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# The Legality and Practicality of Condominium Conversion Moratoriums

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# COMMENT

## The Legality and Practicality of Condominium Conversion Moratoriums

MARSHA D. ROSENTHAL\*

*Condominium conversions have been a source of increasing concern among Florida apartment dwellers as the number of available rental units has continued to decline. The author examines the constitutionality of condominium conversion moratoriums enacted or proposed by counties and municipalities. She then asks whether moratoriums are a practical solution to the housing crisis.*

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### I. THE PROBLEM

The conversion of apartment buildings into condominiums has created panic in many Florida communities. Emotional outbursts by tenants and condominium developers fill the news every day. Tenants accuse converters of throwing them out of their homes with nowhere to go. Developers argue that local condominium regulation is destroying their property rights. The battle lines are drawn, but no one agrees on how to solve the problem.

The vacancy rate in Dade, Broward, and Palm Beach Counties was approximately .05% in November 1979.<sup>1</sup> Experts have stated that a vacancy rate of less than 6% tends to inflate rental rates,

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1. See DIVISION OF FLORIDA LAND SALES AND CONDOMINIUMS, CONDOMINIUM CONVERSIONS IN FLORIDA: A REPORT TO GOVERNOR BOB GRAHAM 5 (1980) [hereinafter cited as REPORT].

force persons out of the community, and force others into housing below their current standards.<sup>2</sup> In 1979, 4,205 apartment units were converted to the condominium form of ownership in Dade County,<sup>3</sup> contributing heavily to a net decrease of 3,672 licensed apartments.<sup>4</sup>

Television and newspapers bristle with accounts of people displaced from their rental apartments.<sup>5</sup> Such persons have only two choices: either to purchase their apartments or to seek other rental housing. By early March 1980, the average used condominium in Dade County sold for \$77,671.<sup>6</sup> Mortgage interest rates spiraled to 17% in the spring of 1980,<sup>7</sup> then plateaued at about 14½%. Despite the discounts offered to apartment dwellers on the purchase price of their units, many tenants find the units out of their financial reach, and they must seek other rental housing.

This alternative is fraught with difficulty. Choosing to rent produces acute problems beyond the inconvenience and cost of moving. An available apartment is a scarce commodity in most Florida cities. Even if a prospective tenant is lucky enough to locate an apartment whose monthly rental he can afford, the landlord may require not only the first and the last month's rent and a security deposit, but also credit references.<sup>8</sup> Moreover, anxiety accompanies any relocation, some of it caused by separation from friends and familiar surroundings. The physical infirmities of many senior citizens compound these problems.

The City of Miami Beach attempted to curb its housing crunch by enacting an emergency moratorium on conversions.<sup>9</sup> The moratorium made the conversion of multi-family rental housing to condominium units unlawful for ninety days. This ordinance and similar legislation in effect in other cities<sup>10</sup> raise a series of questions. First, does a local government have the power to enact such legislation? Condominium developers assert that state regulation of the subject preempts and conflicts with any local regulation. The next question is whether, regardless of the sufficiency of gov-

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2. *Id.* at 9.

3. *Id.* at 5.

4. *Id.*

5. *See, e.g.*, Miami Herald, Feb. 3, 1980, § H, at 1, col. 1.

6. *Id.*, Mar. 23, 1980, § H, at 4, col. 4.

7. *Id.*, Apr. 17, 1980, § A, at 14, col. 1.

8. *See* Fort Lauderdale News West Sun-Sentinel, Feb. 10, 1980, at 1, col. 1.

9. Miami Beach, Fla., Ordinance 80-2197 (Feb. 20, 1980). *See also* Lauderdale, Fla., Ordinance 80-110 (Feb. 25, 1980).

10. *See, e.g.*, Borough of Verona, N.J., Ordinance 15-79 (Aug. 21, 1979).

ernmental power, such moratorium legislation is constitutional. Condominium developers might allege that the moratoriums deny them substantive due process and equal protection of the law, result in a taking without just compensation, and impair their rights to contract. Last, if the moratorium is constitutional, is it the practical solution to the present crisis? This author believes that it is not.

## II. PREEMPTION AND CONFLICT

### A. *Preemption*

Florida courts agree that there is "a peculiar propriety in permitting the inhabitants of a city, through its officials, to determine what rules are necessary for their own local government."<sup>11</sup> Municipalities, however, have no inherent power to enact local legislation. Any power the local area possesses derives from the state.<sup>12</sup>

The State of Florida has given broad home rule powers to its municipalities. Article VIII of the Florida Constitution states that "[m]unicipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law . . . ."<sup>13</sup> "Municipal purposes" is defined in the Municipal Home Rule Powers Act, Florida Statutes Chapter 166, as "any activity or power which may be exercised by the state or its political subdivisions."<sup>14</sup> Of course, there are certain exceptions to this broad municipal power. Under the Municipal Home Rule Powers Act, a municipality may not pass ordinances on:

- (a) The subjects of annexation, merger, and exercise of extraterritorial power, which require general or special law pursuant to s. 2(c), Art. VIII of the State Constitution;
- (b) Any subject expressly prohibited by the Constitution;
- (c) Any subject expressly preempted to state or county government by the Constitution or by general law; and
- (d) Any subject preempted to a county pursuant to a county charter adopted under the authority of ss. 1(g), 3, and 6(e), Art.

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11. *State v. Sawyer*, 346 So. 2d 1071, 1072 (Fla. 3d DCA 1977); *Wilton Manors v. Starling*, 121 So. 2d 172, 174 (Fla. 2d DCA 1960); *accord*, *Retail Credit Co. v. Dade County*, 393 F. Supp. 557, 586 (S.D. Fla. 1975) (dicta).

12. *Merrell v. St. Petersburg*, 91 Fla. 858, 109 So. 315 (1926).

13. FLA. CONST. art. VIII, § 2(b).

14. FLA. STAT. § 166.021(2) (1979).

VIII of the State Constitution.<sup>15</sup>

Moratorium opponents argue that state law preempts local moratorium ordinances.<sup>16</sup> First, they urge that the comprehensiveness of the Florida Condominium Act<sup>17</sup> and its amending and supplementing legislation, the Roth Act,<sup>18</sup> implies an intent to "cover the field." Second, they argue that intent to preempt should be implied because condominium regulation is of statewide rather than local concern.<sup>19</sup>

The first argument breaks down because the Municipal Home Rule Powers Act<sup>20</sup> has eroded the general principle that the state preempts an area by implicitly covering the field. Before its enactment in 1973, courts resolved any doubt about home rule power against a city. In *City of Miami Beach v. Fleetwood Hotel, Inc.*, the Supreme Court of Florida stated:

Local governments have not been given omnipotence by home rule provisions or by Article VIII, Section 2 of the 1968 Florida Constitution. "Matters that because of their nature are inherently reserved for the State alone and among which have been the master and servant and landlord and tenant relationships, matters of descent, the administration of estates . . . and many other matters of general and statewide significance, are not proper subjects for local treatment . . . ."<sup>21</sup>

The Home Rule Powers Act legislatively overruled the *Fleetwood* presumption that the legislature, by enacting a statute that lacked an explicit grant of authority to municipalities to legislate on the same subject, indicates the intent to preempt any such legislation. In *City of Miami Beach v. Forte Towers, Inc.*,<sup>22</sup> a 1974 case, the court applied the Home Rule Powers Act to reverse *Fleetwood's* "express authority or preempted" stand and, despite the existence of a comprehensive, detailed state statute regulating the relations

15. *Id.* § 166.021(3) (a)-(d).

16. Brief of Appellant at 6-7, *Miami Beach v. Rocio Corp.*, appeal docketed, No. 80-626 (Fla. 3d DCA 1980) [hereinafter cited as Brief] (on file *University of Miami Law Review*).

