Comment - Regulating Condominium Conversions: Do Municipal Ordinances Adequately Protect Tenants’ and Owners’ Constitutional Rights?

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Regulating Condominium Conversions: Do Municipal Ordinances Adequately Protect Tenants’ and Owners’ Constitutional Rights?*

I. INTRODUCTION

Condominiums are a relatively recent addition to the national housing market. The popularity of condominiums has increased rapidly during the past twenty-five years because they are a lower-priced alternative to single-family housing with similar economic advantages. In addition,
condominium owners can avoid certain maintenance and financial responsibilities of home ownership, such as the upkeep of recreational facilities.

Because of increasing demand for condominiums, developers often convert existing structures, such as apartment buildings, as less expensive alternatives to constructing new condominiums. Apartment buildings in metropolitan areas have been the primary sites for conversions because they are readily available and conveniently located. Apartment owners in these areas have had strong incentives to sell their apartment buildings to developers because rent control and increasing maintenance costs often lower the profit margin on their rental properties. Developers eager to

the property (I.R.C. § 1031 (West 1985)). See generally S. Guerin, 2 Taxation of Real Estate Disposition ch. 17 (1985). Each owner also has the opportunity to sell or mortgage his home. Such advantages are unavailable to apartment unit renters. See Rev. Rul. 79-180, 1979-1 C.B. 95 (New York State Renters' tax not deductible by renters as real property tax under I.R.C. § 164(a)(1)); cf. Troy Village Realty Co. v. Springfield Township, 191 N.J. Super. 559, 468 A.2d 445 (1983) (holding conversion of apartments to condominiums does not automatically free the property from the two-year assessment ceiling imposed by N.J. Stat. Ann. § 54:2-43 and § 54:3-26 (West 1979)).

4. Condominium associations often exact a pro rata monthly fee from each owner to cover the maintenance costs of common areas. For example, the condominium association takes responsibility for gardening communal areas, repairing roofs, and maintaining recreational facilities. Rohan, "The Model Condominium Code"—A Blueprint for Modernizing Condominium Legislation, 78 Colum. L. Rev. 587, 587-88 (1978).

5. Rhyne, supra note 3, at 1. The condominium boom began in the early 1970's. Between 1970 and 1979, 348,000 apartments were converted to condominiums. The rate of conversion accelerated rapidly between 1977 and 1979; 260,000 units were converted. HUD Report, supra note 1, at introduction-1. By 1983, a total of one million units had been converted. D. Clurman, F. Jackson, & E. Hebard, Condominiums and Cooperatives 141 (2d ed. 1984).

Several factors contributed to condominium popularity during the 1970's: skyrocketing land cost and costs of construction; a general shortage of housing; declining returns on apartment investments due to high operating costs and low rents; new legislation, such as rent control, eviction control, profit control, and price control; limitations on adult-only apartments that did not apply to condominiums; high interest rates and land use policies that discouraged new construction; tax benefits of home ownership, especially as security against increasing inflation; and high profit margins on conversions which require little builder expertise. Id.

6. According to a HUD study, conversion managers agreed that the most appropriate locations for conversions are those with access to public transportation and those near business districts or shopping areas. Buildings situated in historic parts of the city or in neighborhoods with special ambiance are also desirable for conversion. The managers stated that location is so important to some developers that they will choose even poor quality buildings for conversion purposes if the buildings are centrally located. HUD Report, supra note 1, at III-15.

7. Rent control finds as its natural complement the conversion of rental units to condominiums. Rent control limits the operating margins from which owners offset maintenance costs, operating costs, property taxes, and other expenses associated with ownership. Because such costs increase disproportionately with rent increases, owners realize lower profit margins each year. As a result, property is more profitably converted to condominiums than maintained as rental units. PAS Report, supra note 2, at 1.

8. The effect of a decreasing profit margin on the rate of conversion varies between metropolitan areas, and sometimes even between buildings within the same area. For example, a real estate analyst reported that declining profit margins during 1979 were a major motive for sales to converters in
convert will purchase the apartments at prices above the property’s current market value. Consequently, the number of condominium conversions in metropolitan areas has significantly increased during the last two decades.

Municipalities have encouraged conversions because financial and aesthetic benefits result from such housing. Before an apartment building is converted, it is usually assessed for tax purposes as a single entity, based on the property’s income-producing capacity or the fair market value of similar property. The inflated purchase price of buildings bought for conversion enables a city to reassess property values at higher levels for tax purposes. When a city assesses each condominium unit after conversion, the aggregate assessment is often more than the preconversion assessment. As a result, a city may increase its tax base, thereby increasing property tax revenues.

Cities also benefit from the revitalization of metropolitan areas that often accompanies condominium conversions. Conversions create

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9. Id. at V-31. In some markets, declining operating margins are the most visible factor motivating the sale of rental properties for conversion. The inflated market value of buildings sold for conversion is a factor of comparable importance. HUD REPORT, supra note 1, at V-19.


11. HUD REPORT, supra note 1, at VIII-3.

12. See supra note 9 and accompanying text.

13. Most communities assess all multifamily units at the same rate, whether rental or condominium. In communities with equalized assessment ratios, condominium conversion generally increases the assessed value of the property, resulting in a higher tax yield. PAS REPORT, supra note 2, at 3.

14. HUD REPORT, supra note 1, at VIII-3. But see Condominium Owners, 5-7 Slade Ave. v. Supervisor of Assessments, 283 Md. 29, 388 A.2d 116 (1978) (converting a building from single to multiple ownership does not necessarily effect a transformation by which the market value of the parts suddenly exceeds the value of the whole).

15. G. STERNLIEB & J. HUGHES, AMERICA’S HOUSING: PROSPECTS AND PROBLEMS 307 (1980) [hereinafter cited as STERNLIEB]. The authors’ survey of the relationship between nominal assessment before and after conversion revealed potential upgrading of the tax base from 50% to 60% with no increase in the municipal expenditures required to service the land parcel. Conversely, another study found that the total impact of conversion on local property tax revenues is relatively small. It concluded that the degree of impact is a function of the particular jurisdiction’s tax rates for various classes of property, its assessment practices, and its provisions providing tax relief for special classes of property owners. See PAS REPORT, supra note 2, at 3.

16. Revitalization is the process by which deteriorating neighborhoods are renovated by private or public reinvestment. HUD REPORT, supra note 1, at VIII-15. Revitalization occurs in two ways: gentrification, a process of private rehabilitation by predominantly affluent professionals from outside the neighborhood, and incumbent upgrading, a process of rehabilitation by current residents. Condominium conversion usually leads to gentrification rather than incumbent upgrading. J. EGAN, J. CARR, A. MOTT, & J. ROOS, HOUSING AND PUBLIC POLICY: A ROLE FOR MEDIATING STRUCTURES 80 (1981) [hereinafter cited as EGAN].
nonrental housing in convenient central city locations that are desirable to people with higher incomes.\textsuperscript{17} High-income residents tend to improve the aesthetic quality of the neighborhoods by renovating existing buildings and developing recreational areas.\textsuperscript{18} Thus, the influx of these residents shifts the cost of inner-city renovation to the private sector, thereby relieving the city of any potential responsibility to finance such renovations.\textsuperscript{19}

Conversions, however, displace tenants.\textsuperscript{20} Evicted from their apartments, these tenants must quickly find alternative housing, which is both a financial and an emotional burden. The hardships associated with relocating are especially acute for the elderly\textsuperscript{21} and for low- and moderate-income tenants who do not purchase are forced to move because rents after conversion are increased by as much as 25%. HUD \textit{Report}, supra note 1, at introduction-6. Because disadvantaged groups are often in the lower-income brackets, they are the socioeconomic groups most commonly displaced from their apartments. \textit{Id.}

\textsuperscript{21} Because the elderly often fall in the lower-income bracket, they commonly experience financial burdens from being displaced or from purchasing their units. According to the U.S. Department of Housing and Urban Development, a tenant paying 30% or more of his or her income for housing is considered financially "burdened" by the payment. HUD \textit{Elderly Report}, \textit{supra} note 20, at 34. The HUD study revealed that although only 40% of tenant buyers are burdened by their purchase, 67% of elderly buyers are burdened. \textit{Id.} at 34, 36. Of those who continue to rent their unit, 27% are burdened while 60% of the lower-income tenants and 50% of the elderly renters are burdened. \textit{Id.} at 57. Another study found that, in 1980, elderly renters would have to spend up to 63% of their income to purchase their unit, while they had spent only 25.7% of their annual income for rent. Sternlieb, \textit{supra} note 15, at 292-93.

In addition to economic pressure, the elderly tend to experience more emotional pressure than the nonelderly when displaced as a result of conversions. Twenty-eight percent of elderly tenants believed that they were pressured to buy their units as compared to 18% of nonelderly buyers. HUD \textit{Report}, \textit{supra} note 1, at IX-8. Moreover, the elderly are the socioeconomic group most affected by disrupted social ties accompanying displacement because the elderly tend to change their primary residence least frequently. HUD \textit{Report}, \textit{supra} note 1, at IX-19.

\textsuperscript{17} The higher the tax bracket of the condominium purchaser, the more substantial the tax deduction. As a result, most condominium owners have incomes in the middle-bracket or above. People holding professional or managerial positions own nearly 66% of the owner-occupied converted condominiums; approximately 33% are 35 years old or younger, while 24% are over 55 years old, and only 9% are over 65 years old. HUD \textit{Report}, supra note 1, at introduction-4.

\textsuperscript{18} See generally Egan, \textit{supra} note 16, at 75-90.

\textsuperscript{19} According to Patrick J. Rohan, a noted scholar of condominium law, "occupier-ownership in the form of cooperatives and condominiums offers the best long-range solution to the problem of urban decay." Rohan, \textit{supra} note 4, at 599.

\textsuperscript{20} Between January, 1977 and January, 1980, 58% of the tenants in converted apartments moved, while the remaining 42% continued to live in the building either as owners (22%) or renters (20%). Overall, the residence of the building after conversion was 63% owner-occupied and 37% renter-occupied. HUD \textit{Report}, \textit{supra} note 1, at introduction-4.

This data obscures the fact that elderly and low-income individuals are disproportionately represented in the group of displaced tenants. Forty-five percent of those who moved were either elderly tenants, lower-income tenants, or both. U.S. \textit{Department of Housing and Urban Development, The Conversion of Rental Housing to Condominiums and Cooperatives: Impacts on Elderly and Lower Income Households} (1981) [hereinafter cited as HUD \textit{Elderly Report}]. Low- and moderate-income tenants who do not purchase are forced to move because rents after conversion are increased by as much as 25%. HUD \textit{Report}, \textit{supra} note 1, at introduction-6. Because disadvantaged groups are often in the lower-income brackets, they are the socioeconomic groups most commonly displaced from their apartments. \textit{Id.}

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income tenants. In addition, some owners have subjected displaced renters to unfair housing practices, especially in states requiring a minimum percentage of tenants to approve the conversion. To achieve the requisite percentage, some owners have harassed tenants into purchasing their units by making material misrepresentations and giving discriminatory inducements.

To protect displaced tenants, state and municipal governments have enacted land use ordinances and eviction ordinances to regulate condominium conversions. The resultant piecemeal legislation has not adequately or effectively protected the constitutional rights of those involved. This comment analyzes owner challenges to conversion regulations as a means of revealing the inherent unconstitutionality of many of these regulations. Section II discusses the state grant of municipal authority to regulate conversions through land use and eviction ordinances. Section III examines owner challenges that state eviction statutes preempt local conversion ordinances. Section IV focuses on the viability of owner challenges to conversion regulations under fourteenth amendment due process analysis and under fifth amendment “takings” analysis. Finally, Section V addresses owner challenges that local conversion ordinances violate equal protection. The comment concludes with a discussion of alternative provisions for municipal conversion ordinances that more adequately protect the constitutional rights of both owners and tenants.

