.[313] Under the local eviction control ordinance, it was

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may be taken for the public good; the greater amount of state regulation for the public benefit, the closer such regulation comes to ousting the owner. There is no bright-line test for determining what amount of regulation constitutes a taking.

310. Even the earliest trial court decisions would not specifically adapt the taking theory. *See, e.g.*, Rothman v. Borough of Fort Lee, No. L 21679-73 P.W. (Super. Ct. Bergen County, N.J. June 14, 1974) (striking down conversion ordinance as being unconstitutionally vague and an abridgement of the rights of the apartment building owner). *See also* Comment, *The Condominium Conversion Problem: Causes and Solutions*, 1980 DUKE L. REV. 306, 325; *Validity of Ordinances*, note 272 *supra*, at 127 n.18, for further discussion of *Rothman*.

311. Two District Judges, Lacey and McNaught, have suggested that the conversion ordinances challenged in their respective cases might result in a taking. In *Claridge House, supra*, Judge Lacey noted "plaintiff's taking without just compensation claim [can not] be disregarded as completely without merit." 490 F. Supp. at 708. Similarly, Judge McNaught found "[t]he Chans may be deprived of the use of their property permanently. This may be more than simply regulating the use of property. It may constitute redistribution of it—a restriction of such nature that it amounts to a taking without just compensation." Chan v. Town of Brookline, 484 F. Supp. 1283, 1286 (D. Mass. 1980). *See also* notes 300-306 *infra* and accompanying text.

312. 484 F. Supp. 1283 (D. Mass. 1980).

313. *Id.* at 1284.

possible he might never receive possession of his property unless the tenant voluntarily vacated.[314] The court noted that the permanence of the ban may have constituted a taking without compensation.[315] Nevertheless, it withheld the requested relief to prevent harm to the municipality's tenants[316] until the case could be heard on the merits.[317] Thereafter, the case became moot because the tenant vacated.[318]

In *Flynn v. City of Cambridge*,[319] the Supreme Judicial Court of Massachusetts rejected the due process implications raised by the federal court in *Chan.* In *Flynn*, the court upheld a regulation granting the Cambridge rent control board power to prohibit removal of any controlled unit unless the city rental vacancy rate exceeded four percent.[320] The ordinance precluded condominium unit purchasers from obtaining possession of their units if they were used for rental housing on the effective date of the ordinance.[321]

Condominium purchasers challenged the ordinance, arguing that its enforcement amounted to a taking without just compensation.[322] The court repudiated this contention. The opinion stated that: 1) those who purchase units after the effective date "are on notice they have no right to use their property as owner-occupied housing;"[323] and 2) those who purchased, but did not occupy their units before the effective date, will not "establish a 'taking' by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available. . . ."[324] Relying heavily on *Penn Central Transportation Co. v. City of New York*,[325] the court con-

314. *Id.* at 1286.

315. *Id.*

316. *Id.* at 1287.

317. *Id.*

318. Telephone conversation with an unnamed assistant district court clerk on May 6, 1980.

319. 81 Mass. Adv. Sh. 692, 418 N.E.2d 335 (1981).

320. *Id.* at 693, 418 N.E.2d at 336.

321. *Id.* at 699-700, 418 N.E.2d at 339.

322. *Id.* at 699, 418 N.E.2d at 339.

323. *Id.* at 700, 418 N.E.2d at 339.

324. *Id.*

325. 438 U.S. 104 (1978). *Penn Central* is the most important recent Supreme Court decision considering the relationship between the police power and the "taking" of property from a private owner. In that case, the Court upheld a New York City commission decision, pursuant to a local landmark preservation ordinance, re-

cluded that the owners' interests were not so impaired as to constitute a taking because they could still obtain fair rental value for their properties.[326]

The *Flynn* court went well beyond all other courts regarding the taking issue. Under its analysis, a conversion regulation, no matter how severe and restrictive, could never result in a taking of property so long as the owners receive some benefit from their property. The opinion perhaps took *Penn Central* too far when it included unit purchasers who bought their condominiums *before* enactment of the challenged ordinance.[327] On the other hand, *Flynn* is consistent with

