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St. John's Law Review

Volume 48
Number 4 *Volume 48, May 1974, Number 4*

Article 17

August 2012

Tenant Protection in Condominium Conversions: The New York Experience

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TENANT PROTECTION IN CONDOMINIUM CONVERSIONS: THE NEW YORK EXPERIENCE

The conversion of rental apartments to cooperative or condominium ownership has become an increasingly common occurrence in major metropolitan areas. In those locales where large segments of the population have historically been renters, conversions have introduced a particularly divisive element into the already strained fabric of landlord-tenant relations.[1] The effect of apartment conversion to either a cooperative or condominium, however, extends beyond the immediate conflict wherein a landlord attempts to dispose of his rental units and the tenants resist a change from the status quo. Because the tenant who is unwilling or unable to purchase his apartment has usually been forced to vacate and obtain other housing accommodations, the impact of the conversion conflict must be analyzed in light of the many other forces affecting the local housing situation.

The pressure for some form of control over apartment conversions has manifested itself in major urban centers throughout the country.[2] However, nowhere has the ensuing conflict between sponsors and tenant groups been greater than in New York City where some of the most ambitious conversion attempts to date have taken place.[3]

Through an analysis of New York's attempts to safeguard the rights of tenants in cooperative and condominium conversions, it will be possible to better evaluate the merits of proposed legislation in this area.

NEW YORK CITY RENTAL HOUSING

Inasmuch as there is a tendency for conversions to take place in older existing apartment structures, it is necessary to examine the presence of government controls which exist over a sizable portion of New York City's rental housing. Also, consideration must be given to the characteristics of the population occupying rental housing.

As of 1973, there were an estimated 2,231,000 rental units available

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1 In one instance, tenants were so upset at the prospect of conversion that they vandalized the lobby of the building and picketed the entrance to ward off prospective purchasers. *See* N.Y. Times, Mar. 11, 1973, § 8, at 1, col. 6. Although much publicity has been generated by recent conversion attempts, the problems of apartment conversion date back at least as far as World War II when landlords attempted to circumvent government-imposed rent controls by forming cooperatives. *See, e.g.*, Woods v. Krizan, 176 F.2d 667 (8th Cir. 1949); Marks & Marks, *Coercive Aspects of Housing Cooperatives*, 42 ILL. L. REV. 728 (1948).

2 *See* text accompanying notes 70-74 *infra*.

3 *See* text accompanying notes 55-59 *infra*.

in the city.[4] Of these, 975,000 were rent controlled and 285,000 were rent stabilized.[5] A principle feature of the rent control and rent stabilization programs, aside from rent regulation, is the "tenure" protection afforded tenants. The rent control law,[6] which applies to buildings built prior to 1947, and the rent stabilization law,[7] covering units constructed prior to 1969, guarantee the tenant continued occupancy of his unit.[8] Eviction is permissible only under limited circumstances.[9]

Rent control tends to protect, in particular, the elderly and lower income families, as is borne out by the profile of tenants within the controlled sector. An estimated ninety percent of all rent controlled families earn fifteen thousand dollars or less, with 61 percent of the total group earning under eight thousand dollars.[10] Thirty-three percent are 65 years or older, and 45 percent fall into the 35-64 age bracket.[11] A

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4 N.Y. STATE TEMPORARY COMM'N ON LIVING COSTS AND THE ECONOMY, REPORT ON HOUSING AND RENTS § E, pt. 5, at 5 (1974) [hereinafter cited as HOUSING REPORT].

5 *Id.* Of the remaining number, 842,000 were uncontrolled and 129,000 were subject to other government regulation. *Id.*

6 The rent control program is essentially a continuation of the emergency rent control laws adopted by the state legislature in 1946. Ch. 249, [1946] N.Y. Laws *as amended*, N.Y. UNCONSOL. LAWS §§ 8581-97 (McKinney 1961). In 1962 this program was transferred to New York City control. N.Y. UNCONSOL. LAWS §§ 8601-17 (McKinney Supp. 1974). Under rent control, residential buildings constructed prior to 1947 are subjected to a schedule of permissible rent charges which, in theory, are intended to reflect actual operating costs plus a guaranteed percentage return on the landlord's investment. *See* NEW YORK, N.Y. LOCAL LAW No. 20 (1962).