22. Overall, one-half of all former residents experience some difficulty finding new housing. Elderly, non-white, and lower-income tenants are more likely than others to experience difficulty. HUD Report, supra note 1, at IX-16. One reason is the increased housing costs associated with alternative housing. Tenants who rent in other buildings experience housing cost increases of up to 19% while those who try to purchase alternative housing experience an increase of up to 80%. HUD Elderly Report, supra note 20, at 2.

23. See infra note 209.

24. See, e.g., Gilligan v. Tishman Realty & Constr. Co., 283 A.D. 157, 126 N.Y.S.2d 813, 818 (1953), aff’d, 306 N.Y. 974, 120 N.E.2d 230 (1954), motion denied 307 N.Y. 804, 121 N.E.2d 627 (1954) (owner pressured tenants to purchase their apartments by issuing a newspaper release inferring that the building had been sold to a tenants’ group, and by threatening that tenants who refused to purchase would be “‘sleeping in Central Park’ ”); New York v. 820 Associates, 116 Misc. 2d 901, 456 N.Y.S.2d 604 (Sup. Ct. 1982) (owner instituted false unlawful detainer actions when rent was fully paid to force tenants to vacate their apartments in order to meet the 35% tenant approval requirement); see also Richards v. Kaskel, 32 N.Y.2d 524, 300 N.E.2d 388, 347 N.Y.S.2d 1 (1973) (owner resorted to impermissible sales tactics to obtain requisite 35% sales).

25. A “discriminatory inducement” has been defined by one court as an inducement that would improperly persuade a tenant to purchase an apartment that he would not otherwise be willing to purchase. Schumann v. 250 Tenants Corp., 65 Misc. 2d 253, 317 N.Y.S.2d 500, 512 (App. Div. 1970); cf. Karpf v. Turtle Bay House Co., 127 Misc. 154, 485 N.Y.S.2d 173 (App. Div. 1984) (upholding as nondiscriminatory a vacate allowance given to all tenants, with a bonus given to the first 10 persons who accept the offer to vacate).


27. Rohan, supra note 4, at 593.
II. Municipal Authority to Enact Conversion Ordinances

A. Land Use Ordinances

Zoning and subdivision regulations are the major land use controls utilized by state and municipal governments.\(^{28}\) States have authority to regulate land use for the public welfare under a general grant of police power.\(^{29}\) Municipalities, however, cannot enact such regulations under a general grant of police power, but require specific authorization from the state.\(^{30}\) States traditionally have delegated this authority to municipalities\(^{31}\) by a specific grant of police power in a zoning or enabling statute.\(^{32}\) Such statutes authorize municipalities to divide land into different districts and to specify certain uses within each zoning district.\(^{33}\) Subdivision ordinances permissible under granted zoning authority regulate the division of land within "use" zones.\(^{34}\) Both land use controls fall within the

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28. Each type of land use control has a distinct purpose. Zoning separates a municipality into different districts according to particular uses designed to serve the general welfare. P. Rohan, Zoning and Land Use Controls § 1.02(3) (5th ed. 1984). Zoning regulations fall into three general categories: (1) restrictions on the permissible use of land and buildings within each district; (2) height, bulk, and area restrictions; and (3) architectural controls, including the regulation of the exterior design of buildings or structures. Id. "Use" restrictions usually divide the community into four major districts: residential, commercial, industrial, and special. Within each district, the local planning board may allow a variance, a conditional use permit, or other use variation. Id.

Unlike the broad community development purpose of zoning, subdivision controls specify requirements for dividing land tracts into smaller distinct parcels. Id. § 3. Not all divided land, however, is regulated by subdivision laws. Only divided land that fits within the specific definition of a "subdivision" as found in the applicable regulation is subject to subdivision requirements. E. McQuillin, Municipal Corporations § 25.118A (3d ed. 1983 & Supp. 1985). Although subdivision regulations vary between jurisdictions, they contain certain common specifications: standards for street design and lot size; required improvements, reservations, and utilities; and the process for reviewing plat plans. P. Rohan, supra, § 1.02(6). For a detailed description of the review process, see infra note 167.

29. P. Rohan, supra note 28, § 1.02(4). The authority to enact zoning and subdivision statutes is found explicitly in enabling statutes or implicitly through the general grant of home rule in the municipal charters or in the state constitution. See generally Note, The Constitutionality of Local Zoning, 79 Yale L.J. 896 (1970).


31. States have recently begun to accept greater responsibility for land use planning. Some states have implemented major land use programs, such as environment protection legislation. For example, North Carolina, Delaware, and California have each developed coastal zone management programs at the state level. P. Rohan, supra note 28, § 1.04(4). For a comprehensive list and description of these and similar state programs, see id. § 33.01(2).

32. Id. § 1.01(4). General police power does not authorize a municipality to enact zoning ordinances. A. Rathkopf, The Law of Zoning and Planning § 2.02(1) (4th ed. 1984). To grant zoning power to municipalities, states have enacted general zoning enabling acts modeled after the Standard Zoning Enabling Act. For a complete explanation of this model act, see R. Anderson, supra note 30, §§ 2.21-29.

33. P. Rohan, supra note 28, § 1.02(1).

purview of general welfare because their purpose is to promote orderly and planned growth of the community. A municipal land use regulation is invalid if it exceeds the scope of the granted authority.

Zoning ordinances that purport to regulate condominium conversions exceed the grant of zoning police power. Zoning regulations can only regulate the physical uses of land and buildings. A condominium conversion, on the other hand, is a change of ownership rather than a change of use. Because the scope of zoning power does not encompass regulation of the property’s ownership, zoning ordinances that regulate conversions are beyond the scope of the granted zoning power, and are, therefore, invalid.

B. Conversion Eviction Ordinances

Municipalities have virtually no inherent power to regulate and are authorized to act only by a grant of general police power from the state. The state delegates municipal authority to regulate through either a specific grant of power in an enabling statute or through a general grant of home rule authority in the city charter, state constitution, or general

36. E. McQuillin, supra note 28, § 25.38.
39. See supra note 38.
40. E. McQuillin, supra note 28, § 10.03; O. Reynolds, Local State Government 358 (1982); see Hunter v. Pittsburgh, 207 U.S. 161, 178-79 (1907) (affirming that a state can modify or withdraw all municipal power at its discretion because a local government charter or other grant of municipal authority by the state does not constitute a contract with the state).
41. A. Rathkopf, supra note 32, at § 31.03.
42. Home rule authority is a state grant of limited autonomy for municipalities to regulate matters of local concern. O. Reynolds, supra note 40, at 66. It is based upon the antiquated doctrine of “inherent home rule”: a natural right of local self-government arises when the legislature creates a municipal corporation. Id. at 67.

Home rule authority can be delegated by constitutional amendment, general legislative enactment, or city charter. A state can broadly construe constitutional home rule power to grant a municipality general authority to regulate land use, without further delegation of power by the state. Conversely, a state can limit home rule authority by enacting enabling statutes that encumber municipalities with procedural and substantive limitations. In states without a constitutional home rule amendment, municipal power can be granted by enabling legislation alone. In those states, land use control must be specifically delegated to the municipality by an enabling statute. Alternatively, a state lacking consti-
Home rule provisions generally provide municipalities with authority to regulate all local matters. These provisions can grant broad municipal authority to regulate any statewide matter not specifically prohibited by general law or by city charter. On the other hand, states can narrowly interpret these provisions, limiting municipal authority only to those local matters specified in the city charter and authorized by the state statute.

In states with a broad grant of home rule power, municipalities have authority under Dillon's Rule to enact eviction regulations without further enabling legislation. In most states that narrowly construe home

tutional authority may adopt land use regulations by local charter. These regulations, however, are subject to limitation by charter amendments and general state laws. R. Anderson, supra note 30, §§ 2.14-20. For a discussion of the court's role in defining home rule, see Sandlow, The Limits of Municipal Powers Under Home Rule: A Role for the Courts, 48 Minn. L. Rev. 643 (1964).

43. O. Reynolds, supra note 40, at 242.

44. Courts have had trouble determining whether a matter is one of local or statewide concern because "no exact definition of the term 'municipal affairs' can be formulated ...." Butterworth v. Boyd, 12 Cal. 2d 140, 82 P.2d 434, 438 (1938), cited in Bishop v. City of San Jose, 1 Cal. 3d 56, 460 P.2d 137, 81 Cal. Rptr. 465, 469 (1969). Consequently, courts are "required to assume the delicate task of allocating political power between the legislature and the chartered city." Sato, "Municipal Affairs" in California, 60 Calif. L. Rev. 1055, 1058 (1972). Even standards proposed by the courts have been applied inconsistently. In response to this inconsistency, Sho Sato has proposed three criteria to be used by courts in evaluating whether a matter is local or statewide:

1. State laws should prevail where such laws deal with substantial externalities of municipal improvements, services, or other activities, regardless of whether the general laws are directed only to the public sector,
2. state laws should govern if their policies are made applicable to the public and the private sectors, and
3. matters of intracorporate structure and process designed to make an institution function effectively, responsively, and responsibly should generally be deemed a municipal affair.

Id. at 1076-77.

45. O. Reynolds, supra note 40, at 119-20.

46. Id. at 116.

47. Dillon's Rule states that municipalities have (1) those powers expressly conferred by state constitution, state statute, or home rule charter, (2) those powers necessarily or fairly implied in, or incident to, the powers expressly granted, and (3) those powers essential to the declared objectives and purposes of the municipality. J. Dillon, Municipal Corporations § 237 (5th ed. 1911), cited in Nance v. Mayflower Tavern, Inc., 106 Utah 517, 150 P.2d 773, 774 (1944). Under the majority view, a municipality will have only those powers enumerated in Dillon's Rule. The minority view grants the same powers for matters of statewide concern, but grants additional broad power for local matters: to regulate any subject matter not forbidden by general state law or home rule charter. O. Reynolds, supra note 40, at 136.

48. Traditionally, a municipality could regulate local housing only when the legislature declared a local emergency. See Block v. Hirsh, 256 U.S. 135 (1921); see generally M. Lett, Rent Control: Concepts, Realities and Mechanisms 27-29 (1976) (discussing development of "emergency doctrine" justification for enacting rent control ordinances). Courts no longer require a declared emergency to justify a municipality regulating local housing matters. See Birkenfeld v. City of Berkeley, 49 Cal. App. 3d 122 Cal. Rptr. 891 (Dist. Ct. App. 1975), superseded, 17 Cal. 3d 129, 130 Cal. Rptr. 465 (1976) (rejected this "emergency doctrine" by holding that a municipal rent control regulation did not exceed the municipality's authority merely because a local housing emergency did not
rule authority, municipal eviction ordinances can be enacted only by a legislative act that specifically grants local authority to regulate evictions.\textsuperscript{49}

III. PREEMPTION OF MUNICIPAL CONDOMINIUM CONVERSION ORDINANCES BY STATE EVICTION STATUTES

A municipal conversion ordinance is invalid if preempted by state statute.\textsuperscript{60} Under traditional preemption analysis,\textsuperscript{61} a statute preempts an ordinance if the legislative intent to occupy an entire field is apparent from the statute and if the ordinance provisions contradict those prescribed by the statute.\textsuperscript{62} To determine if a field is preempted, courts analyze several factors:\textsuperscript{63} (1) conflicting policies or operational effects between the ordinance and the statute;\textsuperscript{64} (2) an express or implied legislative intent to exclusively regulate the field; (3) the need for uniformity regarding the subject matter; (4) the comprehensiveness and pervasiveness of the statutory scheme; and (5) the extent to which the ordinance frustrates objec-

\textsuperscript{49} E. McQuilllin, supra note 28, § 21.34.