17. FLA. STAT. §§ 718.101-508 (1979 & Supp. 1980).

18. 1980 Fla. Laws ch. 80-3 (codified in scattered sections of FLA. STAT. ch. 718 (Supp. 1980)). The Roth Act took effect on May 1, 1980. For a more complete discussion of the Roth Act, see Mursten, *Florida's Regulatory Response to Condominium Conversions: The Roth Act*, 34 U. MIAMI L. REV. 1077 (1980).

19. Brief, *supra* note 16.

20. FLA. STAT. §§ 166.011-.043 (1979).

21. 261 So. 2d 801, 804 (Fla. 1972) (quoting *Wagner v. Mayor of New York*, 24 N.J. 467, 132 A.2d 794 (1957)).

22. 305 So. 2d 764 (Fla. 1974) (per curiam).

between landlords and tenants,<sup>23</sup> held that a city had the power to enact a rent control ordinance. The statute did not address rent control and did not expressly permit or forbid localities from instituting rent control.<sup>24</sup>

Chapter 718 of the Florida Statutes covers many aspects of the development, construction, sale, lease, ownership, operation, and management of residential condominium units. Section 402 specifically mentions conversions: "A developer may create a condominium by converting existing, previously occupied improvements to such ownership by complying with parts I and VI of this chapter."<sup>25</sup> Part I<sup>26</sup> sets forth such subjects as the items to be included in the declaration of condominium (§ 718.104), the items to be included in the "common elements" (§ 718.108), the powers and responsibilities of the condominium association (§ 718.111), the required content of the condominium association's by-laws (§ 718.112), and the powers of the association (§ 718.114). Part VI<sup>27</sup> specifically regulates conversions, providing some protection for the tenant who resides in a rental unit that the owner wants to convert to a condominium. It requires the developer to allow the lessee to extend the lease up to six months (in some cases, nine months) from the date the lessee receives notice of the intended conversion.<sup>28</sup> A county may extend this six- or nine-month period for another ninety days if the rental-unit vacancy rate in the county is three percent or less and the county has findings that establish "a housing emergency so grave as to constitute a serious menace to the general public" and the necessity and propriety of imposing an extension to eliminate it.<sup>29</sup> Once the county adopts the ninety-day extension, it applies county-wide unless a municipality votes not to have it apply within that municipality's

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23. Florida Residential Landlord and Tenant Act, FLA. STAT. §§ 83.40-.63 (1979). The opinion was per curiam, but a concurring opinion advises that the court was cognizant of the Act. 305 So. 2d at 768 (Dekle, J., concurring).

24. See also *Speer v. Olson*, 367 So. 2d 207, 211 (Fla. 1979) (a county may issue general obligation bonds based on its home rule powers in the absence of a state statute specifically forbidding it); *Broward County v. Fort Lauderdale Christian School*, 366 So. 2d 1264 (Fla. 4th DCA 1979) (a county has the home rule power to enact an ordinance requiring a permit for school cafeterias even though the state statute controlling schools neither prohibits nor authorizes such a permit).

25. FLA. STAT. § 718.402 (Supp. 1980).

26. *Id.* §§ 718.101-.126 (1979 & Supp. 1980).

27. *Id.* §§ 718.604-.622 (Supp. 1980).

28. *Id.* § 718.606(1)(a) (Supp. 1980).

29. *Id.* § 718.606(6) (Supp. 1980).

boundaries.<sup>30</sup>

Thus, Chapter 718 permits conversions if they are conducted as specified. Is this instruction on how to convert legally also a mandate that all developers who are prepared to comply with the requirements of Part I shall be allowed to convert, subject only to the possible delays authorized in Part VI? Is it a removal of local governments' authority to control the time and quantity of conversions? Under the Municipal Home Rule Powers Act<sup>31</sup> and *City of Miami Beach v. Forte Towers, Inc.*,<sup>32</sup> such preemption would have to have been made *expressly* in the statute. "Express" means "direct and unmistakable."<sup>33</sup> For example, certain language within Florida Statutes Chapter 847, relating to obscene literature, has been recognized since 1973<sup>34</sup> as a statement of preemption:

[I]t is the intent of the Legislature to preempt the field, to the exclusion of counties and municipalities . . . [I]t is hereby declared that every county ordinance and every municipal ordinance adopted prior to July 1, 1969 and relating to said subject shall stand abrogated and unenforceable . . . and that no county, municipality or consolidated county-municipal government shall have the power to adopt any ordinance relating to said subject on or after such effective date.<sup>35</sup>

Had the legislature intended to accomplish another preemption within a different statute, they surely would have tracked, at least to some extent, some of the language that had already accomplished their purpose. In fact, they did just that in the Florida Insurance Code:

This state hereby preempts the field of regulating insurers and their agents and representatives, and no county, city, municipality, district, school district, or political subdivision shall require of any insurer, agent, or representative regulated under this code any authorization, permit, or registration of any kind for conducting transactions lawful under the authority granted by the state under this code.<sup>36</sup>

In 1976, the Attorney General of Florida held that this language

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30. *Id.*

31. FLA. STAT. § 166.02(1) (1979).

32. 305 So. 2d 764.

33. BLACK'S LAW DICTIONARY 692 (rev. 5th ed. 1979).

34. [1973] FLA. ATT'Y GEN. ANN. REP. 388.

35. FLA. STAT. § 847.013(4) (1979).

36. FLA. STAT. § 624.401(3) (1979).

established preemption.<sup>37</sup>

No similar language appears in Florida's Condominium Act,<sup>38</sup> as amended by the Roth Act.<sup>39</sup> Preemption is never even mentioned. Any intent to preempt would have to be implied. Implying intent would be difficult in light of section 507 of the Condominium Act,<sup>40</sup> which assumes that local bodies have the power to regulate condominiums—section 507 merely requires any local legislation applicable to condominiums to apply equally to all similar buildings.<sup>41</sup> Implying intent would also be useless in light of the requirement of the Home Rule Powers Act<sup>42</sup> that preemption be express, as the court insisted in *City of Miami Beach v. Forte Towers, Inc.*<sup>43</sup>

The developers' second argument is that intent to preempt should be *implied* because activities pertinent to the condominium form of ownership are not a local concern. Like the prior preemption argument, this too is overcome by the requirement of the Home Rule Powers Act<sup>44</sup> that preemption be express.

Even assuming that it were not so overcome, the developers' argument would not be convincing. It is true that some out-of-state courts have approached preemption by analyzing whether the subject controlled is of statewide concern or municipal concern.<sup>45</sup> In those jurisdictions, if the problem is solely of statewide concern, local governments remain subject to state law;<sup>46</sup> if the matter is also of municipal concern, the state cannot foreclose a municipality from passing an ordinance on the subject.<sup>47</sup> Because each municipality in Florida has its own distinct housing problems, condominium regulation is as much a municipal as a statewide affair. For instance, as of November 1979, the vacancy rate in Dade County

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37. [1976] FLA. ATT'Y GEN. ANN. REP. 428.

38. FLA. STAT. §§ 718.101-.508 (1979 & Supp. 1980).

39. 1980 Fla. Laws ch. 80-3 (codified in scattered sections of FLA. STAT. ch. 718 (Supp. 1980)).

40. FLA. STAT. § 718.507 (Supp. 1980).

41. It excludes land when the owner has recorded a covenant not to convert to condominium for five years. *Id.*

42. FLA. STAT. § 166.021(1) (1979).

43. 305 So. 2d 764 (Fla. 1974) (per curiam).