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jecting a plan to construct an office building on Grand Central Station. Although conceding that enforcement of the regulation had a severe economic impact on the property, diminishing its value, the Court found no "taking." The Court adhered to its traditional position that government could not function if it had to compensate a property owner for every interference caused by changes in general laws. *Id.* at 124. Thus, *Penn Central* reinterated the Supreme Court's reluctance to afford constitutional protection to real property interests, absent an actual physical invasion of property by government. *Id.*

In *Penn Central*, the Court again recognized the difficulties of resolving the "taking" issue. Consequently, cases concerning the "taking" issue have been subject to "essentially ad hoc, factual inquiries." *Id.* Nevertheless, the Court provided some analytical framework for deciding whether a government regulation affected a "taking" of private property. The Court noted two major factors:
1) whether the government action interfered with the owner's "primary expectation" concerning the use of his property; and 2) whether the owner would still obtain a reasonable return on its investment. *Id.* at 136. Applying these factors to *Penn Central*, the Court concluded the owner still could continue the property's original and primary use as a railroad terminal and thereby receive a reasonable return on his investment. *Id. See generally* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Pennsylvania Coal Co. v. Mahon 260 U.S. 393 (1922); Hadachek v. Sebastian, 239 U.S. 394 (1915). *See also* Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057 (1980); Comment, *Regulation of Land Use: From Magna Carta to a Just Formulation*, 23 U.C.L.A. L. REV. 904 (1977). For a general discussion of *Penn Central* as it relates to condominium conversions, see Note, *Government Regulation of Condominium Conversion*, 8 B.C. ENV. AFF. L. REV. 919, 938-40 (1980); Comment, *The Regulation of Rental Apartment Conversions*, 8 FORDHAM URB. L.J. 507, 535 (1980); *Validity of Ordinances*, note 282, *supra*, 134-35; Comment, *The Legality and Practicality of Condominium Conversion Moratoriums*, 34 U. MIAMI L. REV. 1199, 1215-16 (1980).

326. 1981 Mass. Adv. Sh. at 701, 418 N.E.2d at 340.

327. *See* notes 325-26 *supra*. The Supreme Judicial Court of Massachusetts noted the two key factors discussed in *Penn Central*, namely the property owner's expectancy and whether he would still receive a reasonable rate of return on his property. Nevertheless, the *Flynn* court seemed to flout these factors. The court apparently relied heavily on the reasonable rate of return language of *Penn Central*, and virtually

recent zoning cases like *Agins v. City of Tiburon*[328] which upheld a zoning ordinance against a challenge by a property owner whose financial interests in his land were adversely affected by a subsequent regulation.[329] Thus, *Flynn* may stand as the landmark case in this area. While other state courts may not accept or follow its rationale, the *Flynn* decision would probably survive review by the United States Supreme Court.

2. Equal Protection

Some property owners have also argued that municipal conversion regulations deny them equal protection under the Fourteenth Amendment.[330] These owners contend that the local regulations create classifications of property owners that arbitrarily discriminate

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ignored the property owner's expectancy. The *Flynn* court did not distinguish between condominium unit purchasers who bought for investment purposes and other unit purchasers who bought their units for residential purposes. Clearly, the latter group would not receive their expectancy, and would not be adequately compensated for their loss. The purchaser who bought for residential purposes, before the enactment of the ordinance, had his property "taken" if the *Penn Central* factors were literally and rigorously applied. Still, in light of the United States Supreme Court's reluctance to find a "taking" absent a physical invasion of the property by government, the *Flynn* court's reliance on the rate of return factors probably resulted in a correct constitutional resolution of the problem, despite the extraordinary hardship suffered by some unit purchasers.

328. 447 U.S. 255.

329. *Id.* at 261.