\textsuperscript{50} Federal preemption analysis suggests a reasonable standard for determining state preemption questions. Id. § 19.02; see, e.g., Bloom v. City of Worcester, 363 Mass. 136, 293 N.E.2d 268 (1973) (imposed traditional federal preemption analysis under the tenth amendment to the question whether the state's antidiscrimination statutes preempted a municipal ordinance that established and granted certain powers to a human rights committee). Compare Comment, Parker v. Brown: A Preemption Analysis, 84 Yale L.J. 1164 (1975) with Note, Conflicts Between State Statutes and Municipal Ordinances, 72 Harv. L. Rev. 737 (1959).

\textsuperscript{51} An alternative analysis is one based upon the "concurrent power" theory. Supported by a minority of courts, its major premise is that a city granted home rule authority carries concurrent power with the state when both regulate the same field. See City Council of Baltimore v. Sitnick and Firey, 254 Md. 303, 255 A.2d 376, 379 (1969). Under this theory, an ordinance cannot be preempted unless it directly conflicts with a state statute, and the statute expressly disallows municipal regulation in that field. Id. at 383. Unlike traditional preemption analysis, courts cannot automatically conclude that the municipality is precluded from regulating a field solely because the field is regulated by a comprehensive statutory scheme. Id. at 382.

\textsuperscript{52} E. McQuilllin, supra note 28, § 21.34.

\textsuperscript{53} Overlook Terrace Management Corp. v. Rent Control Bd., 71 N.J. 451, 366 A.2d 321, 326 (1976); see also E. McQuilllin, supra note 28, § 15.20.

\textsuperscript{54} A conflict occurs if an ordinance permits that which a state statute prohibits, or prohibits that which a state statute permits. Rhyne, supra note 3, at 16.
tives of the statute. Generally, courts consider an ordinance preempted only if the legislative intent to preempt is clear.\textsuperscript{55}

Absent a legislative intent to preempt, an ordinance is deemed to supplement the state statute and, therefore, is valid.\textsuperscript{56} A regulation that supplements a state statute but enacts more stringent provisions is not "per se" invalid.\textsuperscript{57}

\section*{A. Case Law — Preemption by State Eviction Statutes}

Apartment owners have asserted that state eviction statutes preempt eviction ordinances because these ordinances frustrate the statutory purpose. The success of such challenges depends upon both the degree of authority delegated to the municipality and the prohibitory effect of the ordinance on conversions. Where the state clearly delegates municipal authority to regulate conversions and the ordinance does not prohibit all conversion activity, courts have been reluctant to invalidate the local eviction ordinance.

In \textit{Grace v. Town of Brookline},\textsuperscript{58} for example, the Massachusetts Supreme Court deferred to the legislative delegation of municipal authority regarding conversions. By a specific enabling statute, the Massachusetts legislature had delegated broad authority to the city of Brookline to control housing evictions.\textsuperscript{59} Brookline then enacted an ordinance that established an automatic six-month delay in issuing eviction certificates, and another ordinance that granted a discretionary hardship delay of six months to certain tenants.\textsuperscript{60} Local apartment owners argued that the ordi-

\begin{itemize}
\item \textsuperscript{55} \textit{Id.} at 17. One court has stated that:

\begin{quote}
[t]he subject of conversion of condominiums is of such importance to the property owners and tenants alike that the authority of the local government to regulate in the area should not hinge upon subjective interpretations by the courts or administrative boards of the vague or general language to be found in the planning and land use laws. If the legislature desires to preempt the decision-making power of local governments in the field, it should specifically say so.
\end{quote}


\item \textsuperscript{56} \textit{RHyne}, supra note 3, at 64; see also \textit{Council for Owner-Occupied Housing, Inc. v. Koch}, 119 Misc. 2d 241, 462 N.Y.S.2d 762 (App. Div. 1983), \textit{aff'd}, 61 N.Y.2d 942, 463 N.E.2d 620, 475 N.Y.S.2d 279 (1984) (holding a New York City conversion ordinance valid because it supplemented the state real estate disclosure laws; the absence of conflict implied a recognition that additional government control was necessary to meet the special housing problems existing in New York).

\item \textsuperscript{57} E. \textit{McQuillin}, supra note 28, § 21.35.

\item \textsuperscript{58} 379 Mass. 43, 399 N.E.2d 1038 (1979).

\item \textsuperscript{59} \textit{Id.} at 1039 n.4.

\item \textsuperscript{60} The two eviction ordinance amendments in question were \textsection{} 9(a)(10), which rendered certificates of eviction unavailable to condominium developers, and \textsection{} 9(a)(8), which protected tenants from being evicted by the new owner during the six months preceding purchase, with an additional six month delay for hardship as determined by the planning board. \textit{Id.} at 1040.
\end{itemize}
nance frustrated the purpose of a Massachusetts eviction statute empowering courts to grant discretionary stays of eviction in summary process proceedings. Because municipal authority was delegated in a specific enabing act, the Grace court required a “sharp conflict” between the state and the local eviction laws before it would invalidate the ordinance on preemption grounds. A sharp conflict was found to exist only if the legislative intent to preempt the ordinance was clear or if the ordinance defeated the statutory purpose. By postponing the statute’s application for at least six months, the ordinance did defeat the statute’s purpose—to give the court discretionary power regarding evictions. The court, however, upheld the ordinance. In light of the specific grant of municipal authority, the court reasoned that postponing the statute’s application did not compromise the statutory purpose.

The Grace court appears to have manipulated preemption analysis in favor of public policy. The broad delegation of municipal authority to regulate evictions indicated a legislative intent to give the municipality a means of ameliorating the severe rental housing shortage. A judicial finding of a legislative intent to preempt the eviction ordinance would have conflicted with the legislative intent to give the municipality broad remedial power. Although the ordinance did frustrate the statutory purpose, the court’s reasoning that the ordinance merely postponed the statute’s application avoided invalidating the ordinance on preemption grounds.

In states where a broad general grant of home rule authority is the only source of municipal power to regulate conversions, courts are generally less reluctant to deem the conversion ordinance preempted by the conversion eviction statute. Owners have claimed that eviction ordinances conflict with state eviction statutes because the ordinances prohibit conversions allowed under the statutes. Such challenges have been successful only where the ordinance defeated either the function or the purpose of the eviction statute.

In City of Miami Beach v. Rocio Corp., a grant of home rule power in the state constitution and in a broad enabling statute authorized Miami Beach to enact conversion ordinances. Because the state did not enact a specific enabling statute delegating municipal authority to regulate conversions, the court invalidated only ordinances that regulated sub-

61. Id.
62. Id. at 1039.
63. Id.
64. Id. at 1044.
65. Id.
67. Id. at 1067-68.
jects specifically mentioned as preempted in the state home rule enabling statute. Because condominium conversions were not specifically mentioned, the court found no preemption of the ordinance. But the court did find a conflict between certain provisions of a Miami Beach conversion ordinance and the Florida Condominium Act. A provision of the Act required a tenancy to expire within 180 days of the date that the tenants were notified of the intended conversion. The Miami Beach ordinance, however, permitted a tenancy to expire within 18 months after notice to the tenant. Because the terms of the ordinance conflicted with those of the statute by extending the eviction period by one year, the court invalidated the ordinance.

Conversely, municipal conversion moratoriums enacted as emergency measures under a general grant of police power by the state are usually invalidated because moratoriums inevitably conflict directly with statutes regulating conversion evictions by prohibiting all conversion activity. In Claridge House One, Inc. v. Borough of Verona, the New Jersey federal district court found a clear conflict between the ordinance's one-year conversion prohibition and a statute permitting landlords to evict a tenant after apartment conversion. The court stated that the ordinance deleteriously affected the statewide program of eviction regulation by frustrating "the twin legislative goals of permitting while regulating [conversions]." In striking down the moratorium ordinance, the court noted that a moratorium would frustrate the public policy underlying the statutory eviction scheme of balancing both tenant and owner interests.

B. Analysis of Preemption Case Law

The more specific the state delegation of municipal authority to regulate conversion evictions, the more likely that the ordinance will be upheld against a preemption challenge. The delegation of authority represents a transfer of the primary responsibility for eviction regulation from state to
municipal government. This shift in responsibility is appropriate because a municipal government is more aware of how conversions are affecting the local housing market. Because a municipal government requires flexibility to regulate evictions in relation to the local housing market, courts usually uphold these eviction ordinances against preemption challenges unless the ordinance expressly or functionally prohibits conversions.

Regardless of the state delegation of authority, courts tend to strike down moratoriums prohibiting conversions because the public policies favoring condominium conversions outweigh those policies discouraging conversions. Ordinances that govern evictions resulting from conversions tend to protect all interests concerned; prohibitory ordinances, such as moratoriums, completely frustrate owners' and cities' interests in conversion by precluding all conversion activity. Thus, the tendency for courts to uphold regulatory ordinances while invalidating those deemed prohibitory reasonably protects the interests of those affected by condominium conversions.

IV. DUE PROCESS CHALLENGES TO CONVERSION ORDINANCES

A. Substantive Due Process Under the Fourteenth Amendment

The due process requirement of the fourteenth amendment applies to state and municipal legislation. To determine the constitutionality of an ordinance under the due process clause, courts examine whether the ordinance is unreasonable, arbitrary, or capricious, and whether the means chosen have a rational relation to a legitimate objective of the law. A municipal ordinance enacted under the police power provides due process if it protects and furthers the peace, comfort, safety, health, morality, or general welfare of the inhabitants.

1. Due Process Challenges to Municipal Land Use Ordinances

Owners have asserted that subdivision ordinances requiring structural alterations prior to planning board approval of the conversion violate due process. Because conversions are merely a change of ownership, owners have argued that there is no legitimate purpose under police power au-
authority for applying different standards to apartments converted to condominiums than to rental apartments. Courts, however, have deferred to legislative findings that condominium conversions differentially affect the quality and quantity of the rental housing stock; conversions decrease the number of rental units available for low- and moderate-income individuals, and present potential problems of overcrowding. Because preservation of the housing supply and municipal land use planning are legitimate general welfare objectives under the police power grant, courts have found a rational basis for placing different subdivision requirements on condominiums than on apartments.

2. Due Process Challenges to Municipal Eviction Ordinances

Municipalities are authorized to enact tenant protection provisions, commonly found in eviction ordinances, under the grant of police power by the state. Conversions affect the general welfare of the public by decreasing the availability of low- and moderate-income rental housing.

85. See, e.g., McHenry State Bank v. City of McHenry, 113 Ill. App. 3d 82, 446 N.E.2d 521 (1983) (holding that the practical effect of restricting condominiums only to specially designated "condominium zones" constituted impermissible discrimination against the conversion of existing apartment dwellings into condominium units); AMN, Inc. of New Jersey v. South Brunswick Rent Leveling Bd., 93 N.J. 518, 461 A.2d 1138 (1983) (holding a municipality may not impose a moratorium on conversion of rental units into condominiums because land use requirements must apply equally to all buildings of the same kind). But see 82 Op. Att'y Gen. (Inf) 232 (N.Y. Dec. 28, 1982) (stating that a rational distinction exists between more stringent requirements for converted condominiums than for apartments regarding storage, parking, and recreational facilities).