7 NEW YORK, N.Y., LOCAL LAW No. 16 (1969). The main purpose of this program is to provide control over apartment units constructed prior to 1969 by means of a regulated schedule of permissible rent increases, coupled with a requirement that the landlord offer a tenant in possession a renewal of his lease. The program is administered in part by an association made up of apartment owners and, in essence, amounts to a system of self-regulation by the real estate industry. *See generally* CODE OF THE REAL ESTATE INDUS. STABILIZATION ASS'N OF NEW YORK CITY, INC. (1969). The validity of this program was upheld in 8200 Realty Corp. v. Lindsay, 27 N.Y.2d 124, 261 N.E.2d 647, 313 N.Y.S.2d 733 (1970).

8 In 1971, the state legislature enacted a program which effectively decontrolled apartments as they became vacant. Ch. 371, [1971] N.Y. Laws. Since its adoption, approximately 325,000 apartments have been decontrolled. As recently as 1971, rent controlled housing accounted for over one half of the city's rental population. HOUSING REPORT, *supra* note 4, § E, pt. 5, at 5. Citywide, the average monthly rent per room in a controlled unit is $33.30 compared with $50.47 for those units which have been decontrolled. *Id.*, § E, pt. 1, at 10. Vacancy decontrol has come under severe attack from tenants and legislative leaders. Rents for decontrolled apartments are reported to have risen 52% with little improvement in unit quality, raising serious doubts as to the validity of the reasoning behind the decontrol legislation. The sharp rise in the overall cost of living has added to the already considerable pressure to reinstate controls over the free market sector. *Id.* at 1-85. *See also* N.Y. Times, Feb. 18, 1974, at 29, col. 3; Long Island Press, Feb. 5, 1974, at 1, col. 1.

9 *See* note 23 *infra*.

10 HOUSING REPORT, *supra* note 4, § E, pt. 5, at 7-13.

11 *Id.* These figures show little change in the renter profile over the past nine years. In 1965, 97% of the rent controlled population earned under $15,000. Of the total city population 65 years or older, approximately 83% occupied rent controlled housing as

housing population with these characteristics will naturally tend to lack mobility.[12]

The high demand for housing in the New York metropolitan area and the low vacancy rate extend the impact of conversions beyond the persons displaced.[13] Even though the group immediately affected may be small, the impact on the economic stability of housing in the entire neighborhood is likely to be severe.

In this respect, the growth of cooperative and condominium housing in the New York area is significant. In 1965, there were seventy-six thousand condominium and cooperative units in the city. At that time they represented the fastest growing form of home ownership.[14] By 1970, the figure had risen to 116,567,[15] and on a statewide basis represented 2.2 percent of housing throughout New York urban areas.[16] In the two-year period from 1971 to 1973, condominiums and cooperatives accounted for over 12 percent of new unit construction in New York City,[17] indicating an increasingly strong desire for unit ownership.

These condominium and cooperative unit figures include conversions as well as new construction. During 1972 alone, 81 rental buildings underwent conversion.[18] Since a total of 373 offering plans were filed with the Attorney General's office over the three-year period from 1970 to 1972,[19] the 81 buildings converted during 1972 indicates that conversions account for a significant percentage of condominium and cooperative offering plans.[20]

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compared with 87% in 1973. *See* C. RAPKIN, THE PRIVATE RENTAL HOUSING MARKET IN NEW YORK CITY — 1965 2-3, 28-30 (1966) [hereinafter cited as RAPKIN].

12 In 1965, two hundred and twenty-four thousand controlled units were occupied by tenants who had lived in the same apartments since 1942. Two hundred and sixteen thousand lived in the same unit they occupied in 1953. Overall, one half of the residents moved into controlled units prior to 1960, and of that number, more than a third before 1954. RAPKIN, *supra* note 11, at 37-40.