44. FLA. STAT. § 166.021 (1979).

45. This is one approach used by the California courts in their analysis of the home rule powers given by their constitution and statutes. See *Sonoma County Org. of Pub. Employees v. County of Sonoma*, 23 Cal. 3d 296, 315-16, 591 P.2d 1, 12, 152 Cal. Rptr. 903, 914 (1979); *Bishop v. City of San Jose*, 1 Cal. 3d 56, 460 P.2d 137, 81 Cal. Rptr. 465 (1969).

46. 1 Cal. 3d at 61-62, 460 P.2d at 140-41, 81 Cal. Rptr. at 468.

47. *Id.*



was approximately .05%, compared to a 2.6% rate in Hillsborough County.<sup>48</sup> Approximately one-fourth of the total number of units converted from rental to condominium in the state during 1979 were located in Dade County.<sup>49</sup> Miami Beach has an extremely large concentration of elderly persons<sup>50</sup> and thus faces difficulties not experienced by other cities in Dade County. Because of these variations between and within counties, the locality is in the best position to understand, evaluate, and cure the regional evils created by a housing crunch. Thus, localities may persuasively argue that, even without the Municipal Home Rule Powers Act,<sup>51</sup> the state cannot foreclose local legislative treatment of a housing crisis.

### B. Conflict

Notwithstanding any possibility of preemption, a municipal ordinance may be struck down if it is in direct conflict—"inconsistent"—with a state law.<sup>52</sup> The word "inconsistent" has been given varying definitions by Florida case law.<sup>53</sup> The Supreme Court of Florida, in *State ex rel. Dade County v. Brautigam*,<sup>54</sup> construed the word "inconsistent" as used in Article VIII of the Florida Constitution<sup>55</sup> as "contradictory in the sense of legislative provisions which cannot coexist."<sup>56</sup> Another interpretation would label as "inconsistent" a requirement that a person violate one provision "in order to comply with" another.<sup>57</sup> This interpretation, first stated in *Jordan Chapel Freewill Baptist Church v.*

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48. REPORT, *supra* note 1, at 5.

49. *Id.*

50. See Brief, *supra* note 16, at 1-2.

51. FLA. STAT. §§ 166.011-.043 (1979 & Supp. 1980).

52. *Boven v. City of St. Petersburg*, 73 So. 2d 232 (Fla. 1954) (en banc).

53. The definitions of "inconsistent" presented in this section are interpretations of article VIII of the Florida Constitution. Article VIII addresses only whether a Dade County ordinance is consistent with existing municipal powers and general law. Therefore, when determining the constitutionality of any ordinance except a Dade County ordinance, one may employ the article VIII definitions of "inconsistent" only by analogy. Consideration of judicial interpretation of article VIII is nonetheless appropriate; the analogy is powerful.

54. 224 So. 2d 688 (Fla. 1969).

55. FLA. CONST. art. VIII, § 6(f), provides: "[t]o the extent not *inconsistent* with the powers of existing municipalities or general law, the Metropolitan Government of Dade County may exercise all the powers conferred now or hereafter by general law upon municipalities." (emphasis added).

56. 224 So. 2d at 692, cited by *Scavella v. Fernandez*, 371 So. 2d 535, 536 (Fla. 3d DCA 1979).

57. *Jordan Chapel Freewill Baptist Church v. Dade County*, 334 So. 2d 661, 664 (Fla. 3d DCA 1976).

*Dade County*,<sup>58</sup> was supposedly a mere restatement by the District Court of Appeals, Third District, of the earlier definition set forth in *Brautigam*.<sup>59</sup> Three years later, however, in *Scavella v. Fernandez*,<sup>60</sup> the Third District said that the two definitions were not interchangeable, and that the second definition was not applicable in an examination of a statute that vests a right or privilege. When prohibitory legislation designed merely to establish minimum regulations is involved, however, the *Jordan Chapel* "no violation" definition is to be applied.<sup>61</sup>

In *Scavella*, an action was brought against the county to recover damages for personal injury sustained in an automobile accident caused by a Dade County employee. The district court dismissed the action because notice to the county had not been given "within sixty (60) days after the date of receiving the injury or damages alleged,"<sup>62</sup> as required by section 2-2 of the County Code. *Scavella* appealed, claiming she had given proper notice well within the time period allowed by section 768.28(6) of the Florida Statutes. The state law specifies that no action may be instituted against the state unless notice is given "within three years after such claim accrues."<sup>63</sup>

In striking down the county provision as being in conflict with the state statute, the court said: "[I]t seems obvious that, under [the *Brautigam*] definition, the two provisions in question here cannot co-exist."<sup>64</sup> The county relied on the *Jordan Chapel* interpretation of inconsistency as arising from the necessity of violating one provision by complying with another, arguing that because one could comply with both the ordinance and the statute merely by giving notice within sixty days, the two provisions were not inconsistent. The court deemed the county's argument "unsound,"<sup>65</sup> and pointed to the difference in the types of legislation involved in *Jordan Chapel*<sup>66</sup> and *Scavella*.<sup>67</sup>

The *Jordan Chapel* plaintiff challenged the local regulation of

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58. *Id.*

59. 224 So. 2d 688.

60. 371 So. 2d 535 (Fla. 3d DCA 1979).

61. See *E.B. Elliott Adv. Co. v. Metropolitan Dade County*, 425 F.2d 1141, 1150 (5th Cir.), cert. denied, 394 U.S. 932 (1970).

62. DADE CO., FLA., CODE § 2-2 (1976).

63. FLA. STAT. § 768.28(6) (1979).

64. 371 So. 2d at 536.

65. *Id.*

66. 334 So. 2d 661.

67. 371 So. 2d 535.

bingo playing. The Florida statute governing bingo playing<sup>68</sup> permits nonprofit or veterans' organizations to operate bingo games if the proceeds are donated to the nonprofit or veterans' organizations for charitable, civic, community, benevolent, religious, or educational purposes.<sup>69</sup> If the organization is not established for the above purposes, it may still operate bingo games as long as the proceeds are returned to the players in the form of prizes. The statute also specifies the number of times per week the games may be operated, the maximum size of the jackpot, the persons who may operate the games, the minimum age required to play the games, and the places where the games may be played.<sup>70</sup> In addition to these regulations, the Dade County ordinance required bingo operators to obtain a valid permit, to disclose certain information before receiving a permit, to maintain records on the operation of the games, to post specified information about the identity of the charity, and to provide specified types of playing materials.<sup>71</sup> The court in *Jordan Chapel*<sup>72</sup> reasoned that since the state law was prohibitive in nature, it merely provided minimum regulations, allowing for stricter local regulation. Therefore, in order for conflict to be deemed to exist between the state statute and any controlling local ordinance, the plaintiff would have to cite "language in the statute which [could] be deemed a prohibition on additional stricter regulations by local government agencies."<sup>73</sup>

Acknowledging both the correct usage of the *Jordan Chapel* definition in *Jordan Chapel*,<sup>74</sup> and the correctness of the result, the court in *Scavella*<sup>75</sup> distinguished the "prohibitory-regulatory" type of legislation found in *Jordan Chapel*<sup>76</sup> from the "permission-granting" type of legislation involved in *Scavella*. In *Scavella*, the statute granted the plaintiff permission to act in a certain manner—to file a claim any time within three years; the state did not forbid anything. The court said that a local ordinance would be in conflict with such a "permission-granting" statute if it limited the

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68. FLA. STAT. §§ 849.01-.46 (1975) (current version at FLA. STAT. §§ 849.01-.46 (1979 & Supp. 1980)).

69. *Id.* § 849.093.

70. *Id.*

71. Dade County, Fla., Ordinance 70-50 (July 2, 1975).

72. 334 So. 2d 661.

73. *Id.* at 664.

74. 334 So. 2d 661.

75. 371 So. 2d 535.