86. See Rasmussen v. City of Tiberon, 140 Cal. App. 3d 842, 190 Cal. Rptr. 1 (1983). "Concerns exist over the reduction in rental units to condominiums which are sold. This practice significantly diminishes the number of dwelling units available as rentals and increases the difficulties for a moderate-income family to remain in the community." Id. at 6. According to one scholar of condominium conversions, this fact alone does not provide adequate justification for applying different standards to converted condominiums than to rental apartments because the shortage results not only from conversions, but also from lack of new rental housing construction. Thus, the burden for this shortage should not be placed solely on owners of converted apartments. RHINE, supra note 3, at 70.

87. Griffin Development Co. v. City of Oxnard, 39 Cal. 3d 256, 703 P.2d 339, 217 Cal. Rptr. 1 (1985) (upheld a building code provision pertaining only to converted condominiums which required the condominiums to have at least two bedrooms, on the ground that the ordinance protected against overcrowding potentially created by the influx of larger lower-income families).

88. See, e.g., Grace v. Town of Brookline, 379 Mass. 54, 399 N.E.2d 1038, 1045 (1979) (reasoned that legislation preserving the rental market for low-, moderate-, and fixed-income persons promotes health, safety, and welfare generally; "In short, a housing crisis justifies the exercise of the police power.").

89. E. McQuILLIN, supra note 28, § 24.563E; see People v. H & H Properties, 154 Cal. App. 3d 894, 201 Cal. Rptr. 687 (Cal. Dist. Ct. App. 1984) (holding a relocation assistance provision valid under police power authority by analogy to rent control ordinances: both protect tenants potentially forced into the housing market in order to protect the health and welfare of the county and its residents).

90. See supra notes 86-87 and accompanying text.
As the supply of affordable rental housing decreases, the burden on displaced tenants forced to seek alternative housing increases. In recognition of this causal relationship, legislatures have enacted tenant protection regulations, such as relocation assistance, right of first purchase, and tenant approval provisions.\(^9\) Because a legislative determination that a particular measure serves the general welfare is conclusive unless proven to be clearly erroneous,\(^9\) courts have acknowledged protection of displaced tenants as a legitimate general welfare purpose under the grant of police power.\(^9\)

In deference to legislative concerns regarding conversions, courts have upheld ordinances under due process analysis where only a tenuous relationship existed between the purpose of the ordinances—protecting displaced tenants—and the specific ordinance provisions.\(^9\) For instance, the court in *Kaladjian v. City of Fremont*\(^6\) upheld an ordinance requiring owner-developers to pay relocation fees based on the average relocation costs at the time of enacting the ordinance. The court dismissed the owner’s allegation that the *amount* of the fee was unreasonable, stating that the city was not required to precisely ascertain each tenant’s relocation costs.\(^9\) It found that the mandatory relocation fee was reasonable because tenants displaced by conversion would be removed from rent-controlled apartments.\(^9\)

The *Kaladjian* court did not adequately address the due process challenge because it did not examine whether the actual relocation assistance fee was rationally related to the general welfare. Instead, the court justified the relocation assistance provision on the ground that relocation assistance fees in general protect displaced tenants. To adequately protect the general welfare of the public, these provisions should protect both displaced tenants and owners-developers. An unrealistically high relocation as-

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91. By 1980, approximately 25 states had enacted statutes protecting tenants displaced by conversion. Common provisions in tenant protection statutes and ordinances are (1) notice of the proposed conversion, specifying the eviction procedure, (2) tenants' right to quiet enjoyment of the property, (3) minimum percentage of tenant approval to convert, (4) tenants' right to purchase condominium before sale to the general public, known as the "right of first refusal", and (5) owner's requirement to provide relocation plan and/or financial assistance to displaced tenants. For a detailed explanation of each provision, see HUD REPORT, supra note 1, at chs. XI and XII.

92. E. McQUILLIN, supra note 28, § 24.29.

93. See supra note 88.

94. See H & H Properties, 201 Cal. Rptr. at 690 (holding relocation assistance provision valid solely because the means of tenant protection was not "so incongruent with the ends that it [was] invalid.").


96. Id. at 151.

97. Id. at 152.
assistance fee penalizes owners for choosing to convert their property, and may provide a financial windfall to displaced tenants. Thus, the amount of these fees is an important element to examine in determining whether the ordinance violates due process. The Kaladjian court, therefore, inadequately addressed the issue of whether the amount of the relocation assistance fee was unreasonable.

B. Conversion Eviction Ordinances as “Takings” Under the Fifth Amendment

The takings clause protects against unrestricted government confiscation of private property for public use by physical invasion or unreasonable regulation.98 The government can regulate land use without compensating the property owner as a lawful exercise of its police power. A regulation that restricts the use of the property too extensively is a “taking,” for which an injunction may issue prohibiting enforcement of the ordinance.99 Traditionally, the United States Supreme Court has evaluated alleged violations of the takings clause on an ad hoc basis because it has “been unable to develop any set formula for determining when ‘justice

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98. “[N]or shall private property be taken for public use, without just compensation.” U.S. Const. amend. V. The Supreme Court applies a broad public benefit test for determining when a use is public. The public use limitation is met whenever the purpose of the government action is for the benefit of the health, safety, or welfare of its citizens. Berman v. Parker, 348 U.S. 26, 33 (1954); see also Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) (held state exercise of eminent domain power to transfer fees simple from private landowners to individual lessees did not violate the public use requirement of the fifth amendment); Note, Eminent Domain—The Public Use Clause and Judicial Review—Hawaii Housing Authority v. Midkiff, 104 S. Ct. 2321 (1984), 1985 Ariz. St. L.J. 237.

99. In Agins v. City of Tiburon, the California Supreme Court held that damages could not be recovered even if a regulation effected a taking; the only remedy was invalidation of the ordinance, 24 Cal. 3d 266, 157 Cal. Rptr. 372 (1979). On appeal, the United States Supreme Court refused to address the issue of damages, claiming that the issue was moot because no taking had occurred. 447 U.S. 255 (1980); accord Williamson County Regional Planning Comm’n v. Hamilton Bank of Johnson City, 105 S. Ct. 3108 (1985) (Court refused to decide whether a density zoning ordinance effected a compensable taking because the developer did not exhaust his administrative remedies by seeking a variance or by bringing an action for inverse condemnation). In San Diego Gas & Electric Co. v. City of San Diego, the Supreme Court again refused to decide the damages issue, claiming that the California Supreme Court had not entered a final judgment. 450 U.S. 621, 633 (1981). In his dissent, Justice Brennan asserted that a police power regulation could constitute a taking requiring compensation. 450 U.S. at 652 (Brennan, J., dissenting). He argued, therefore, that a temporary regulatory taking required payment of damages until revocation of the ordinance. Id. at 658-59. Citing Brennan’s dissent in San Diego Gas, the New Jersey Supreme Court in Sheerr v. Township of Evesham, found a compensable temporary taking of land restricted by a zoning regulation. 184 N.J. Super. 11, 445 A.2d 46, 74 (1982). Although the court denied the owners an order requiring the township to condemn the property, it granted damages based on the difference between the option value of the parcel at the enactment date of the ordinance and the option value at the revocation date of the ordinance.
and fairness' require that economic injuries caused by public action be compensated by government. 100

1. Condominium Conversion Ordinances Challenged as Regulatory Takings

In a relatively recent Supreme Court decision, Pennsylvania Central Transportation Co. v. City of New York (Penn Central), 101 the Court specified factors to consider when determining whether a regulation effects a compensable government taking. In Penn Central, the City of New York denied owners of Grand Central Station a permit to construct an office building above the terminal because the building was a designated landmark. 102 In analyzing whether a compensable taking had occurred, the Court focused on the character of the government action and on the economic impact of the regulation on the claimant. 103 To determine the character of the government action, the Court distinguished between a physical invasion and a regulation. 104 It indicated that a physical invasion would more readily be considered a taking than a regulatory action. 105 A regulation would be deemed a taking only if its economic impact substantially interfered with the distinct investment-backed expectations of the owner. 106 Labeling the government action affecting Penn Central as regulatory, 107 the Court analyzed the ordinance's economic impact on the owners' property. The Court claimed that diminution of property value alone did not render the ordinance confiscatory. 108 It rejected the argu-

101. Id.
102. Id. at 115-16.
103. Id. at 130-31.
104. Id. at 124.
105. Id.
106. Id.
107. Id. at 135.
108. Id. at 131. To support this proposition, the United States Supreme Court cited several cases in which it had held an ordinance nonconfiscatory even though the ordinance had significantly decreased property value. In Hadacheck v. Sebastian, the Supreme Court upheld an ordinance that rendered plaintiff's property worth only 10% of its previous value by precluding him from operating his brickyard business. 239 U.S. 394 (1915). Similarly, in Village of Euclid v. Ambler Realty Co., the Ambler Realty Company alleged that a zoning ordinance that reduced the value of its land from $10,000 to $2,500 an acre violated its due process and equal protection rights. 272 U.S. 365 (1926). The Supreme Court upheld the ordinance, noting in dicta that the reduction in land value was not the definitive factor in determining whether a taking had occurred. In a later case, Goldblatt v. Town of Hempstead, an ordinance restricted plaintiff's beneficial use of his property, mining sand and gravel. 369 U.S. 590 (1962). The Court upheld the ordinance, stating that a comparison of land values before and after the enactment of a regulation is relevant, but not conclusive, to a takings analysis. For further discussion of the early development of takings clause analysis, see Sax, Takings and the
ment that a taking had occurred because the government action prevented Penn Central from exploiting a property interest that the owners had believed was available. The Court held instead that the ordinance fulfilled the owners' investment-backed expectations by providing a reasonable return on their investment based upon the property's existing use rather than upon its "most beneficial" use. Because the ordinance was substantially related to "public use" by promoting the general welfare and did not frustrate the owners' investment-backed expectations, it was upheld.

Courts have not invalidated conversion ordinances as regulatory takings under the Penn Central analysis because these ordinances do not frustrate legitimate investment-backed expectations of the owner-purchaser. Only persons who purchase a converted unit before the effective date of the ordinance have a legitimate expectation that the property will be available for owner-occupation by evicting the current tenants. Owners who

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110. *Id.* at 127.
111. In later cases, the United States Supreme Court further clarified the meaning of "investment-backed expectation." In *Agins v. City of Tiburon*, property owners alleged that the government had "taken" their property by zoning it solely for single-family dwellings, accessory buildings, and open space uses and by allowing only five buildings on their property. 447 U.S. 255 (1980). The Court denied that the ordinance was confiscatory because the regulation did not preclude the owners from the "economically viable" use of their land; they were free to pursue their reasonable investment-backed expectations by submitting development plans to local officials. In *Andrus v. Allard*, a regulation prohibited the commercial sale of bird parts that were legally obtained before enactment of the regulation. 444 U.S. 51 (1979). The measure of economic impact was not whether the owner was deprived of the property's most beneficial use or whether the ordinance substantially reduced the property's value. Unable to discern the economic impact of the regulation, the Court upheld the ordinance because the loss of future profits unaccompanied by any physical property restriction "provides a slender reed upon which to rest a takings claim." *Id.* at 66.
112. In *Chan v. City of Brookline*, for example, the Chans bought a condominium six months before expiration of a local moratorium prohibiting issuance of eviction certificates. 484 F. Supp. 1283 (D. Mass. 1980). The Chans, therefore, had a reasonable expectation of occupying their unit within approximately six months after purchasing it. Two months after the Chans' purchase, the moratorium ordinance was amended to retroactively prohibit an owner from evicting a tenant who had occupied the apartment continuously before the recording of the master deed to the condominium. The court noted that this ban essentially prevented the Chans from ever evicting the tenant who was in possession when the master deed was executed. Because the Chans did not have notice of the extended ban before purchasing the unit, the ordinance frustrated their legitimate investment-backed interest.