13 New York City currently has a vacancy rate of 1.94%. In the contiguous counties of Nassau and Westchester, the vacancy rates are 3.73% and 2.45% respectively. HOUSING REPORT, *supra* note 4, § E, pt. 1, at 5. The 1.94% figure compares unfavorably with a 2.64% vacancy rate in New York City in 1965 and clearly indicates a considerable increase in the demand for available housing in the city. *See* RAPKIN, *supra* note 11, at 106-07.

14 RAPKIN, *supra* note 11, at 1.

15 U.S. BUREAU OF THE CENSUS, HC(7)-8 COOPERATIVE AND CONDOMINIUM HOUSING 233 (1970).

16 HOUSING REPORT, *supra* note 4, § E, pt. 6, at 1.

17 *Id.*

18 N.Y. Times, Mar. 18, 1973, § 8, at 1, col. 1, *quoting* Assistant Attorney General David Clurman in charge of the Bureau of Securities and Public Financing. Of the 81 buildings converted, 80 changed to cooperative status and one changed to condominium ownership. *Id.*

19 N.Y. DEP'T OF LAW, ANNUAL REP. 19 (1972).

20 The 373 plans filed include both New York offerings and out-of-state developments offered for sale in New York. The three-year period is used because of the length of

While the number of rental units which have been converted comprise only a small percentage of the available total, the growing impetus for large scale conversions of rent controlled and rent stabilized housing will have a significant impact, both economically and psychologically, on the tenant population.[21]

CONVERSIONS AND EVICTIONS: PRESSURE FOR CHANGE

Prior to the recent enactment of New York's statewide conversion law,[22] the only controls over a sponsor converting his building related to his right to evict nonpurchasing tenants. Under the rent and eviction regulations pursuant to the rent control and rent stabilization laws, any plan of conversion entailing the possible eviction of nonpurchasing tenants was conditioned upon the sponsor's acquiring the agreement of 35 percent of the tenants to purchase their apartments.[23] If the land-

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time which can exist between the date of filing and the date when a sponsor may declare the plan effective. *See, e.g.*, Offering Plan, The Parkchester North Condominium (The Bronx, N.Y., Dec. 1972) [hereinafter cited as Offering Plan], wherein the sponsor may, under certain conditions, abandon the plan within a two year period after the initial filing date. *Id.* pt. 1, at 12. The 81 buildings converted in 1972, therefore, represent as a minimum, an approximate ratio of conversions to all offering plans filed for the prior three-year period and points out the significance of conversions in the growth of cooperative and condominium ownership in New York City.

21 The Parkchester offering plan alone involves 3,985 rent controlled units. *See* Offering Plan, *supra* note 20. Several other large scale complexes within the city have braced themselves for anticipated conversion plans. At a meeting of the Tudor City Tenants Association on Nov. 27, 1973, tenant representatives met to voice their opposition to such conversions. New York State Assemblyman John Dearie indicated that in a private poll of the tenants at Parkchester, almost 99½% were opposed to the conversion plan (meeting attended by author). As reported by State Senator Goodman in a legislative memorandum in support of a bill to require 51% tenant approval for conversions, there are over 200 plans being processed with the Attorney General for the conversion of existing rental units in New York. Legislative Memorandum in Support of S. 881, A. 751, N.Y. 1973-74 Sess. *See also* N.Y. Times, Nov. 18, 1973, § 3, at 1, col. 1.

22 *See* text accompanying notes 61-68 *infra*.