76. 334 So. 2d 661.

right granted in any manner.<sup>77</sup> The court relied on the reasoning of a Louisiana court that said:

When the law of the state provides that it is unlawful for a person under fourteen years of age to drive an automobile on the highways of the state, it is equivalent to stating that it is lawful for a person over fourteen years of age to drive an automobile on the highways of the state, and therefore an ordinance of a municipality that attempts to make it unlawful for a person over fourteen years to drive on the highways . . . is in conflict with the general law, and of no effect.<sup>78</sup>

The District Court of Appeals, Third District, thus summed up: "what the legislature hath granted, the commission may not take away—even in part."<sup>79</sup>

An analysis of whether local condominium conversion moratoriums conflict with the Florida Condominium Act requires a threshold determination of whether the Act is "permission-granting" or "prohibitory." Cases in which the courts have used a *Scavella*-like test (for permission-granting ordinances) have involved the right to regulate driving ages,<sup>80</sup> monitor speed limits,<sup>81</sup> and require the issuance of a permit for carrying a concealed firearm.<sup>82</sup> In all of those cases the subject of the legislation was a privilege granted by the state. There was no right recognized at common law to drive,<sup>83</sup> to use state roads,<sup>84</sup> or to keep and bear firearms.<sup>85</sup> Courts have used the kind of interpretation found in *Jordan Chapel* (applicable to "prohibitory-regulatory" legislation) to decide cases involving the regulation of billboard placement<sup>86</sup> and bingo playing.<sup>87</sup> The legislation in these latter cases is distinguishable from that in the first set of cases because the activities regulated in the latter cases do not owe their legal existence to legislation.

Thus, unless a statute regulates an activity unknown at com-

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77. 371 So. 2d 535.

78. *Lowenberg v. Fidelity Union Cas. Co.*, 147 So. 81, 90 (La. App. 1933) (citing *Schneiderman v. Sesanstein*, 121 Ohio St. 80, 86, 167 N.E. 158, 160 (1929)).

79. 371 So. 2d at 537.

80. *Lowenberg v. Fidelity Union Cas. Co.*, 147 So. 81 (La. App. 1933).

81. *Schneiderman v. Sesanstein*, 121 Ohio St. 80, 167 N.E. 158 (1929).

82. *Purdy v. Woodward*, 369 So. 2d 105 (Fla. 3d DCA 1979) (per curiam).

83. See, e.g., *United States v. Best*, 573 F.2d 1095 (9th Cir. 1978).

84. See *Olberding v. Illinois Cent. R.R.*, 346 U.S. 338 (1953).

85. 79 AM. JUR. 2d *Weapons and Firearms* § 4 (1975).

86. *E.B. Elliot Adv. Co. v. Metropolitan Dade County*, 425 F.2d 1141 (5th Cir.), cert. denied, 394 U.S. 932 (1970).

87. 334 So. 2d 661.

mon law, it will be deemed "prohibitory" and the *Jordan Chapel* conflict definition should be used. The condominium form of ownership was found throughout the country before the passage of any special legislation.<sup>88</sup> Under common law, the selling of a condominium merely involved the conveyance of title to a portion of a building.<sup>89</sup> In 1962 a condominium in Hallandale, Florida, was the first in the United States to gain the approval of the Federal Housing Administration,<sup>90</sup> even though Florida's first condominium legislation was not passed until 1963.<sup>91</sup> The conflict of local condominium regulation with state regulation will therefore be tested under the *Jordan Chapel* definition if analogy is made to judicial interpretation of "inconsistent" in Article VIII of the Florida Constitution. Even if the local moratorium legislation is more restrictive than the state legislation and temporarily forbids conversions although section 718.402 of the Florida Statutes permits them, there is no conflict between the ordinance and the statute under the *Jordan Chapel* definition of "inconsistent" because compliance with the local ordinance would not result in a violation of the state statute. A person could comply with the local law by refraining from converting an apartment building into a condominium. This abstention would not violate any state law.

The opponents of the Miami Beach moratorium might claim that a local moratorium violates section 718.507 of the Florida Statutes, which prohibits legislation affecting condominiums unless it is "equally applicable to all buildings and improvements of the same kind."<sup>92</sup> The opponents claim that the local moratorium discriminates against the condominium form of ownership and is therefore in direct conflict with the statute.<sup>93</sup> Local legislators, however, can argue that they are not regulating condominiums, but are placing a restriction on all buildings of a like kind, as is required by the statute. All multi-family residential buildings are regulated under the ordinance; condominiums are not singled

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88. 1 A. FERRER AND K. STECHER, *LAW OF CONDOMINIUM* § 53 n.66 (1967); W. LIPPMAN, *CONDOMINIUM DEVELOPMENT* 2d 11 (1972).

89. Borgwardt, *The Condominium*, 36 CAL. ST. B.J. 603 (1961).

90. *Lawyers Title News*, June 1962, at 7.

91. FLA. STAT. §§ 711.01-.23 (1963) (current version at FLA. STAT. §§ 718.101-.508 (1979 & Supp. 1980)).

92. FLA. STAT. § 718.507 (Supp. 1980). See Brief, *supra* note 16, at 32-37 (appellee's position implicit therein). Section 507 now requires equal applicability unless the owner of the land has recorded a covenant not to convert to condominium for five years.

93. See Brief, *supra* note 16, at 32-33 (appellee's argument implicit therein).

out.<sup>94</sup>

Regardless of how the preemption question and the conflict question are eventually resolved, the problems raised call for further analysis of moratorium legislation. Even if a locality is precluded from enacting a moratorium law, the state might decide to pass similar legislation, in which case constitutional challenges will arise.

### III. CONSTITUTIONALITY OF MORATORIUMS

#### A. *Due Process*

Developers may challenge moratoriums as allowing a confiscation of property under color of law without due process. They might allege a right to buy, own, and sell real estate—a right to use their land in any manner not materially inconsistent with the common good.

The principle that there exists a natural right to acquire, own, and deal with property as one chooses as long as the use is not harmful to others is well established.<sup>95</sup> This right, however, is subordinate to the state's or municipality's right under its police power reasonably to regulate the property's use.<sup>96</sup> To effect a constitutional regulation and not an unconstitutional taking, an exercise of police power must be aimed at securing the general safety, public welfare, public convenience, or general prosperity.<sup>97</sup>

The Supreme Court has held a housing shortage to be a menace to the health, safety, and general welfare of citizens. Such an emergency gives rise to a proper exercise of the police power.<sup>98</sup> The Supreme Court, in upholding a New York tenant law, said:

The warrant for this legislative resort to the police power was the conviction on the part of the state legislators that there existed in the larger cities of the State a social emergency, caused by an insufficient supply of dwelling houses and apartments, so grave that it constituted a serious menace to the health, morality, comfort, and even . . . the peace of a large part

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94. Miami Beach, Fla., Ordinance 80-2197 (Feb. 20, 1980).

95. 16A AM. JUR. 2d *Constitutional Law* § 397 (1975).

96. *Nebbia v. New York*, 291 U.S. 502 (1934); *Palm Beach Mobile Homes, Inc. v. Strong*, 300 So. 2d 881 (Fla. 1974); *William Murray Builders, Inc. v. City of Jacksonville*, 254 So. 2d 364 (Fla. 1971); *Eccles v. Stone*, 134 Fla. 113, 183 So. 628 (Fla. 1938); *Pinellas County v. Dynamic Inv., Inc.*, 279 So. 2d 97 (Fla. 2d DCA 1973).