Although the court denied their request for a preliminary injunction, it noted in dicta that the deprivation of property in this case "may be more than simply regulating the use of property. It may constitute a restriction of such nature that it amounts to a taking without compensation." *Id.* at 1286. Rather than directly address the takings issue, however, the court denied the injunction on public policy grounds; "Injury to many persons might occur if the injunction is granted. Injury to the Chans may be incurred if it is not." *Id.* at 1287.
purchase after the eviction ordinance has taken effect have at least con-
structive notice of the limitations imposed on their property. Because these owner-purchasers have notice that they do not have a legitimate right to personal occupancy, they cannot claim that the ordinance frustrates a legitimate investment-backed expectation by precluding them from occupying their unit.

Even owners who purchase before the effective date of the eviction ordi-
nance have not been deprived of legitimate investment-backed expectations because the rental income provides reasonable return on their investment. Rent control and eviction ordinances are often enacted concurrently to preserve the depleted rental housing supply during a housing shortage. In these areas, the amount of rental income for low- and moderate-income housing usually depends upon a rent control ordinance. Rent control ordinances providing a fair net operating income have been upheld as nonconfiscatory. Where such rent control ordinances exist in conjunction with conversion eviction ordinances, courts have held these eviction ordinances nonconfiscatory because the rent control ordinance provides a reasonable return on investment, thereby satisfying the owner-purchaser's investment-backed expectations.

114. Id.
115. Condominium conversion regulations and rent control regulations are often jointly enacted by municipalities in response to a local housing shortage. The removal of existing rental housing by conversion depletes the rental housing supply, creating or worsening a rental housing shortage. Rhyme, supra note 3, at 5. As the rental housing supply diminishes, the demand for such housing increases, resulting in inflated rental rates. Id. at 62. Furthermore, landlords may try to harass tenants into purchasing their units by threatening to significantly increase rents. Id. at 73. In response, cities frequently enact conversion ordinances to regulate evictions and rent control ordinances to limit rent increases to a specified yearly percentage. Sternlieb, supra note 15, at 276. Often, the combined effect of these ordinances severely restricts the owner-developer's use of his property by, in effect, disallowing evictions resulting from conversion.

116. Net operating income is rental income minus direct operating and maintenance expenses. Sternlieb, supra note 15, at 286 n.14. See generally M. Lett, supra note 48, at 223-26 (1976). "Fair net operating income" has been held a reasonable return on investment. See Zussman v. Rent Control Bd. of Brookline, 371 Mass. 632, 359 N.E.2d 29 (1976); Marshall House, Inc. v. Rent Control Bd. of Brookline, 358 Mass. 686, 266 N.E.2d 876 (1971). Therefore, a rent control ordinance that provides "fair net operating income" is nonconfiscatory. See Apartment and Office Bldg. Assoc. of Metropolitan Washington v. Washington, 381 A.2d 588 (D.C. 1977) (held statute allowing 8% increase was not so low as to be confiscatory, even though it was based upon the assessed value rather than the fair market value of the rental property, because the statute had a limited duration and included provisions for periodic review, hardship petitions, and partial pass-through of costs); see also Cotati Alliance for Better Housing v. City of Cotati, 148 Cal. App. 3d 280, 195 Cal. Rptr. 825, 830 (1983) (upheld a local rent control ordinance as nonconfiscatory even though it did not require an economic return to the landlord based on the present fair market value of the property because this standard would have undermined the rent control ordinance).
2. Conversion Regulations Challenged as Physical Occupation Takings

Owner challenges that eviction regulations are physical invasions effecting a taking have not been any more successful than those challenged as regulatory takings. In a recent case, Troy, Ltd. v. Renna,117 the Third Circuit rejected two arguments alleging that the New Jersey Senior Citizen and Disabled Tenancy Act was a taking as a physical invasion under the "per se" takings standard. This standard, as first stated in Loretto v. Teleprompter Manhattan CATV,118 is that a physical occupation is a taking "per se", without regard to whether the action achieved an important public benefit or had only minimal economic impact on the owner.119 Analyzing the Act under this standard, the Third Circuit rejected the argument that the statutory provision120 allowing a forty-year stay of eviction constituted a physical invasion by the tenants. It reasoned that the Act specifically applied to the elderly, which naturally limited the duration of the occupancy.121 The court also noted that the tenancy could be terminated if the tenant moved or was evicted for "just cause."122 In addition, the court rejected the owner's argument that the regulation was for a "public use," based upon the United States Supreme Court's reasoning in Loretto.123 In Loretto, the Supreme Court had approved in dicta the state government's broad power to regulate housing conditions in general without paying compensation for all economic injury resulting from such regulation.124 The Troy court interpreted this dicta to mean that the Supreme Court "clearly assumed that the creation of statutory tenancy for private

117. 727 F.2d 287 (3d Cir. 1984). The Troy court's analysis of the New Jersey eviction statutes serves as an example of the problems associated with analyzing an eviction ordinance as a physical occupation taking.

118. 458 U.S. 419 (1982), on remand, 58 N.Y.2d 143, 446 N.E.2d 428, 459 N.Y.S.2d 743 (1983) (holding that a New York statute requiring apartment building owners to allow installation of facilities for cable television transmission effected a taking because the cable permanently occupied the plaintiff's rental property.)

119. Loretto, 458 U.S. at 426.

120. N.J. STAT. ANN. §§ 2A:18-61.22 to -61.39 (West Supp. 1983). The relevant provision of the Act grants a protected tenant status to eligible senior citizens and disabled tenants. To be an eligible senior citizen, the tenant must be at least 62 years old on the date of a conversion recording for the building of which he is a tenant, or a surviving spouse (at least 50 years old at the time of filing) of such person if the person dies after the owner files for conversion. The senior citizen or surviving spouse must have resided in the building for the two years immediately preceding the conversion recording or death. N.J. STAT. ANN. § 2A:18-6124(a) (West Supp. 1983).

121. Troy, 727 F.2d at 301.

122. Id.

123. Id. at 302.

124. Loretto, 458 U.S. at 440.
The court concluded, therefore, that the statutory laws, although frequently involving cost to the owner, were not confiscatory but merely allowable government regulation of the use of private property.¹²⁸

The Troy court substantially relied on the holding and reasoning of the Loretto decision in rejecting the owner’s challenge that the eviction ordinance was a governmental physical occupation tantamount to a compensable taking. The court in its analysis, however, ignored critical dicta in the Loretto opinion regarding regulations affecting the landlord-tenant relationship. Although the Supreme Court acknowledged that states have broad powers to regulate housing conditions without paying compensation for all economic injuries resulting from such regulations, it noted that “[i]n none of these [past] cases . . . did the government authorize the permanent occupation of the landlord’s property by a third party.”¹²⁷ The Court further specified that landlord-tenant regulations should be examined under the multifactorial analysis generally applicable to nonpossessory government activity “so long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party.”¹²⁸ The Supreme Court, therefore, apparently did not preclude analyzing as a permanent physical invasion those regulations that result in physical occupation of the property. Consequently, the Troy court seems to have misinterpreted Loretto as implying that a statutory tenancy could not be analyzed as a physical taking.

A cogent argument can be made that the New Jersey Tenancy Act actually effected a physical taking under Loretto. The Act granted a forty-year extension of tenancy not only to elderly tenants, but also to handicapped individuals.¹²⁹ Because handicapped tenants and surviving spouses could remain in tenancy for an extended duration, the regulation potentially postponed indefinitely the owner’s right to convert his property. Thus, this provision seems to meet the Loretto exception to general noncompensable regulatory ordinances because it required the landlord to suffer the physical occupation of part of his building by a third party.¹³⁰

¹²⁵. Troy, 727 F.2d at 302.
¹²⁶. Id.; accord Edgewater Assoc., Inc. v. Borough of Edgewater, 201 N.J. Super. 267, 493 A.2d 11 (1985) (affirming Troy holding that the incidental effect of the New Jersey statutory eviction scheme on property rights of landowners is far outweighed by salutary purpose underlying the statutory scheme).
¹²⁷. Loretto, 458 U.S. at 440.
¹²⁸. Id.
¹²⁹. See supra note 120.
¹³⁰. The United States Supreme Court has held that a regulation can effect a physical occupation taking. In Kaiser-Aetna v. United States, the government asserted that the improvements on a private marina by Kaiser-Aetna made the marina into “navigable water” subject to navigational ser-
Moreover, the New Jersey Tenancy Act in this case benefitted the public on two levels. First, the purpose of the ordinance was to protect the “public interest of the state to avoid the forced eviction and relocation of senior tenants . . . and the displacement of the handicapped.”181 Second, the regulation denied eviction of predominantly low- and moderate-income tenants which, when combined with the extended eviction stay, effectively converted the owner’s property from private to public housing.182 Thus, the regulation closely resembled a physical occupation taking.183

vitude under the Commerce Clause, thereby opening the marina to public access. 444 U.S. 164 (1979). The Court stated that “the government’s attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking under the logic of Pennsylvania Coal v. Mahon.” Id. at 170. By discussing the alleged taking in terms of Pennsylvania Coal, a regulatory case, the Court seemed to characterize the government action as regulatory. Later in its opinion, however, the Court stated that the regulation would result in “an actual physical invasion of the privately-owned marina” by the public. Id. at 171. The Court’s analysis implies that the extent of a physical invasion permitted by a regulation determines the label of the government action; regulations that “go too far” by allowing a permanent physical invasion by a third party will be considered physical occupation takings.

A more recent case, Pruneyard Shopping Center v. Robins, defined the standard for determining whether a regulation effected a physical occupation taking. 447 U.S. 74 (1980). In Pruneyard, a shopping center owner unsuccessfully asserted that state constitutional provisions, as construed to permit people to exercise free speech and petition rights on his private property, effected a physical taking. The Court determined that the ordinance did not effect a taking because the owner’s right to exclude others was not essential to the use or economic value of his property, and because the value and primary use of the property was not unreasonably impaired, as it was in Kaiser-Aetna.

Applying this standard to Troy, the regulation “went too far” and effected a physical occupation taking. The owner’s “right to exclude” was essential to the use of his property; by disallowing evictions for 40 years, the owner was unable to convert his property because part of the property was “permanently” occupied by third persons—handicapped tenants and surviving-spouse tenants.


132. See Mayo v. Boston Rent Control Admin., 365 Mass. 575, 314 N.E.2d 118, 125 (1974) (Tauro, C.J., dissenting) (asserted that a restrictive eviction ordinance constituted a pro tanto taking requiring compensation because the ordinance severely infringed on owners’ property rights: “important constitutionally-protected individual rights are being sacrificed here to meet a public need. Such a sacrifice on the part of an individual is too great to demand, no matter how urgent the public need”).