23 NEW YORK, N.Y. RENT REG., §§ 55(c), (f) (1973). This section sets forth the eviction regulations for rent controlled units. It provides in pertinent part:

> A certificate [of eviction] shall be issued . . . to a purchaser of stock of a [cooperative association] . . . where the stock was acquired less than two years prior to the date of filing of the application [for eviction] and on that date stock in the cooperative has been purchased by persons who are tenant-owners of at least 80 percent of the housing accommodations in the structure [with no percentage requirement after two years] . . . and within 6 months from the time the cooperative plan was presented to such tenants . . . stock in the cooperative had been sold in good faith without fraud or duress . . . to at least 35 percent of the tenants in occupancy . . . at the time of the presentation of the plan. [And in the case of condominium offerings] . . . a certificate [of eviction] shall be issued to the unit owner where . . . more than two years have expired since the date of recording the deed of such unit to the applicant; or . . . the date of recording of the deed of such unit to the applicant is less than two years prior to the date of the filing of the application and on that date units in such property have been purchased by persons who were tenants of at least 80 percent of the housing accommodations in the property on the date the declaration was duly recorded . . . [and further provided that] . . . no public offering for the sale of any unit in the premises will be made until at least 35

lord waived his eviction rights, the requirement of 35 percent tenant agreement was unnecessary.[24] However, because most sponsors elected to proceed under the eviction regulations,[25] the 35 percent figure became a substantial source of controversy.

To the tenants who were unwilling or unable to purchase their units, these regulations seemed inherently unfair. Several of the tenant organizations from the larger apartment complexes within the city banded together and, under the auspices of local political leaders, began to bring intense pressure for change in the conversion law.[26]

As the battle lines were drawn, the issues became clearly delineated. To the landlords, conversions represented a highly profitable way of disposing of apartment buildings which were becoming increasingly unprofitable in their operation. Individually marketed units provide a significantly higher return in comparison with the amount which could be realized on a single sale of the entire complex.[27] Used up depreciation allowances, government controls over rents and sharp increases in maintenance costs all combine to make operation of older rental buildings unproductive[28] and often lead to breakdowns in necessary service ultimately resulting in the physical deterioration of the building itself.

In addition to benefitting building owners, conversions can have a definite positive impact on an urban environment. They tend to

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> percent of the tenants in occupancy on the date of recording the declaration have agreed to purchase the unit then occupied by the individual tenant.

NEW YORK, N.Y. ADMIN. CODE § YY51-6(c)(9), provides that in the case of a rent stabilized apartment,

> an owner shall not refuse to renew a lease except . . . where he has submitted to and the attorney general has accepted for filing an offering plan to convert the building to cooperative or condominium ownership and . . . the plan provides [that it] . . . will not be declared effective unless and until thirty-five percent of the tenants then in occupancy have agreed to purchase dwelling units or the stock . . . within eighteen months from the date of the presentation of . . . [the] plan.

[24] The right to convert outside the 35% rule follows case law and does not explicitly appear in the regulations. *See* note 59 *infra*.

[25] *See* note 59 *infra*.

[26] *See* note 21 *supra*.

[27] One real estate official, in reference to the high profits realized in conversions, has advised against converting where the anticipated profit margin is not at least 20-25%. U.S. NEWS & WORLD REP., Oct. 9, 1972, at 60, col. 2.

The Parkchester complex in the Bronx, New York, was purchased by its present owners for $90 million. *See* text accompanying notes 55-59 *infra*. The selling price for one condominiumized section alone is $55,944,400, and should the entire complex be sold, it is estimated that the return would be approximately $300 million. HOUSING REPORT, *supra* note 4, § E, pt. 6, at 2-3. The sponsor has been quoted as saying that this merely amounts to buying wholesale and selling retail. *See* N.Y. Times, Nov. 18, 1973, § 3, at 1, col. 1.

[28] The offering plan for the north quadrant of Parkchester indicates that total expenses, including taxes and mortgage payments, exceed total income by over one million dollars annually. *See* Offering Plan, *supra* note 20, pt. 1, at 8-9.

promote a middle class stability by creating in the purchasers a vested interest in living in and maintaining their "homes" within the urban housing community.[29] Individual ownership of apartments likewise enhances the prospects for better maintenance and upgrading of the physical housing plant — a preferable alternative to costly new building construction.[30] Finally, condominium or cooperative ownership can be a particularly attractive investment for equity conscious tenants.