330. U.S. CONST. amend. XIV § 1. The fourteenth amendment provides in part that: "No State shall make or enforce any law which . . . den[ies] to any person within its jurisdiction the equal protection of the laws." *Id. See, e.g.*, Claridge House One, Inc. v. Borough of Verona, 490 F. Supp. 706 (1980) (raising an equal protection argument the court found was not frivolous; case decided, however, on state grounds); Chicago Real Estate Board v. City of Chicago, No. 79 C 1284 (N.D. Ill. Apr. 12, 1979) (order granting temporary restraining order) *reprinted in* ALI-ABA MATERIALS at pg. 460-61 (noting two potential equal protection violations: 1) whether an ordinance that applies only to buildings with 30 or more apartment units is arbitrary; and 2) whether ordinance distinctions between buildings built *as* condominiums and buildings be converted *to* condominiums are arbitrary). *See also* Green Hill Concerned Tenants Ass'n v. Green Hill Venture, No. 810567 (E.D. Pa. filed Feb. 12, 1981); River Parks Tenants Ass'n, Inc. v. 3600 Venture, No. 810566 (E.D. Pa., filed Feb. 12, 1981). These cases are challenging portions of the Pennsylvania condominium law that are based on the Uniform Condominium Act. The equal protection challenge focuses on a part of the Pennsylvania statute that provides an extended notice period for persons over 62 years of age or older, who have occupied the unit for more than two years. 68 PA. CONS. STAT. ANN. § 3410 (Purdon 1980). The plaintiffs argue that the distinction between those persons who have resided for less than two years in the apartment building and other residents is arbitrary. Telephone interview

against and single out rental buiding owners from other owners. Some courts have responded rather summarily to these equal protection claims,[331] always denying relief.[332] Applying the "rational basis" test,[333] they have found the municipal ordinances rationally related to some legitimate governmental interest.[334] The decisions comport with the general judicial tendency to allow legislatures wide latitude in remedying social problems.[335]

In *Grace v. Town of Brookline*,[336] the only state supreme court case to consider an equal protection claim, the Supreme Judicial Court of Massachusetts preemptorily disposed of the challenge.[337] The court noted that classification by form of ownership could be rationally related to the purposes of rent and eviction control.[338] It then deter-

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with Jack M. Bernard of Philadelphia, Pa., attorney for the plaintiffs in both suits (May 15, 1981).

331. *See* notes 318-26 and accompanying text *infra*.

332. No case, in any court, federal or state, has sustained the challenge of a condominium conversion ordinance on equal protection grounds.

333. *See* Minnesota v. Clover Leaf Creamery Co., 49 U.S.L.W. 4112, 4112 (1981); New Orleans v. Dukes, 427 U.S. 297, 303 (1976). The United States Supreme Court applies the rational basis test as the standard of review for equal protection challenges concerning economic interests. Applying this test, a court determines whether the legislative classification at issue is rationally related to the legitimate statutory objectives. 49 U.S.L.W. at 4113. In the case of condominium conversion ordinances, under the rational basis test, the question will be whether the classification, usually singling out apartment building owners, is rationally related to the objectives of protecting the low-income persons and the elderly from displacement and providing adequate rental housing. It is unnecessary that the method chosen by the legislature be the best means available. In addition, there is no equal protection violation if the challenged regulation addressed only part of the problem. New Orleans v. Dukes, 427 U.S. 297, 303 (1976). A conversion regulation will be upheld if it is rationally related to the objective of providing adequate housing.

334. See notes 338-40 and accompanying text *infra*.

335. *See* G. GUNTHER, CONSTITUTIONAL LAW (10th ed. 1980), 693-704. The author suggests that the courts give legislatures deferential review of economic and social legislation. Specifically, under the rationality standard, the court requires little factual data to support a legislative classification. Thus, short of proving that the legislative facts relied on by the governmental decisionmaker could not be true, a litigant challenging a legislative classification will inevitably fail. *See also* Claridge House One, Inc. v. Borough of Verona, 490 F. Supp. 706, 709 (1980).

336. 399 N.E. 2d 1038 (Mass. Sup. Jud. Ct. 1979).

337. *Id.* at 1046.