133. Id. In Fresh Pond Shopping Center, Inc. v. Callahan, 464 U.S. 875 (1983) (Rehnquist, J., dissenting), Justice Rehnquist found that an eviction ordinance constituted a physical occupation taking under the Loretto standard. The Massachusetts Supreme Court had upheld as nonconfiscatory a rent control ordinance which forbade an owner from destroying his rent-controlled apartment building to build a parking lot. Fresh Pond Shopping Center, Inc. v. Callahan, 388 Mass. 1051, 446 N.E.2d 1060 (1983). Although the United States Supreme Court dismissed the case for lack of a substantial federal question, Justice Rehnquist dissented, claiming that the case presented important, undecided questions concerning the application of the takings clause. 464 U.S. at 876. Justice Rehnquist asserted that the combined effect of the state enabling statutes and the eviction ordinance was to deny the owner use of his property in a manner closely analogous to the permanent physical invasion involved in Loretto. Id. at 876-77. The regulation forbade evictions unless the rental unit was either to be demolished, removed from the rental market, or occupied by the owner or his family. Id. at 876. The evictions also required discretionary approval by a rent control board. Id. Justice Rehnquist argued that the ordinance, in effect, precluded evictions unless tenants voluntarily moved from the
In conclusion, ordinances postponing conversion evictions for an unreasonably long duration should be regarded as physical invasions constituting "per se" takings under Loretto. Monetary compensation for such takings, however, is an inadequate remedy. The principle underlying "just compensation" is to "leave the individual owner in a position of indifference between the taking by the government and retention of the property." Compensation cannot put the owner in the same position as he would have been had he converted the apartments or sold the building to a converter; he is forced to remain a landlord, with the concomitant financial and managerial burdens.

Because compensation cannot be "just" in this situation, these regulations should be invalidated. Unreasonably restrictive ordinances would then be invalidated more readily because the owner would have to prove only a physical occupation rather than prove the more difficult factor of "frustrated investment-backed expectations" required under Penn Central regulatory analysis. This rule would better fulfill the purpose and intent of conversion eviction ordinances—to balance both tenants' and owners' rights—by invalidating those ordinances so restrictive as to, in effect, preclude evictions. Less restrictive ordinances should continue to be analyzed under the traditional Penn Central multifactorial approach applicable to regulatory takings.

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135. For example, the owner remains liable for personal injuries occurring on his property, see Uccello v. Laudenslayer 44 Cal. App. 3d 504, 118 Cal. Rptr. 741 (1975), and for property damage, see Evans v. Thompson 72 Cal. App. 3d 978, 140 Cal. Rptr. 525 (1977). See also Nash, 207 Cal. Rptr. at 297 (Mask, J., dissenting) (claimed that the financial and managerial responsibilities of being a landlord are so onerous that compelling a person to remain a landlord by the effect of an eviction ordinance verges on involuntary servitude).

136. If the owner is suing in federal court, he will have the remedy of declaratory relief available. 28 U.S.C.A. § 2201 (West 1982 & Supp. 1985). If he is suing in state court and no statute provides declaratory relief as a remedy, the owner may seek an injunction to prevent the city from enforcing the statute. Because the owner must prove the unconstitutionality of the statute to get the injunction, the success of his lawsuit will result in invalidation of the ordinance as applied. D. Dobbs, Remedies 26 (1973).
V. EQUAL PROTECTION CHALLENGES TO CONDOMINIUM CONVERSION ORDINANCES

The equal protection guarantee applies to the exercise of all powers of a municipal corporation that affect or can affect the individual or his property, including police power regulations. It does not forbid reasonable classifications in municipal legislation. A classification is constitutionally permissible if the government objective is legitimate and the classification bears a rational relationship to the objective. Municipal eviction ordinances that specially advantage the elderly have been analyzed under the “rational basis” test of the equal protection clause.

A. Equal Protection Challenges to Eviction Ordinances

Owners have argued that the preferential treatment afforded the elderly in conversion eviction ordinances violates the equal protection clause because special classification of the elderly does not relate to a proper government purpose. Courts correctly have rejected this argument in deference to the legislative recognition of the elderly as a socioeconomic group uniquely affected by displacement resulting from condominium conversions. In Reiner-Kaiser Association v. McConnachie, for example, a converter claimed that a New York City ordinance which prevented him from evicting lower-income elderly tenants in order to convert the apartments to condominiums violated equal protection. He argued that the special classification of the elderly was not legitimate under the police power grant. The court noted that the elderly with lower-incomes are the tenants least likly to be able to purchase the converted apartments or to remain tenants once rents are escalated after conversion. Consequently, the court held that special classification of lower-income elderly tenants in the conversion eviction ordinance was legitimate, and, therefore, upheld the ordinance.

138. Id. § 19.14.
139. Id.
140. The Supreme Court has rejected age as a “suspect classification.” See Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 56 (1972) (applied rational basis test to determine whether a mandatory retirement age for state police was a valid classification). Consequently, the question whether special classification of the elderly is unconstitutional should be analyzed under the rational basis test rather than the strict scrutiny test.
142. Id. The ordinance stated that an owner could not evict a tenant who was at least 62 years old with an income below $30,000 per year and who began residence two years before the owner filed for conversion. Id
143. Id. at 345.
CONDOMINIUM CONVERSIONS

B. Equal Protection Challenges to Subdivision Controls

A subdivision ordinance is valid under equal protection analysis if its classification of various land uses has a reasonable basis germane to the purpose of the ordinance, and if the purpose is legitimate under the grant of zoning police power.\(^\text{144}\) The basis of the classification, therefore, must bear a rational relationship to the public safety, health, or general welfare.\(^\text{145}\) A classification is invalid as discriminatory if either the classification of land uses or the restrictions within each district are not fair and uniform in operation with respect to each class, use, or building within the district.\(^\text{146}\)

Owners have asserted that subdivision ordinances applying unequally or differently to converted condominiums than to apartments are discriminatory and, therefore, invalid. Ordinances requiring fees in lieu of land dedication\(^\text{147}\) as a condition of plat approval have been challenged as discriminatory on the ground that they do not bear a rational relation to a legitimate general welfare objective.\(^\text{148}\) In Norsco v. City of Fremont,\(^\text{149}\) for example, an owner-developer argued that fees-in-lieu provisions as applied to converters lacked a rational relation to a general welfare purpose\(^\text{150}\) because conversions do not increase the population density and therefore do not significantly affect the needs of the community. The California Supreme Court rejected this argument based upon its previous

\(^{144}\) E. McQuillan, supra note 28, § 19.13.

\(^{145}\) Id. § 19.14.

\(^{146}\) Id. § 19.15.

\(^{147}\) A common requirement for approval of a subdivision plat is dedication of land for public recreational use. R. Anderson, supra note 30, § 23.39. Some municipal ordinances permit the developer to donate a fee instead of the land itself, known as a fees-in-lieu provision. The donated amount can be based upon either a set fee per lot, a fee equal to the value of the land which would have been donated, or a fee based upon a percentage of the assessed value of all the land in the plat. Id. § 23.40.

\(^{148}\) To require a fee from subdividers as a condition of subdivision approval, a municipality must act under proper enabling statutes or charter provisions. See Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949). One justification for imposing a fees-in-lieu provision is that the subdivision developer should be required to assume costs specifically and uniquely attributable to his activity, which would otherwise be cast on the general public. See Krughoff v. City of Napeville, 68 Ill. 2d 352, 369 N.E.2d 892 (1977). An alternative justification is that the subdivider must only pay that portion of the cost bearing a rational nexus to the needs of, and special benefits conferred upon, the subdivision. See, e.g., Land/Vest Properties, Inc. v. Town of Plainfield, 117 N.H. 817, 379 A.2d 200 (1977) (holding that the rational nexus rule only required a developer to pay that portion of the cost of upgrading access roads bearing a rational nexus to needs of, and benefits conferred upon, the affected subdivision). A "reasonable portion" of the costs means those costs associated with the portion of the land that the municipality will need to acquire after the subdivision is built. Collins v. City of Bloomfield, 310 Minn. 5, 246 N.W.2d 19 (1976).

\(^{149}\) 54 Cal. App. 3d 488, 126 Cal. Rptr. 659 (1976).

\(^{150}\) Id. at 664.
analysis of fees-in-lieu provisions\textsuperscript{151} in \textit{Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek}.\textsuperscript{152} The Walnut Creek court had upheld fees-in-lieu provisions on the ground that the development of new subdivisions consumes a substantial supply of open land which, when combined with future population growth, creates an urgent need for open land preservation.\textsuperscript{158} The court assumed that a subdivision constitutes a horizontal division of land rather than a vertical division, as does an apartment building.\textsuperscript{154} In its analysis, the court noted that construction of an apartment building usually requires considerably less land than construction of a subdivision. On that basis, it concluded that building an apartment complex does not decrease the limited supply of open space as much as building a subdivision.\textsuperscript{155}

In actuality, however, converted condominiums are structurally more comparable to apartment buildings than to typical subdivision plats. The Norsco court, therefore, inappropriately applied the Walnut Creek analysis of fees-in-lieu provisions to condominium conversions. Converting apartments to condominiums does not require additional land or increase the population density. Thus, ordinances that exact fees-in-lieu from owner-developers of converted condominiums do not further the general welfare purpose of land preservation, and should therefore be invalidated.

Instead, converted condominiums should be regulated by land use ordinances applicable to structurally similar buildings.\textsuperscript{156} Converted condominiums that originally had been apartments in a high-rise building would then be required to meet standards applicable to apartment buildings, while condominiums converted from single-story or duplex apartments would fall within the subdivision requirements. This rule would better protect owners’ and tenants’ equal protection rights.

VI. GUIDELINES FOR MODEL ORDINANCE PROVISIONS

The judicial resolution of preemption challenges to conversion ordinances has revealed the inherent conflict between state and municipal government regulation of conversions. This conflict is caused by a bifurcation of authority to regulate between state and municipal governments. Although some states have allowed municipalities considerable latitude to

\begin{itemize}
  \item \textsuperscript{151} \textit{See supra} note 147.
  \item \textsuperscript{152} 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971), \textit{appeal dismissed}, 404 U.S. 878 (1971).
  \item \textsuperscript{153} \textit{Id.} at 635.
  \item \textsuperscript{154} \textit{Id.} at 638.
  \item \textsuperscript{155} \textit{Id.}
  \item \textsuperscript{156} \textit{See infra} note 166 and accompanying text.
\end{itemize}
CONDOMINIUM CONVERSIONS

regulate, others have severely limited municipal authority. This confusion between state and municipal government authority has resulted in haphazard, piecemeal legislation that has not adequately protected the constitutional rights of those involved.

Municipal government should assume responsibility for implementation of specific regulations governing condominium conversion because officials at the local level are more knowledgeable about conditions that affect the optimal rate of condominium conversion, such as the rental housing vacancy rate. Local officials also tend to be more responsive to the needs and desires of constituents directly affected by condominium conversions. Municipal government, therefore, is best able to create legislation that appropriately balances the infringement on the owner's property rights with the needs of the displaced tenants. If conversion statutes served solely as guidelines rather than as legislation that ordinances may only supplement, fewer preemption challenges would be successful. Including the following general tenant protection provisions in each ordinance would protect tenants' and owners' due process and equal protection rights, while only minimally restricting the owners' property use.

A. Land Use Controls

Although zoning and subdivision controls are the major means by which government regulates land use, zoning is not appropriate for regulating condominium conversions because it regulates changes in use rather than changes in ownership. On the other hand, subdivision controls, such as building and land plat regulations, are especially appropriate for regulating conversions.