97. See cases cited note 96 *supra*.

98. *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921); *Block v. Hirsh*, 256 U.S. 135 (1921).

of the people of the State. That such an emergency, if it really existed, would sustain a resort, otherwise valid, to the police power for the purpose of dealing with it cannot be doubted, for, unless relieved, the public welfare would suffer in respects which constitute the primary and undisputed, as well as the most usual, basis and justification for exercise of that power.<sup>99</sup>

The situation in Florida during the past year reached the dimensions of a crisis.<sup>100</sup> A moratorium passed under the state's police power would, therefore, satisfy the proper purpose requirement.

Once it is established that the purpose of the moratorium falls within the scope of the state's police power, its validity depends on whether the regulation is reasonable under the existing circumstances.<sup>101</sup> The reasonableness of an exercise of police power "varies with circumstances and conditions."<sup>102</sup> The court will uphold a regulation "[i]f the validity of the legislative classification . . . [is] fairly debatable."<sup>103</sup> Under this test, the burden of proving unreasonableness, placed on the moratorium's opponents, is great. They cannot fulfill this burden; the differences of opinion voiced daily evidence the debatability of the subject.

It is unlikely that a court would strike down a moratorium on due process grounds. Governing bodies possess great discretion to determine which public interests must be protected and which means are best suited to protect those interests.<sup>104</sup> Using its discretion, a legislating body may determine when conditions exist that require the exercise of police power to combat a public evil.<sup>105</sup>

Developers might argue that conversion moratoriums deprive them of their rights while favoring tenants. The county in *Rockville Grosvenor, Inc. v. Montgomery County*<sup>106</sup> furnishes a way of attacking this argument. There, a circuit court in Maryland upheld legislation requiring developers who converted rental housing to condominiums to give certain displaced low-income tenants the money required to relocate. The county had analogized the relocation assistance payments to minimum wage requirements. It noted:

[m]inimum wage laws constitute a regulation which deprives

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99. 258 U.S. at 245.

100. See text accompanying notes 1-8 *supra*.

101. See *Mutual Loan Co. v. Martell*, 222 U.S. 225 (1911).

102. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

103. *Id.* at 388.

104. *Burnsed v. Seaboard Coastline R.R.*, 290 So. 2d 13 (Fla. 1974).

105. *Newman v. Carson*, 280 So. 2d 426 (Fla. 1973).

106. No. 68203 (Cir. Ct. Montgomery County Aug. 24, 1979), discussed in 20 MUNICIPAL ATTORNEY 138 (1979).

employers of "property" in favor of individual persons, employees, [when] these employers engag[e] in a certain activity, i.e. employment, much the same as the relocation payment provisions . . . "deprive" an owner of property, in favor of certain displaced and needy tenants who receive relocation payments, [when] that owner engag[es] in a regulated activity, i.e. condominium conversion.<sup>107</sup>

In *Miller v. Schoene*,<sup>108</sup> petitioners who were required by statute to cut down a large number of ornamental red cedar trees (because they bore a disease fatal to nearby apple trees) offered the same argument as the developers in *Rockville Grosvenor*. The apple trees were owned by persons not parties to the case. Despite the statute's favoring one group at the expense of another, the Court upheld the action, ruling that the state could make this choice between competing interests because there was a "preponderant public concern in the preservation of the one interest over the other."<sup>109</sup> The Court noted that "[i]t would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go on unchecked."<sup>110</sup> With a similar "preponderant public concern," Miami Beach can prefer the interests of tenants over the interests of the building owners because the potential injury to the former group is greater than the harm to the latter.

An Illinois district court in *Chicago Real Estate Board v. Chicago*<sup>111</sup> was convinced that a challenged forty-day moratorium denied developers their due process rights. The district court not only stated that circumstances that would warrant the deprivation of the developer's property rights were lacking, but it also doubted whether there could ever be such a showing.<sup>112</sup> The court drew a distinction between regulating the rights and suspending them, stating that regulation of rights, as opposed to suspension, is permissible.

This distinction, however, appears to be dubious, since every piece of legislation can be seen as suspending a person's rights. In

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107. MUNICIPAL ATTORNEY at 139. The appellee made a similar argument in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 371 (1926). The Court, however, did not discuss the issue.

108. 276 U.S. 272 (1928).

109. *Id.* at 279.

110. *Id.*

111. No. 79C (D. Ill. Apr. 20, 1979).

112. *Id.*



*Penn Central Transportation Co. v. New York City*,<sup>113</sup> the Supreme Court of the United States upheld the city's Landmark Preservation Law despite the fact that it forbade developers from constructing a high rise building atop the Grand Central Terminal. The city's ordinance did not regulate the construction of such a building, but forbade it, thereby suspending the developer's property rights. Condominium conversion moratoriums impose less of a restriction on property rights than does the Landmark Preservation Law; they suspend rights for only ninety days, while the Landmark Preservation Law suspends a property right indefinitely. The conversion moratoriums should be upheld on the basis of *Penn Central Transportation Co.*

Although developers claim that Miami Beach could have used a less restrictive alternative to alleviate the housing problem, a regulation does not violate the due process clause merely because the problem could have been solved by other, more lenient means. As long as the means are reasonably related to the end, the judiciary will refuse to make any further inquiry.<sup>114</sup>

Thus, as long as the moratorium is of limited duration and keyed to an existing housing crisis, it will likely be upheld as a proper and reasonable exercise of the state's police powers, overcoming any due process challenge to the statute.

### B. *Taking Without Just Compensation*

Another challenge to the moratorium legislation, that the statute or ordinance effects a taking without just compensation, is intertwined with the due process argument.

Governmental action that diminishes the value of someone's property is not per se an unconstitutional "taking."<sup>115</sup> Although tax laws and regulations have an unquestionably adverse affect upon private economic interests, they are upheld as a legitimate exercise of police power. Land use regulations have also been upheld as a legitimate exercise of police power even though they diminish recognized property rights. In *Village of Euclid v. Ambler Realty Co.*,<sup>116</sup> a zoning change which prohibited industrial use of

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113. 438 U.S. 104 (1978).

114. *Smolowe v. Delendo Corp.*, 136 F.2d 231 (2d Cir.), cert. denied, 320 U.S. 751 (1943); see notes 76-80 *supra*; cf. *State ex rel. Schillberg v. Everett Dist. Justice Court*, 19 Wash. App. 421, 575 P.2d 1096 (1978) (county ordinance found to violate state's constitution).

115. See, e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

116. 272 U.S. 365 (1926).

the appellee's property was upheld despite an alleged 75% diminution in the property's value.<sup>117</sup>

Recently, in *Rogin v. Bensalem Township*,<sup>118</sup> the United States Court of Appeals, Third Circuit, sustained a zoning regulation notwithstanding a condominium developer's claim that there was a taking without just compensation. The developer challenged the Township's retroactive application of an amended zoning ordinance that reduced the permissible number of housing units per acre from twelve to four. The developer's plan to build a 557-unit condominium project had been approved by the Township before the zoning change. The new zoning would permit only 200 units to be built in the project, resulting in an alleged diminution of one million dollars (\$1,000,000) in the land's market value.<sup>119</sup>

The court considered two factors significant in determining whether an unconstitutional taking had occurred.<sup>120</sup> The first factor considered was the expansiveness of the regulation's application. The broader the class of properties affected, the greater the likelihood of sustaining the ordinance.<sup>121</sup> Applying the first factor, the court noted that the zoning amendment in question applied to all landowners in the area, not just the developer. The breadth of its application therefore supported the validity of the ordinance.

In *Rogin*, several types of properties and landowners in one concentrated area were affected by the legislation. Developers opposing a moratorium on condominium conversions might argue that their case is distinguishable because a moratorium would affect only one class of property owners—condominium converters.<sup>122</sup>

*Penn Central Transportation Co. v. New York City*,<sup>123</sup> however, indicates the questionable merit of that distinction. In that case, the New York City law sustained by the Supreme Court applied only to selected properties adjudged landmarks. The property owners argued that the landmark law related only to selected parcels and not to all property within a given area (as would a zoning ordinance). The Court stressed the fact that the landmark legislation was part of a comprehensive plan to preserve structures of

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117. *Id.* at 384.