338. *Id.* at 1046. The court rejected the plaintiffs-property owners contention that classifications based solely on property ownership, rather than use, were improper. The plaintiffs advanced this argument on the basis of cases that prohibited different zoning treatment for condominiums. *See* notes 228-38 *supra* and accompanying text.

mined that the Brookline by-law regulating conversion advanced the purposes of rent and eviction control, and thus was rationally related to the town's legitimate interest in providing housing for its elderly.[339] The court upheld the regulation, holding that the legislature could rationally single out condominium conversion as a particular threat to rent and eviction control.[340]

The *Grace* rationale was followed in the New York case of *Reiner-Kaiser Associates v. McConnachie*.[341] In *Reiner-Kaiser*, a landlord brought a holdover proceeding to evict an elderly tenant. One issue raised by the proceeding was whether the senior citizen exemption in the state conversion ordinance denied the landlord equal protection.[342] The court upheld the ordinance, finding that the law was not arbitrary and capricious.[343] Holding that the legislation served the rational interest of protecting the elderly during a housing shortage, the court concluded that the resulting discrepancies in treatment of certain property owners did not deny them equal protection.[344] It did, however, evict the tenant since the statute was inapplicable to the particular circumstances.[345]

The *Grace* court, however, distinguished the zoning cases from the instant case, noting that none of these cases considered conversion regulation through eviction controls, nor rested their conclusions on the equal protection clause. *Id.*

339. *Id.* at 1047. The court found that the challenged regulation did further the purposes of rent and eviction controls. The Town of Brookline imposed these controls to protect its large elderly population. *See generally*, Note, *Government Regulation of Condominium Conversion*, 8 B.C. ENV. AFF. L. REV. 919 (1980). *See also* Note, *Condominium Conversion Legislation: Limitation on Use or Deprivation of Rights?—A Re-Examination of Rights*, 15 NEW ENG. L. REV. 815, 833-34 (1980). For an extensive discussion of the equal protection clause challenge to condominium conversoin ordinances see, C. RHYNE, W. RHYNE & P. ASCH, MUNICIPALITIES AND MULTIPLE RESIDENTIAL HOUSING: CONDOMINIUMS AND RENT CONTROL 65-71 (1976).

340. 399 N.E.2d at 1047.

341. 104 Misc. 2d 750, 429 N.Y.S. 2d 343 (Cn. Ct. N.Y. Queens Cty. 1979).

342. *Id.* at 749, 429 N.Y.S.2d at 344-45. The landlord argued that the State of New York unconstitutionally exercised its police power when it enacted a senior citizen exemption which prohibited the eviction of any tenant, 62 years old or older, from an apartment that is being converted, if the tenant earns less than $30,000 per year. N.Y. GEN. BUS. LAW § 352-eeee (McKinney Supp. 1979). The landlord contended that the statute violated the equal protection clause because its purpose was to protect a particular class rather than the general public.

343. 429 N.Y.S.2d at 345.

344. *Id.*

345. *Id.* at 346. The court found that the challenged statute was not applicable to this particular defendant. Although Ms. McConnachie met the statutory require-

Equal protection challenges, along with other constitutional claims,[346] will prove of little value to developers, landlords, and unit purchasers. Although the legal arguments have some merit, courts probably will find conversion regulations rationally related to the problems of tenant displacement and preservation of rental housing stocks. Discrimination against converters is not invidious if the legislature can justify its classifications as furthering the legislative purpose.[347] Additionally, while courts recognize that these regulations frequently interfere with the usual owner-tenant and owner-buyer relationships, they will be sustained because they do not totally deprive the owner of all uses of his property.[348] For the most part, therefore, conversion regulations will withstand constitutional challenges except when they are poorly drafted or obviously arbitrary.

VI. ANALYSIS

Analysis of the condominium conversion problem requires that one premise be kept in mind: the underlying objective of government, at all levels, must be to provide enough desirable rental housing. The critical problem is not condominium conversions; rather, it is the shortage of affordable rental housing.

Present state and local regulations of condominium conversions have serious shortcomings. First, many of the ordinances are merely stop-gap provisions, effective only in the short run.[349] These regulations benefit present tenants but will provide little protection for other tenants in the future. Second, local ordinances and state statutes are enacted without the necessary coordination between the communities affected by conversions and other levels of government.[350] Lack of coordination between state and local governments

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ments, she was denied protection because the landlord filed his conversion plans before passage of the legislation. *Id.* at 345-46. Thus, the landlord prevailed in the holdover proceeding to oust the tenant for possession.

346. *See* notes 272-316 *supra*.

347. *See* notes 307-28 and accompanying text *supra*.

348. *See* notes 207-28 and accompanying text *supra*.