At the state level, condominium conversion should be addressed in the state's Subdivision Map Act. The Act should define condominium conversions as subdivisions. It should also delegate limited regulatory author-

157. See, e.g., Cal. Gov't Code §§ 66410-499.37 (West 1983). For example, Cal. Gov't Code § 66411 provides in part: "Regulation and control of the design and improvement of subdivisions are vested in the legislative body of local agencies. Each local agency shall by ordinance regulate and control subdivisions for which this division requires a tentative and final or parcel map . . . ." (emphasis added).
158. Rohan, supra note 4, at 588.
159. Sternlieb, supra note 15, at 331.
160. See infra notes 172-74 and accompanying text.
161. However, local regulatory bodies may be more susceptible to pressure from vested real estate interests. See Proxmire, 48 St. John's L. Rev. i, xi (1974).
162. See supra notes 28-36 and accompanying text.
163. See supra notes 37-39 and accompanying text.
164. Id.
165. See supra note 157.
ity to municipalities, permitting only those regulations that follow the "look-alike rule." Under this rule, a municipality could not, under existing land use ordinances, regulate an apartment building differently than condominiums that look like a high-rise apartment building. This restriction would preclude municipalities from applying different subdivision requirements to converted condominiums than to apartments, thereby eliminating special classification of converted condominiums in subdivision ordinances. Consequently, subdivision regulations would not violate the equal protection rights of owners.

Under this limited grant of authority, municipalities would enact subdivision regulations that apply uniformly to both converted condominiums and apartments. A local planning board would be the most appropriate administrative body to implement these controls. The board would evaluate and approve proposed condominium conversions. By making approval contingent on factors correlated with the availability of housing for each socioeconomic group, the board would protect the needs of each sector of the community.

To protect owners' due process rights, the ordinance granting power of approval to the board must serve a legitimate purpose and be rationally related to the general welfare of the community. Regulating condominium conversions for the purpose of maintaining the rental housing supply would serve a legitimate objective under the granted police power by protecting the general welfare. Because the rental housing supply is ad-

166. Application of the look-alike rule would prohibit application of different land use regulations to converted condominiums than to apartments. For further discussion of the look-alike rule, see Note, Zoning and Condominiums, 48 St. John's L. Rev. 957 (1974).

167. Municipal authority to review plats and to require developers to comply with subdivision regulations comes from either a constitutional, statutory, or charter provision. The relevant provisions delegate authority to the municipality to approve the new subdivision plat before the owner records the plat with the appropriate local government official. It also specifies the steps and procedures involved in reviewing and approving the proposed subdivision plat. E. McQuillin, supra note 28, § 25.118B.

The review and approval process provides the planning board with an opportunity to evaluate the proposed development in relation to the comprehensive development plan, and to judge whether the development will complement the physical characteristics of the site. The review process usually consists of three steps: (1) the applicant, after submitting a preapplication sketch, meets with the planning board to discuss the requirements to be imposed on the subdivision; (2) the planning board gives conditional approval to a preliminary plat after examining the specific development plan; and (3) the subdivider submits a formal subdivision plat. At this point, the planning board determines whether the formal plat meets the requirements for approval. P. Rohan, supra note 28, § 1.01(6). Its decision is discretionary within the proscriptions of the applicable ordinance or statute. If the decision by the planning board falls within its authority and is not unreasonable, arbitrary, or capricious, the court should uphold its decision. E. McQuillin, supra note 28, § 25.118C.

168. See supra text accompanying notes 82-84.

169. See supra note 88.
versely affected by condominium conversions, the municipality could rationally base conversion approval on factors that measure the rental housing supply and displacement demography. A subdivision ordinance that made board approval of conversions contingent on the following factors would more easily withstand due process challenges.

1. The Quantity and Quality of Rental Housing

The availability of rental housing is important because it indicates both the ease with which displaced tenants will find alternative housing and the demand for additional converted condominiums. The critical statistic for analyzing the housing situation is the vacancy rate percentage, which represents the quantity and availability of rental housing for displaced tenants. Because a rate below four percent indicates a housing shortage, the board should decrease the number of approved conversions once the rate falls below four percent in order to preserve the existing rental housing supply. If the rate drops below two percent, the board should only approve conversion of apartments in higher-priced areas to displace the fewest low- and moderate-income tenants.

The rental cost and the location of alternative housing also must be evaluated because the vacancy rate may obscure the fact that low- and moderate-income rental housing is being rapidly depleted compared to higher-priced rental housing. Conversely, construction of new higher-priced rentals, new small single-family homes, or new condominium com-

170. See supra text accompanying notes 86-87. According to the Department of Housing and Urban Development, however, condominium conversions do not significantly decrease the rental housing supply because (1) tenants who purchase their units decrease the demand for rental housing, and (2) condominiums purchased as rental property increase the rental housing supply. Consequently, every 100 rental units converted results in a net increase of only five units for sale and a net decrease of five rental units. HUD REPORT, supra note 1, at introduction-3.

This analysis, however, obscures municipal and regional variations in the housing supply. For example, condominium conversions worsened the housing shortages in Detroit, Miami, Brookline, Boulder, Los Angeles, St. Louis, and Washington, D.C. For information about the regional effect of conversions on the local housing market, see generally HUD REPORT, supra note 1, at vol. 1.

171. HUD REPORT, supra note 1, at V-9.

172. STERNLIEB, supra note 15, at 73.

173. A vacancy rate of 3% to 5% for all year-round rentals indicates a housing shortage. P.A.S. REPORT, supra note 2, at 9. Therefore, a 4% vacancy rate is a reasonable percentage upon which to base board approval.

If the normal vacancy rate is low, however, the 4% vacancy rate standard should be reduced to accurately reflect a housing shortage in that community. M. LETT, supra note 48, at 39-40. For example, "if a 5 percent vacancy rate provides equilibrium in the housing market, then disequilibrium does not occur at 4.9 percent—but certainly may at 3 percent." Id. at 40.

174. A rate below 3% indicates a critical housing shortage in which all renters, regardless of income, will experience difficulty finding alternative housing. PAS REPORT, supra note 2, at 10.
plexes indicates decreased demand for converted condominiums by middle-income individuals,\textsuperscript{175} in response to which the board should limit conversion approval. Finally, the board should consider the citywide rate of conversions because the rate may reveal future trends in the availability of rental housing.

2. The Demography of Displaced Tenants

The board must determine which socioeconomic groups will be displaced by each proposed conversion. Although a finding by the board that low- and moderate-income tenants will be evicted weighs against conversion approval, it alone is not adequate justification for denying conversion approval. Similarly, if elderly tenants constitute a significant portion of the displaced tenants,\textsuperscript{176} the board should consider this factor as weighing heavily against conversion approval.\textsuperscript{177} Before precluding conversions based on demographic information, the board should correlate this information with (1) the availability of acceptable rental housing alternatives as discussed in provision 1, and (2) the demographic composition of recently approved conversions that may displace tenants in the same socioeconomic group.

3. Tenant Approval of Conversion

Before approving a conversion, the board should require the owner to submit a petition indicating the percentage of tenants who favor the conversion.\textsuperscript{178} While approval by a large percentage of tenants should not mandate board approval, it should be a factor weighing in favor of conversion approval. The owner-developer should also submit the sales contract for the board to determine whether tenants who indicate a willingness to purchase could actually meet the financial responsibility.\textsuperscript{179} These documents would indicate not only adequate demand for the converted condominiums, but would also insure minimum tenant displacement. In addition, the board should examine the vacancy rate to determine whether warehousing or tenant harassment has occurred.\textsuperscript{180} If the rate

\textsuperscript{175} Middle-income individuals are the primary purchasers of converted condominiums. See supra note 17.

\textsuperscript{176} The elderly are the socioeconomic group most severely affected by displacement. See supra note 21.

\textsuperscript{177} See, e.g., In Re Egg Harbor Assoc. (Bayshore Center), 94 N.J. 358, 464 A.2d 1115 (1983) (holding that municipal bodies having power to control land use for health, safety, and general welfare may use that power to create housing opportunities for the poor).

\textsuperscript{178} See infra note 209.

\textsuperscript{179} See supra note 21.

\textsuperscript{180} See supra notes 24-25 and infra note 181.
indicates that either had occurred, the board should prohibit conversion for a three-year period.\textsuperscript{181}

4. Regional Housing Market

The board should examine the effect that their decisions will have on the surrounding communities.\textsuperscript{182} A high conversion rate may displace large numbers of tenants, especially those with low- and moderate-incomes\textsuperscript{183} who cannot readily find affordable rental housing. They may be forced to seek housing in nearby communities, which could create a housing shortage in those areas.\textsuperscript{184} On the other hand, nearby communities may already have a housing shortage, which would prevent displaced tenants from finding adequate alternative housing. Therefore, municipal planning boards should coordinate their conversion approval to insure adequate housing for all tenants.\textsuperscript{185}

\textsuperscript{181} In Sadowsky v. City of New York, an ordinance required owners to obtain a certificate of "no harassment" before altering or demolishing their property. 578 F. Supp. 1577 (S.D.N.Y. 1984), aff'd, 732 F.2d 312 (2d Cir. 1984). If harassment occurred during the three years before the owner applied for a building permit, the building could not be altered for approximately three years. An owner who had been denied a permit on grounds of harassment asserted that the ordinance was confiscatory. The court held that the ordinance did not deprive the owner of the economically viable use of his land even though the owner could not afford to delay construction for the 36-month penalty period and could not recoup losses by selling the property.

The court's holding reflects important public policy considerations underlying the ordinance. The ordinance was enacted to prevent "warehousing" in New York City, a practice by which owners harassed tenants to vacate their apartments in order to sell the building to condominium developers at inflated prices. The court upheld the ordinance because the benefit to the public by preventing warehousing far outweighed the potential infringement on the owner's property use. See also Harbor Towers, Inc. v. Abrams, 85 A.D.2d 558, 453 N.Y.S.2d 1 (App. Div. 1981), aff'd, 56 N.Y.2d 740, 437 N.E.2d 279, 452 N.Y.S.2d 20 (1982) (stating that the Attorney General has broad powers to effect the remedial purpose of a statute penalizing owners for warehousing).

\textsuperscript{182} See Berenson v. Town of New Castle, 67 A.D.2d 506, 415 N.Y.S.2d 669 (App. Div. 1979) (holding that a court in examining an ordinance must consider both the general welfare of the zoning township and the effect of the ordinance on the neighboring communities); see also In Re Appeal of Elochin, Inc., 501 Pa. 348, 461 A.2d 771 (1983) (holding that a court, when determining whether an ordinance reflects a balanced consideration of regional needs and development, should examine the current density of development and the ability of the area to absorb population growth).

\textsuperscript{183} See supra note 20-21.

\textsuperscript{184} See, e.g., Taxpayers Ass'n of Weymouth Township, Inc. v. Weymouth Township, 71 N.J. 249, 364 A.2d 1016 (1976), cert. denied and appeal dismissed sub. nom. Feldman v. Weymouth Township, 430 U.S. 977 (1977) (examined both regional and local housing needs to determine the validity of a land use ordinance authorizing mobile home parks for the elderly).

\textsuperscript{185} See Southern Burlington City of NAACP v. Mount Laurel Township, 67 N.J. 151, 336 A.2d 713, 727 (1975), cert. denied and appeal dismissed, 423 U.S. 808 (1975) (asserting that adequate housing for all categories of people is an "absolute essential in promotion of the general welfare required in all land use regulations").
B. Tenant Protection Ordinances

The state should enact a Tenancy Act that would insure at least minimum regulatory protection for displaced tenants. The Act should require (1) a minimum tenancy of 120 days, (2) a right of first purchase for 90 days, (3) relocation assistance, and (4) minimum tenant approval of the conversion by fifty-one percent of the tenants.