118. 616 F.2d 680 (3d Cir. 1980).

119. *Id.* at 692.

120. *Id.* at 690-91.

121. *Id.* at 690. See also *United Gas Pipe Line Co. v. Bevis*, 336 So. 2d 560 (Fla. 1976).

122. Cf. text accompanying notes 92-94 *supra* (argument concerning types of property rather than classifications of property owners).

123. 438 U.S. 104 (1978).

historic and aesthetic interest. Although the legislation applied only to the few properties classified as landmarks, it had application throughout a large area and was part of a broad plan. Such reasoning could be applied to support legislation limiting condominium conversions.

The second factor applied by the *Rogin* court<sup>124</sup> concerned the diminution in land values resulting from the ordinance. The court stressed that there had been tolerance of great diminutions in value in other cases,<sup>125</sup> and stated that a law should be sustained unless it "destroys or severely diminishes the value of the property."<sup>126</sup> In *Village of Euclid v. Ambler Realty Co.*,<sup>127</sup> the Supreme Court sustained a zoning law that had allegedly caused a drastic reduction in the value of the appellee's land.<sup>128</sup> In another Supreme Court case, an alleged 92½% diminution in value was not sufficient to require invalidation of an ordinance forbidding the operation of a brickyard.<sup>129</sup> The *Rogin* court noted that the reduction in population density required by the ordinance "very likely will benefit the developer to some extent by making the remaining units in Bensalem Village [the condominium development] more desirable."<sup>130</sup>

The court in *Grace v. Town of Brookline*<sup>131</sup> approached the "taking" question in a different context. The plaintiffs in *Grace* argued that an ordinance prescribing special rules for the eviction of tenants in buildings being converted to condominiums effected a taking without just compensation. They argued that the ordinance did not regulate, but rather involved a "transfer of rights"—specifically, a transfer of "the right to possess from the owner to the tenant."<sup>132</sup> The Supreme Judicial Court of Massachusetts rejected that argument, analogizing to the line of Supreme Court decisions that have sustained rent control statutes despite

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124. 616 F.2d 680 (3d Cir. 1980).

125. See, e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Miller v. Schoene*, 276 U.S. 272 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

126. 616 F.2d at 690.

127. 272 U.S. 365 (1926).

128. The landowner alleged that the land use limitation would reduce the land's value from \$10,000 per acre to not more than \$2,500 per acre and would diminish 200 feet of frontal footage in value from \$150 per foot to \$50 per foot. *Id.* at 384.

129. *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915).

130. 616 F.2d at 691.

131. — Mass. —, 399 N.E.2d 1038 (1979).

132. *Id.* at —, 399 N.E.2d at 1045.

their redistribution of economic rights. The court emphasized that the developer's property was not rendered useless by the legislation, because the developer would still be entitled to receive rent until the tenants vacated.

Under the tests set forth in *Rogin* and *Grace*, those who oppose the moratorium will have to make a compelling showing of detriment in order to prevail on the "taking" argument. As noted above, the moratorium is part of a broad plan to deal with a problem affecting the general public. Sufficient diminution in property value will be hard to prove. Although the profit resulting from a conversion is generally much greater than that received by operating the same building as rental property, any claim by the developer of a diminution will lose some of its persuasiveness because the building will still be able to generate rental income.

### C. *Equal Protection*

The constitutional mandate of equal protection of the laws requires that statutes uniformly apply to all persons similarly situated.<sup>133</sup> Neither the equal protection clause of the federal Constitution nor the corresponding clause in the Florida Constitution grants unequivocal equality among all persons.<sup>134</sup>

The equal protection challenge will focus on whether the classification of persons affected by the moratorium has a rational basis.<sup>135</sup> The "rational basis" test requires that there be a reasonable relation between the statutory classification and the lawful object of the legislation.<sup>136</sup>

The objective of moratorium legislation is the alleviation of the rental housing shortage. To this end, the legislation applies only to the conversion to condominiums of housing classified as multi-family. The legislation does not affect existing condominiums on land upon which there is no multi-family dwelling.<sup>137</sup>

Apartment owners might assert that there is no rational basis for this classification. Although conceding that the legislature has broad discretion to decide what evils to combat and how best to fight those wrongs, they might claim they are being wrongfully sin-

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133. *Reed v. Reed*, 404 U.S. 71 (1971).

134. See *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973); *Sawyer v. State*, 94 Fla. 60, 113 So. 736 (1927).

135. *Landrau v. State*, 365 So. 2d 695 (Fla. 1978).

136. *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Soverino v. State*, 356 So. 2d 269 (Fla. 1978).

137. See, e.g., *Miami Beach, Fla., Ordinance 80-2197* (Feb. 20, 1980).

gled out. Apartment owners would point out that although their conversion of apartment buildings into condominiums would not help alleviate the rental housing shortage, a developer who builds condominiums on unimproved land does not help alleviate the shortage either, yet he is not forbidden to market his units. In other words, the moratorium requires would-be converters to remain rental apartment landlords, so it must similarly require those who develop multi-family housing on unimproved land to market them as apartments or not at all. This argument cannot stand. Although the choice to build a condominium instead of an apartment building does not help alleviate the rental housing shortage, it does not add to the crisis. When a conversion occurs, there is a double negative impact. Existing rental housing is taken off the market, thereby decreasing the supply, while simultaneously tenants from the converted apartment who cannot afford to buy their units must seek housing, thereby increasing the demand for what few units remain available for rental elsewhere.

Moreover, a state has discretion to decide which problems to confront and is not required to give attention to all similar evils.<sup>138</sup> In *Stone v. City of Maitland*,<sup>139</sup> a zoning ordinance required 150 feet of frontage on each side of the street and a distance of 350 yards between proposed gasoline stations and any church, hospital, school, library, stadium, arena, or other place of public assembly. A property owner who wished to build a gas station challenged the ordinance under the fourteenth amendment, arguing that other businesses, such as drive-in restaurants, created similar traffic problems, yet were exempt from similar regulation. The United States Court of Appeals, Fifth Circuit, upheld the ordinance, stating that as long as the regulation bears a rational relation to the problem at hand, the ordinance should be upheld. Noting that the equal protection clause imposes no requirement to correct all similar wrongs, the court said, "If the legislature senses an evil, it may deal with it. At the same time it is under no compulsion to deal with all other evils that are seen to be equally serious."<sup>140</sup>

In *Grace v. Town of Brookline*,<sup>141</sup> the court rejected an equal protection challenge to condominium conversion regulation, stating:

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138. See *City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *State v. Champe*, 373 So. 2d 874 (Fla. 1978).

139. 446 F.2d 83 (5th Cir. 1971).

140. *Id.* at 88.

141. — Mass. —, 399 N.E.2d 1038 (1979).

The record suggests that conversion of controlled units into condominiums has been occurring with accelerating frequency. Consequently, Brookline reasonably could have concluded that condominium conversion posed a singular threat to the purpose of rent control. There is no denial of equal protection because Brookline chose to focus its response on that threat.<sup>142</sup>

In *Rothner v. City of Chicago*,<sup>143</sup> an ordinance requiring automatic sprinkler systems in nursing homes constructed with fire resistant or non-combustible materials was sustained even though the regulation did not apply to similarly-constructed hospitals, orphanages, homes for the aged, and the like. The court emphasized that the legislature has broad discretion, and acknowledged that special problems exist in nursing homes because they house people who are both sick and elderly.