349. *See* notes 139-191 and accompanying text *supra*. The stop-gap provisions are merely fingers in the leaky dike. These provisions do not emphasize development of new housing. They merely regulate or in some cases prohibit conversions. *See also* Comment, *The Condominium Conversion Problem: Causes and Solutions*, 1980 DUKE L.J. 306.

350. As previously noted, cities created most conversion ordinances because the state government failed to act. *See* notes 11-13 *supra*. Now, however, a number of

often weakens local regulations by creating policy conflicts. Third, regulations at both levels have imposed greater threats upon developers, further restricting private housing development and exacerbating the housing shortage. Adequate condominium conversion regulation requires cooperation between the various levels of government, as there is no single solution to the problem.

Most conversion regulations also are insufficient because they fail to address the basic problem. In enacting regulations, both states and municipalities have protected tenants in varying degrees.[351] While the regulations mitigate the hardships on tenants, and in some instances preserve rental housing, most often they are counterproductive. Like rent controls, they discourage building maintenance, inner-city rehabilitation, and new construction.

Any ordinance regulating condominium conversion, however, is better than none at all. Cities like Houston, Texas, with uncontrolled growth, soon will face substantial problems adequately housing their low- and moderate-income residents.[352] It is abundantly clear, there-

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states have responded to the conversion problem and have enacted specific legislation. Nevertheless, many state statutes on conversion illustrate tremendous insensitivity to the conversion problems of the cities because they provide only a minimum of protection for tenants. Winer, *Housing Law Converted by Condomania*, Nat'l. L.J., May 18, 1981, at 24. Consequently, many municipalities have attempted to co-regulate conversions. Ritter, *Condominium Conversions: A City Attorney's View*, 55 FLA. B.J. 94 (1981). Such co-regulation has often resulted in court battles.

Only a few states have attempted to coordinate conversion regulations. CAL. GOV'T CODE § 66411 (West Supp. 1979) (delegating some power of conversion regulation to cities); MINN. STAT. ANN. § 515A.1-106(c) (West 1980) (permitting cities the power to enact legislation to resolve significant problems). Yet even these states have not otherwise developed and implemented national housing policies to resolve the conversion crisis. This problem has been exacerbated by the recent passing of Proposition 13 in California, Proposition 2 1/2 in Massachusetts, and other initiatives seeking to limit state spending.

The lack of coordination between governments includes the federal level. The federal government thus far has failed to enact either any direct conversion legislation or any tax revisions which could aid in dealing with the conversion problems, although it has investigated both areas. The result is often a confusing morass or contradictory regulations, or an absence of adequate regulation altogether.

351. *See* notes 139-206 and accompanying text *supra*.

352. Telephone discussion with an associate city planner in Houston, Texas on March 3, 1980. The planner disclosed that the only conversion regulation is by enforcement of building codes. Consequently, conversion activity is essentially unchecked. Further, to date, the City had not undertaken to study the conversion activities and their effects.

fore, conversions must be regulated until other solutions for the general housing crisis can be found.

Present governmental solutions, though inadequate, must not be merely discarded in a deregulatory fervor. It is true local regulation of condominium conversions follows a piecemeal approach by the governmental level least equipped to solve the entire problem. Localities, however, must retain the power to regulate conversions because they are best able to resolve the specific individualized housing problems of their respective communities. It is also essential that state governments take a more active role in condominium conversion regulation. They must work more closely with their cities.[353] The state has greater resources available, and can develop and implement a more comprehensive housing policy. Such an approach has been adopted in California[354] and Minnesota.[355]

353. The drafters of both the Uniform Condominium Act and the Model Condominium Code have suggested that conversion regulation be restricted to the state level. The rationale for this suggestion is that localities may subvert the state policy of encouraging desirable conversion activity. *See* Comment, *The Condominium Conversion Problem: Causes and Solutions*, 1980 DUKE L.J. 306, 328-29 (1980).