To avoid state preemption of municipal eviction ordinances, the Tenancy Act should expressly delegate municipal authority through enabling statutes to implement eviction ordinances that meet or exceed the minimum statutory requirements. Only the provision requiring fifty-one percent tenant approval could not be altered by ordinance. Other regulations at the municipal level should be modified by the municipality to meet local housing needs.

Both owners' and tenants' due process rights would be adequately protected if the ordinance provisions were rationally related to the general welfare purpose of maintaining the rental housing supply. Toward this end, local government should implement the following provisions.

1. Relocation Assistance

An owner should be required to pay a relocation assistance fee only if

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186. According to the Uniform Condominium Act, this requirement provides tenants with adequate time to decide whether to purchase their apartment or to seek alternative housing. The Act, proposed in 1977 by the National Commissioners on Uniform State Laws and adopted by the American Bar Association in 1978, proposes statutory guidelines for "second generation" condominium statutes. Uniform Condominium Act §§ 1-101 to 5-110 (amended 1980). It recommends that written notice of conversion be given to tenants 120 days before conversion. After the 120-day "notice to vacate" expires, the tenant may be evicted pursuant to other eviction procedures. Id. § 4-110. By 1980, two-thirds of conversion ordinances required a 120-day "notice to vacate." One-quarter of the municipal ordinances with this provision extended the eviction period approximately 60 days for elderly and/or low-income tenants. HUD Report, supra note 1, at XII-10.

187. This provision gives the tenant the first option to buy the converted unit. Most ordinances having this provision grant a 60- to 90-day period for the tenant to submit a written notice of intent to purchase. HUD Report, supra note 1, at XII-14 to -15. Although the Uniform Condominium Act grants only a 60-day "right to first purchase", Uniform Condominium Act § 4-110, a Model Condominium Code proposed by P. Rohan, Executive Director of the Condominium Research Institute, recommends a 90-day period in order to encourage conversions. Rohan, supra note 4, at 599.

188. Relocation assistance provisions usually require developers to make assistance payments based on actual moving expenses or as determined by a payment schedule. Some ordinances additionally require developers to implement a relocation assistance plan that includes a list of comparable housing available in the immediate area. The purpose of relocation assistance provisions is to reduce the inconvenience suffered by displaced tenants. HUD Report, supra note 1, at XII-16 to -18.

189. For an explanation of the rationale for a 51% approval rate, see infra note 209.

190. See supra text accompanying note 57.

191. See infra note 209.

192. See supra text accompanying notes 89-93.
the displaced tenant is either elderly or in a low- or moderate-income bracket. The amount of relocation assistance should be determined by a relocation schedule and by the tenant's actual moving expenses. The relocation schedule should be based on (1) the current vacancy rate of comparable local housing, (2) the average rent of available apartments, (3) the age of the displaced tenant, and (4) the income of the displaced tenant. This relocation assistance provision would adequately compensate the tenant for the financial burden of relocating. It would also provide a reasonable, objective method for determining the relocation assistance fee to be paid by the owner. Because relocation assistance would be correlated directly with each displaced tenant's financial needs, the amount of relocation assistance would be rationally related to the legitimate governmental purpose of protecting displaced tenants. The provision, therefore, would adequately protect owners' due process rights. The owner should also be required to provide all nonpurchasing tenants with information on the availability of alternative housing, financing programs, and government housing assistance programs.

In addition, an “emergency” provision should be invoked under which the owner would be required to pay the difference between the rent before eviction and the new rent for a one-year period if (1) the vacancy rate is below two percent, (2) the tenant is unable to find comparable, affordable housing after a six-month search, (3) the tenant is elderly and/or in a low- or moderate-income bracket, and (4) the new rent exceeds ten percent of the former rent.

By its terms, this emergency provision should be invoked only during an extreme housing shortage when disadvantaged tenants are unable to find affordable alternative housing. The ordinance would be rationally related to a legitimate general welfare purpose—protection of displaced tenants during a rental housing “emergency”—because a municipality could reasonably conclude that tenants displaced during an extreme housing shortage require additional compensation. Therefore, the financial burden placed on the owners would not violate their due process rights.

193. See HUD REPORT, supra note 1, at XII-16 to -18.
194. See supra text accompanying notes 94-97.
195. See supra notes 172-74 and accompanying text; see also Krater v. City of Los Angeles, 130 Cal. App. 3d 839, 181 Cal. Rptr. 923 (1982) (holding that the vacancy rate is a factor to consider in determining the reasonableness of a relocation assistance program).
196. See supra note 174.
197. See supra text accompanying notes 89-93.
2. Right of First Refusal

Although the statutory provision allowing ninety days for tenants to exercise the first option to purchase their unit is manifestly adequate, the local legislature could extend the period to 120 days. After expiration of the tenant purchase period, the developer should be precluded for six months from selling the units to outside purchasers on financial terms more favorable than those offered to the tenants.

3. Percentage Vacancy of the Apartment Building

A certificate of eviction should not issue if more than twelve percent of the apartments in the building have remained vacant for the year preceding submission of the conversion plan for approval. Such a provision should apply only if the general vacancy rate percentage for the municipality falls below four percent. This stipulation would not unduly burden the owner because a large number of vacancies in a particular building located in an area with a high vacancy rate would not prevent conversion approval. However, an artificially high vacancy rate would prevent conversion approval, thereby serving as a disincentive to harassment and warehousing.

4. Occupancy Eviction Requirement Procedures

Tenants should be allowed to stay in their apartments for the greater of the specified statutory period or the remainder of the lease, up to a maximum of one year. To extend tenancy through the statutory period, the tenant must notify the owner of his decision in writing. If the rental vacancy rate falls below four percent, all evictions should be postponed an additional six months to provide tenants with the extra time necessary to find an apartment during a housing shortage. Evictions should be postponed automatically for any tenant age 65 years or older with an income below $30,000 per year to provide the tenant with adequate time to locate

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198. Rohan, supra note 4, at 599.
199. According to the Uniform Condominium Act, a 120-day option of "first purchase" for the tenant is reasonable. Uniform Condominium Act § 4-112.
200. Id. § 4-110.
201. This percentage should be increased if the average vacancy rate is significantly higher than 6%. See supra notes 173-74.
202. See supra note 173.
203. See supra notes 24-25.
204. See supra note 181.
205. See supra notes 22 and 174 and accompanying text.
alternative housing.\textsuperscript{206} Rent increases during this extended tenancy should be limited to the percentage increase allowable under the rent control statute or, if none exists, to a specified percentage increase over the year preceding eviction. Limiting rent increases would prevent owners from escalating rents so high that elderly tenants would be forced to move before lapse of the extended tenancy.

This eviction provision could not be successfully challenged as confiscatory if the rent control ordinance provides fair net operating income because the ordinance would not deprive the owner of the economically-viable use of his property.\textsuperscript{207} The eviction ordinance, therefore, would not be a compensable regulatory taking under \textit{Penn Central}. Moreover, the ordinance would not effect a permanent physical occupation of the property because the occupancy period would be limited to three years.\textsuperscript{208}

5. Tenant Approval

The state should not empower the municipality to modify the statutory requirement that fifty-one percent of the tenants approve the conversion. This percentage would adequately protect tenants' rights because conversion approval by the board would require a majority of the tenants to favor the conversion.\textsuperscript{209} Moreover, this percentage would force owners to bargain in good faith with tenants concerning the proposed conversion plan, and would discourage owners from harassment and warehousing to

\begin{itemize}
  \item \textsuperscript{206} See supra note 21.
  \item \textsuperscript{207} See supra note 116 and accompanying text.
  \item \textsuperscript{208} See supra notes 117-36 and accompanying text.
  \item \textsuperscript{209} New York, for example, has an extensive and comprehensive regulatory scheme to protect tenants evicted as a result of condominium conversions. N.Y. GEN. BUS. LAW §§ 352ee-eeee (McKinney 1980). In the original statutes, a controversial provision allowed conversion only if 35% of the tenants approved the conversion. N.Y. GEN. BUS. LAW § 352ee (McKinney 1968). Tenant groups claimed that the percentage was inherently unfair and undemocratic because it did not reflect the views of a majority of the tenants. See Schumann v. 250 Tenants Corp., 65 Misc. 2d 253, 317 N.Y.S. 2d 500 (1970). "The court understands and sympathizes with the complaint of the resisting tenants that they are being undemocratically forced into a course of action they oppose because the law now permits a minority to impose its will upon the rest. That quarrel, however, is for the legislature and not the courts." \textit{Id.} at 512.
  
  In response, the provision was revised to read as follows:

  (i) The plan may not be declared effective unless \textit{at least fifty-one percent of the bona fide tenants in occupancy} of all dwelling units in the building or group of buildings or development on the date the offering statement or prospectus was accepted for filing by the Attorney General (excluding, for the purposes of determining the number of bona fide tenants in occupancy on such date, eligible senior citizens and eligible disabled persons) shall have executed and delivered written agreements to purchase under the plan pursuant to an offering made in good faith without fraud and with no discriminatory repurchase agreements or other discriminatory inducements. N.Y. GEN. BUS. LAW § 352eee (McKinney 1980) (emphasis added).
\end{itemize}
obtain the requisite tenant approval. The percentage, however, would not be so high as to effectively preclude conversions. Thus, a fifty-one percent tenant approval requirement would reasonably and effectively protects displaced tenants and only minimally restricts owners’ property use.

VII. CONCLUSION

Condominium conversions benefit apartment building owners and cities, but burden tenants displaced from their homes. To protect both owners’ and tenants’ rights, cities have enacted eviction and land use ordinances to regulate the rate of conversion. Many of the current regulatory schemes, however, severely limit the number of conversions in an attempt to protect tenants. As a result, owners have argued that these ordinances violate their due process and equal protection rights. To protect owners’ rights, state and local government should coordinate conversion ordinances and conversion statutes, placing the primary responsibility for regulation on the local government. Statutes should serve only as guidelines to limit the scope of municipal regulation, rather than as proscriptions of municipal authority to regulate conversions. This coordinated regulatory scheme would avoid preemption of conversion ordinances by state conversion statutes.

Land use regulation of conversions should not be implemented through zoning ordinances. Applying zoning ordinances to converted units exceeds the grant of zoning police power by the state because such ordinances impermissibly regulate a change of ownership rather than a change of use. Converted condominiums, instead, should fall within the ambit of state subdivision legislation. Within the limitations imposed by the State Subdivision Map Act, municipal ordinances should regulate land use under the look-alike rule to avoid potential equal protection violations.

Tenant protection ordinances should also be guided by a state statutory scheme. The state should specifically grant municipal authority to regulate conversion evictions in a separate enabling statute, which would minimize the success of preemption challenges. The statutory eviction scheme should require municipalities to enact specific tenant protection provisions that local legislatures could modify according to local housing needs. Such ordinances would protect both tenants’ and owners’ due process rights because they would be rationally related to the general welfare purpose of maintaining the rental housing supply. However, eviction ordinances that restrict the owner’s use of his property so extensively as to effect a physical occupation for public use should be invalidated as confiscatory. Conversely, less restrictive eviction ordinances should be upheld under the traditional Penn Central takings analysis.

In summary, local governments should be aware of the potential consti-
tutional problems that may arise from conversion ordinances. This com-
ment proposes guidelines for enacting a model ordinance that would pro-
tect both owners’ and tenants’ constitutional rights. This comment also
serves as a guide for future implementation of conversion regulations in
those cities that have not yet experienced extensive metropolitan conver-
sions. By initially enacting legislation that adequately protects the rights
of both tenants and owners, these cities may minimize the constitutional,
social, and economic problems potentially created by extensive condomin-
iu m conversion in metropolitan areas.

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