The Supreme Judicial Court of Massachusetts also has distinguished property classifications that appeared similarly situated when it refused to invalidate an ordinance regulating rents and evictions in mobile home parks even though the ordinance did not regulate other rental housing.<sup>144</sup> Thus, it appears that regulation affecting the convertibility of multi-family housing into condominiums cannot be defeated on equal protection grounds.

The United States Court of Appeals for the Third Circuit recently upheld a zoning statute despite a condominium developer's claim that the regulation deprived him of four constitutional rights.<sup>145</sup> The developer contended that the statute effected a taking of property without just compensation and denied him substantive due process, equal protection of the laws, and procedural due process. The court rejected the developer's arguments and went on to state a sweeping judicial policy concerning local land-use regulation.

In the past century the nation has witnessed the rise and decline of federal judicial protection of rights inhering in the ownership of interests in real property. Today, the Supreme Court affords state and local governments broad latitude in enacting and implementing legislation affecting the use of land. Implicit in this deference is the recognition that land-use regulation generally affects a broad spectrum of persons and social interests, and that local political bodies are better able than fed-

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142. *Id.* at \_\_\_, 399 N.E.2d at 1047.

143. 66 Ill. App. 3d 428, 383 N.E.2d 1218 (1978).

144. *Newell v. Rent Bd.*, \_\_\_ Mass. \_\_\_, 392 N.E.2d 837 (1979).

145. *Rogin v. Bensalem Township*, 616 F.2d 680 (3d Cir. 1980).

eral courts to assess the benefits and burdens of such legislation. Thus, absent defects in the process of enacting the legislation, or manifest irrationality in the results flowing from that process, courts will uphold state and local land use regulations against challenges based on federal constitutional grounds.<sup>146</sup>

This policy reinforces the conclusion that the state's or local area's decision on the nature of the problem and the appropriate solution must be given great deference. A party opposing a regulation will carry a tremendous burden in any attempt to invalidate a land-use statute on an equal protection ground.

#### D. *Impairment of Contract Rights*

Opponents of moratoriums might argue that the regulation impairs the obligation of contracts previously entered into between developers and purchasers of future converted units. The Miami Beach ordinance prevents the "selling [of] a unit previously occupied as a rental as a condominium,"<sup>147</sup> not only when developers have not yet converted<sup>148</sup> to condominium, but even when they have already sent the tenants notices of intent to convert and fixed prices for the units.<sup>149</sup> These latter developers may have already contracted with prospective purchasers, but are now forbidden from concluding the sale.

The argument regarding impairment of contract is not new. In *Home Building and Loan Association v. Blaisdell*,<sup>150</sup> the Supreme Court examined a Minnesota statute that provided for a one-year moratorium on mortgage foreclosures. The Court emphasized that

146. *Id.* at 697-98.

147. Miami Beach, Fla., Ordinance 80-2197 § 3(c) (Feb. 20, 1980).

148. *Section 2: Applicability*

This ordinance applies to all owners of multi-family residential units which owners have not done all of the following as of the date of passage of this Ordinance:

- A. Recorded a Declaration of Condominium in the Public Records of Dade County in the manner provided by State law.
- B. Filed with the State Division of Florida Land Sales and Condominiums documents and items required by Florida Statute 718.502.
- C. Mailed notices of intent to convert to all tenants by certified mail.
- D. Fixed prices for units.
- E. Taken deposit for sale on at least one unit, and deposit same in seller's or escrow bank account.

*Id.* at § 2.

149. *Id.*

150. 290 U.S. 398 (1934).

during an emergency, contracts are subordinate to the proper exercise of the police power.<sup>151</sup>

Whatever doubt there may have been that the protective power of the State, its police power, may be exercised—without violating the true intent of the provision of the Federal Constitution—in directly preventing the immediate and literal enforcement of contractual obligations, by a temporary and conditional restraint, where vital public interests would otherwise suffer, was removed by our decisions relating to the enforcement of provisions of leases during a period of scarcity of housing.<sup>152</sup>

To support this proposition, the Court cited three cases involving the constitutionality of statutory regulation of landlord and tenant relationships.<sup>153</sup> In two of these cases,<sup>154</sup> challenges were made to the constitutionality of a New York statute that deprived landlords of all possessory remedies. The Court stated that “the police power is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people and is paramount to any rights under contracts between individuals”<sup>155</sup> and that the legislature is not limited to preventing the enforcement of only those contracts which are in and of themselves hostile to the public’s well-being.<sup>156</sup> The Court stressed, however, that the relief afforded by the statute was temporary and conditional, and had been sustained because of the housing emergency.<sup>157</sup>

As applied to conversion moratoriums, the Court’s analysis seems to suggest that as long as a housing shortage is viewed as a legitimate reason for the exercise of police power,<sup>158</sup> and as long as

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151. See also *Kirshner v. United States*, 603 F.2d 234 (2d Cir. 1978); *Telephase Soc’y, Inc. v. State Bd. of Funeral Directors & Embalmers*, 308 So. 2d 606 (Fla. 2d DCA 1975).

152. 290 U.S. at 440.

153. *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921); *Block v. Hirsh*, 256 U.S. 135 (1921).

154. 258 U.S. 242; 256 U.S. 170.

155. 290 U.S. at 437 (quoting *Manigault v. Springs*, 199 U.S. 473 (1905)).

156. 290 U.S. at 438-39.

157. *Id.* at 441. In *Home Building & Loan Association*, the Court also noted that the New York legislation provided reasonable compensation to the landlord during the period he could not regain possession. The legislation obligated the tenants to pay an amount the court “regards as fair and reasonable.” *Id.* at 441, 442. The same provision could be made for would-be converters of apartment buildings to condominiums. With rental housing so scarce, tenants are even more motivated to pay their rent. Courts can be relatively sure that apartment owners will continue to receive income from the apartment units during the moratorium period.

158. See discussion of legitimate exercise of police power in the text accompanying notes 98-100 *supra*.



a moratorium has a temporal restriction, any resulting impairment in contracts that results from the moratorium would not be a viable basis for a constitutional challenge.

### E. *Conclusion of Constitutional Analysis*

Although moratorium legislation might seem unpalatable to those who cherish personal rights and freedoms, the proposed legislation should nevertheless withstand constitutional challenges grounded on denial of substantive due process, taking without just compensation, unequal protection of the laws, and impairment of contract.

## IV. PRACTICALITY OF MORATORIUMS

Although a moratorium may be constitutional, it is debatable whether it, rather than another measure, should be enacted. Despite the decreased number of licensed apartments and the increase in conversions,<sup>159</sup> the conversion of apartment buildings into condominiums is merely the result of the underlying cause of Florida's housing problem. Conversions are merely a symptom of a broader housing problem.<sup>160</sup> The underlying problem is a combination of two factors: an increased demand for condominiums among those who can afford them for residences and investments, and a decreased supply of new rental housing for those who cannot. Current social and economic factors, as well as the present tax laws, are encouraging condominium ownership while simultaneously discouraging apartment construction. The moratorium would be a tourniquet, not a cure.

The present high rate of inflation<sup>161</sup> has increased the desire to own a home, whether it be a house or a condominium, among members of the public who are able to purchase. Increases in rent have occurred frequently and without apparent limit,<sup>162</sup> frustrating and frightening renters. Housing costs can be stabilized by buying a home that, once established, is not subject to increases.<sup>163</sup> The high inflation rate has also encouraged renters who can afford to

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159. REPORT, *supra* note 1, at 5.

160. *Id.* at 2.

161. The *Wall Street Journal* reported an inflation rate of approximately 17%. *Wall St. J.*, Apr. 23, 1980, at 3, col. 3.