These drafters are incorrect; conversion activities should be regulated by cities as well. First, cities will not undermine conversion activities where appropriate. Conversions are beneficial to cities in terms of urban renewal and a broader tax base. Thus, whenever possible, cities would probably permit conversion. Second, as a practical matter, state regulation has failed miserably. Most state regulations have loopholes which have permitted injurious conversion activity, resulting in tenant displacement of the elderly, in particular. Consequently, even with comprehensive state condominium regulations, many municipalities have attempted to co-regulate. Such co-regulation is symptomatic of inadequate state protection. *See* notes 213-232 *supra* and accompanying text. *Compare* Ritter, *Condominium Conversion: A City Attorney's View*, 51 FLA. B.J. 94 (1981) *with* Mursten, *Florida's Regulatory Response to Condominium Conversions: The Roth Act*, 34 U. MIAMI L. REV. 1077 (1980). The *Ritter* article criticizes the Florida Condominium Act and the courts because they preclude municipal conversion controls. He notes that the state protection has been ineffective in protecting many residents. In contrast, the *Mursten* article praises the state conversion ordinance. Mursten notes that the statute is not entirely comprehensive, but offers greater protection than ever before for Florida residents.

354. CAL. GOVT CODE §§ 66410-66499.37 (West Supp. 1979); CAL. BUS. RES. CODE § 30600 (West Supp. 1979). *See generally* J. Soloway, *Condos, Co-ops, and Conversions: A Guide on Rental Conversions for Local Officials*, STATE OF CALIFORNIA, OFFICE OF PLANNING AND RESEARCH (Nov. 1979); Comment, *Conversion of Apartments to Condominiums: Social and Economic Regulations Under the California Subdivision Map Act*, 16 CAL. W.L. REV. 466 (1980); Note, *Municipal Regulation of Condominium Conversions in California*, 53 S. CAL. L. REV. 225 (1979).

355. MINN. STAT. ANN. §§ 515A1-101 to 515A.4-118 (West 1980). Both the Minnesota and California Statutes expressly permit state regulation and contemplate some coordination between governmental levels.

By regulating condominium conversions through statutes and ordinances, states and municipalities have dealt with only half the problem. Each level of government must develop incentives for new rental housing construction because even when the conversion boom subsides, a shortage of rental housing will still exist. Local governments, for example, could encourage developers by giving them preferred zoning treatment.[356] Moreover, both states and municipalities could aid developers through financial assistance programs. Such programs could consist of low-interest loans, local Industrial Development Bond financing,[357] or other state funds targeted for development of low- and moderate-income housing. These and other legislative incentives may promote new housing construction.

Despite the efforts of state and local governments, federal government involvement may be necessary. The federal government can stimulate rental housing construction through financing programs and tax incentives for builders. Federal financing through insured low-interest government loans could be used to leverage private capital, promoting private development. Tax incentives, such as special credits and special, larger depreciation allowances, may once again make rental construction profitable.[358] As it stands now, returns on

356. A grant of preferred zoning treatment would require only that the municipality provide developers who agree to building rental housing with special use permits, zoning variances, and so on. Considering the scarcity of city land, such permits are very desirable.

357. *See, e.g.*, Kane & Belkin, *Financing Commercial Developments in Illinois by the Use of Various Forms of Municipal Bonds*, 29 DE PAUL L. REV. 1009 (1980). In this article, the authors have noted that private real estate developers have encountered numerous difficulties in obtaining conventional financing for their ventures. Consequently, alternative forms of financing must become available. The authors have suggested that local governments participate in financing new developments through various forms of bond financing. Their analysis, which usually applies to commercial developments, could be altered to apply to housing ventures. While there is no guarantee that such financing would be successful (because housing has not been traditionally as lucrative as other developments), bond financing is certainly worthy of consideration.

358. Investment tax credit is designed to foster capital investment in new personalty to create a more efficient capital plant. The grant of tax credit is found in I.R.C. § 48 and refers to applicable property that is found in Section 38. I.R.C. § 38. Thus it is frequently referred to as "Section 38 Property." Generally, Section 38 Property is personalty, although energy-related tax credits permit credits for items that are not personalty. *Id.* For a general review of Investment Tax Credit *see* M. Levine, WEST'S HANDBOOK SERIES: REAL ESTATE TRANSACTIONS, TAX PLANNING 294-307 (1976).