162. Most of Florida's 567,347 licensed apartments are not subject to rent control. FLA. STAT. § 166.043 (1979).

163. This statement assumes a fixed rate mortgage. Variable rate mortgages are more akin to rent in that allowance for changes in market rates is built into the loan agreement.

purchase to seek the tax deductions that ownership of a home confers, such as those for interest and real estate taxes.<sup>164</sup> A homeowner gets an immediate income tax benefit by taking the allowable deductions and at the same time builds up equity that will give him a return upon the sale of the home. Moreover, condominium conversions have increased because many people find the size of condominiums especially attractive. Much of the present population of Florida desires a unit smaller than the traditional home. The two-person household has become increasingly common because of both the growing senior citizen population and the changing family structure.

Florida has had a tremendous influx of elderly persons during the last decade. In 1970 the population of persons aged sixty-five and older was estimated at 985,266.<sup>165</sup> This segment of the population increased to 1,603,000 by July 1979.<sup>166</sup> This 62.7% increase has placed a great number of people in the market for smaller housing units. The number of two-person households has also increased because of the nationwide change in family lifestyles. People are marrying at older ages and having fewer children than ever before.<sup>167</sup> The singles' community has increased because of the large number of marriages which end in divorce.<sup>168</sup> This results in an increased demand for smaller units.

Condominiums are also desirable solely for investment purposes. Real estate in the United States is an especially attractive investment to foreigners because of favorable tax treatment, the devaluation of the dollar, and the relative stability of our government. Foreigners choose to purchase condominiums because they are easy to maintain, control, and market.<sup>169</sup> United States residents also choose condominium units as an inflation-hedging investment for these latter reasons. With such demand for condominium units,<sup>170</sup> developers are encouraged to place a greater number of units on the market.

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164. I.R.C. §§ 163-164.

165. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, No. 875, POPULATION ESTIMATES AND PROJECTIONS 11, table 3 (1980).

166. *Id.* at table 1.

167. Miami Herald, Apr. 7, 1980, § D (Living Today), at 1, col. 3.

168. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF U.S., tables 48, 51 (1979).

169. Miami Herald, Mar. 28, 1980, § H (Home & Design), at 1, col. 1.

170. It was reported that when 100 rental units in Dade County were converted to condominiums, buyers started lining up two days before the sales office opened. In another Dade County development, 1,000 people reportedly lined up to purchase one of 200 available units. Miami Herald, *supra* note 5, at 12.

At the same time, apartment buildings seem to be ever less attractive as profit-making ventures. Inflation makes constructing and operating an apartment building risky. In 1979, construction costs increased at a rate of 2% per month.<sup>171</sup> The price of general items necessary to supply and maintain apartment buildings increased 12.2%.<sup>172</sup> Although rents increased 8.4% in 1979,<sup>173</sup> many renters do not have incomes that keep pace with inflation. Lessors undoubtedly sense that there is a limit to what renters can pay. A possible additional cost in the operation of an apartment building is the landlord's potential liability for the criminal acts of third persons. Landlords have been held liable in suits based on the theories of tort and contract when tenants were attacked or raped in their apartment buildings.<sup>174</sup>

Present income tax laws also discourage developers from building rental units as opposed to condominiums. Before the Tax Reform Act of 1976,<sup>175</sup> deductions for real estate interest and taxes incurred during the construction period could be taken in a single year.<sup>176</sup> These large deductions provided a shelter for income derived from other sources. This tax shelter advantage is somewhat diluted today; deductions are now required to be capitalized and amortized over a number of years.<sup>177</sup> Until 1976, the amount of depreciation that was required to be recaptured upon sale or exchange of the property was reduced 1% for each month the property was held over 100 months.<sup>178</sup> Today there is no such reduction,<sup>179</sup> and any gain on the sale of the property will be considered ordinary income to the extent that the depreciation taken under an accelerated depreciation method<sup>180</sup> is greater than that allowed under the straight-line method.<sup>181</sup> As a result, the income

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171. Result of 1980 market analysis to be published by Douglas Wiles, editor of *Real Estate Digest*.

172. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CONSUMER PRICE INDEX, table 1, at 8 (Oct. 1979).

173. *Id.*

174. In tort, the landlord must protect tenants from reasonably foreseeable harm. A contract theory requires the landlord to maintain the level of protection that existed when the tenancy began. *See, e.g.,* *Kline v. 1500 Mass. Ave. Apt. Corp.*, 439 F.2d 477 (D.C. Cir. 1970); *Braitman v. Overlook Terr. Corp.*, 68 N.J. 368, 346 A.2d 76 (1975). *See also* Annot., 43 A.L.R.3d 311 (1972).

175. Tax Reform Act of 1976, Pub. L. No. 95-455, 90 Stat. 1520 (1976).

176. I.R.C. §§ 163-164.

177. *Id.* § 189.

178. *Id.* § 1250 (1970) (amended by the Tax Reform Act of 1976, § 202).

179. *Id.* § 1250.

180. *Id.* § 167(b)(2)-(3).

181. *Id.* § 167(b)(1).

tax advantages to developing and holding real estate have been severely diminished.

Because conversions are not the cause, but merely a symptom, of a general housing crisis, some contend that a moratorium on conversions is not the proper governmental response.<sup>182</sup> Others point out that mere talk of a moratorium may result in developers' rushing conversion projects to completion before the legislation can be enacted, thus lessening the impact of the legislation and perhaps reducing the quality of the units.<sup>183</sup> In its study on condominium conversions, the Division of Florida Land Sales and Condominiums rejected the idea of a moratorium, concluding that it would not solve the rental housing shortage, but rather, in all probability, would worsen the situation.<sup>184</sup>

In fact, condominium conversions are applauded by some who find benefits in them.<sup>185</sup> One ostensible benefit to government is a larger tax base.<sup>186</sup> As a general rule, the just value assessment for the collective units of a condominium is greater than the value assessment of the same building operated as an apartment house. The increased assessment, however, does not necessarily net a greater receipt of funds. To result in an economic benefit to the government, the taxes collected must be greater than the homestead and real estate exemptions that will be claimed by the new individual unit owners. Proponents of conversions also find another benefit to society: "[C]onversion is a powerful tool for preserving and rehabilitating housing that otherwise might slip into decay and abandonment."<sup>187</sup>

Given the promise of profit from turning apartments into condominiums, caused by the large demand for condominium units, and given the decreasing desirability of apartment-building ownership, owners of apartment buildings will convert and sell. While the market struggles to equalize the supply of and demand for condominium units, the government's goal must be the protection of renters who cannot afford to purchase their units and have nowhere else within the community to seek affordable rental housing. Government can do this in either of two ways: It can place a mora-

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182. Miami Herald, *supra* note 5.

183. See REPORT, *supra* note 1, at 118; Miami Herald, Feb. 14, 1980, § D (Neighbors), at 2, col. 1; Miami Herald, Feb. 13, 1980, § B, at 2, col. 1.

184. REPORT, *supra* note 1, at 118-19.

185. BUS. WEEK, Feb. 18, 1980, at 90.

186. *Id.*

187. *Id.* at 95.

torium on condominium conversions, thus allowing owners of currently unimproved land to reap the profits of condominium sales and denying the same opportunity to owners of apartment buildings, or it can attach sufficient incentives (mainly, tax relief or reimbursement) to ownership of apartment buildings so that owners of apartment buildings will choose not to convert.<sup>188</sup> The latter is preferable to the former because, even seen in its worst light, the latter solution spreads the cost of the imbalance in supply and demand among the people of the state (or the nation, if the federal government could be persuaded to help), rather than concentrating the cost upon owners of apartment buildings.

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188. The 1980 Report to Governor Graham recommends several types of legislation, including local option incentives for apartment development, the establishment of a state housing finance agency, and a state investment program to promote construction of rental housing. See REPORT, *supra* note 1, at 94-117.