In the mid-1970's historic preservationists were successful in convincing Congress

rental housing are so low as compared with similar condominium

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to incorporate tax credits for "qualified rehabilitation expenditures" for a "qualified rehabilitated building." I.R.C. § 48(a)(1)(E). In the instance of historic preservation, these credits may be used in conjunction with accelerated depreciation. Thus the credits further encourage developers to preserve historic properties by providing them with a faster write-off due to the credits and accelerated depreciation.

Investment tax credits have been most recently made available for the promotion of energy conservation. For example, business may take investment tax credit on categories of energy property that are treated as Section 38 property. They are alternative energy property (boilers, burners, equipment for producing synthetic fuel, equipment to convert coal [including lignite] or any unmarketable substance derived therefrom into petroleum or natural gas derived feedstock) wind or solar energy property, specifically designed energy property (designed to reduce energy consumption) in existing commercial and industrial processes, shale oil equipment, recycling equipment, equipment for producing natural gas from geopressured brine, and equipment to convert ocean thermal energy to usable energy. I.R.C. § 48(1)(3)(A). Qualified hydroelectric generating property, congeneration equipment, and qualified intercity buses also may use the tax credit. I.R.C. § 48(1)(2)(A). The credit available varies from 10-15%. I.R.C. § 48(1). If the improvements are financed by tax-exempt bonds, the credit is reduced by one-half. I.R.C. § 48(1)(11). If the energy credit is for tangible personal property, both credits may be utilized. Thus, a taxpayer might achieve a twenty-five percent credit for certain business investments.

The credit is much more niggardly with respect to personal residences. A taxpayer may claim income tax credit for energy-saving and renewable energy source equipment purchased with respect to principal residence after April 19, 1977 and before 1986. I.R.C. § 53. The maximum credit for energy-conserving equipment is $300. I.R.C. § 44(b)(1). A separate credit of up to $4,000 is available for the installation of certain renewable energy source equipment such as solar, wind, or geo-thermal energy systems. I.R.C. § 44(b)(2).

Through the growing use of such credits, there is clearly precedent for creating necessary capital to finance new construction by tax credit inducements. Rental housing starts, especially in multi-family housing units, have fallen off dramatically in recent years. Congress could avail itself of the tax credit to encourage entrepreneurs to invest in middle-income multi-family housing.

To further spur this housing creation Congress could also repeal the recapture of accelerated depreciation that was taken in the construction of qualified middle-income housing as is currently the practice with qualified low-income housing. *See* I.R.C. § 1250. The yield to investors could be further increased by the repeal of the minimum and maximum taxes on accelerated depreciation taken with respect to middle-income housing construction. These minimum and maximum taxes have virtually eliminated the use of accelerated depreciation by investors. For an analysis of these taxes *see generally* Willis & Rabbe, *Imposition of Minimum Tax Eliminates Advantages of Accelerated Depreciation in Most Cases*, 55 TAXES 368 (1977) and O'Neill, *Changes in the Minimum and Maximum Taxes Have Broad Impact Especially on Shelters*, 46 J. TAX. 22 (1977). The repeal of these taxes would produce a greater shelter for middle-income housing and greater investment would follow.

Thus there are substantial federal tax pools that could be employed to promote multi-family housing. The construction of such housing would enhance the housing market and relieve the intense pressure to convert the existing multi-family housing stock to condominiums.

developments, builders will always opt for the latter. Disincentives to convert, in other words, will only further injure the already dismal housing market. Favorable treatment of rental housing is necessary; a failure to promote private construction and rehabilitation of rental housing will result in government landlords.

VII. CONCLUSION

The increase in condominium conversions has highlighted the United States' rental housing crisis. The conversion problem itself is a result of that crisis. While conversions have had many positive effects on cities, they also have caused hardships for elderly and low- and moderate-income tenants. State and local governments have responded by regulating conversions in order to halt depletion of rental housing supplies. For the most part, these government measures have operated to protect tenants and hinder converters. Still, the crisis is not over. Federal, state, and local governments have not responded to the entire housing problem. Under President Reagan's administration, the federal government probably will not make the necessary financing available to developers. Even so, developers will receive better tax treatment, encouraging more building, though probably not in rental housing. Presently, the conversion problem has abated because high interest rates have limited financing of construction and purchases. However, when the interest rate drops, the problem will reemerge. Something must be done.