In contrast to the avowed benefits, it was argued that apartment conversion does not add to available housing but merely results in the displacement of one segment of the population by another.[31] Under New York City's regulations, conversions were found to have encouraged "warehousing vacant apartments."[32] There was no requirement that unoccupied units be placed on the rental market, and a landlord could either refuse to lease the apartment to any one not agreeing to ultimately purchase the unit, or insert a clause in the lease requiring the tenant to purchase or vacate within a stated period after the plan had been declared effective.[33] Under the eviction regulations the 35 percent figure is computed on the basis of tenants in occupancy on the

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29 A recent survey in the Boston metropolitan area indicated that approximately 28% of the rental population anticipated moving during the following year as compared with only 4.7% of that city's condominium population anticipating a similar move. *See* Kenney, *City Policy Toward Condo Conversions*, Sunday Herald Advertiser (Boston), Mar. 17, 1974, § 3, at 39, col. 1. The former residences of present Boston condominium owners were broken down as follows: 30% were rental tenants in the same units; 28% were from other Boston locations; 19% were from the Boston metropolitan area; and 23% were from outside the Boston area. *See* Colton & Earsy, *Most Condo Owners from Apartments*, Sunday Herald Advertiser (Boston), Mar. 24, 1974, § 4, at 59, col. 1.

Both surveys are significant in that they show several consequences of condominium ownership in a metropolitan area. First, unit ownership encourages a longer term commitment to maintaining residency within the city as indicated by the low percentage of condominium owners anticipating an early move. Second, 42% of Boston unit owners were drawn either from the metropolitan area excluding Boston itself, or from outside the Boston area altogether. Third, at least 30% of condominium ownership does not represent new construction but conversion from existing rental structures. In this regard *see* text accompanying notes 18-20 *supra*.

30 It has been suggested that when a building lacks certain amenities it is a psychological deterrent to prospective purchasers. It is for this reason that owners often undertake modernization programs to make their buildings competitive with new condominiums. *See* 1 P. ROHAN & M. RESKIN, CONDOMINIUM LAW & PRACTICE § 3A.02 (1974). *See also* Hannah, *Conversion of Existing Structures to Condominiums* in ILL. CONDOMINIUM LAW pt. 5, at 5.7 (Illinois Institute for Continuing Legal Education, 1974).

31 *See* HOUSING REPORT, *supra* note 4, § E, pt. 6, at 5-6.

32 *Id.* at 4. It is estimated that in Parkchester, *see* text accompanying notes 55-59 *infra*, 11% of the rental units were intentionally withheld from the rental market in anticipation of sale. HOUSING REPORT, *supra* note 4, § E, pt. 6, at 4.

33 *Id.* at 5. *See also* NEW YORK, N.Y. ADMIN. CODE § YY51-6(c)(9)(f) which provides:

> [A]ny renewal or vacancy lease executed after notice to the housing and development administration that a proposed cooperative or condominium plan has been submitted to the attorney general may contain a provision that the lease may be cancelled after ninety days' notice to the tenant that the plan has been declared effective . . . .

date on which the plan is presented to the tenants. Specifically excluded from the computation are vacant apartments.[34] Thus, a sponsor planning to convert his building pursuant to the regulations could effectively reduce the number of tenants necessary to purchase by keeping vacant units off the market prior to filing the offering plan. Such practices, in addition to circumventing the 35 percent requirement, have further exacerbated an already short housing supply.[35]

One of the strongest tenant objections to the 35 percent eviction rule was the inherent unfairness of a law permitting a minority of tenants to determine the fate of the remaining 65 percent.[36] They advocated that any percentage requirement should at least reflect a majority rule and recommended that it be raised to 51 percent. It was further argued that a higher percentage would also force the sponsor to bargain in good faith with the tenants over the content of the offering plan.[37] Tenants favoring the 51 percent requirement found a supporter in the New York Attorney General, who stated:

> While conversion to cooperative or condominium housing is desirable in many cases, it is unjust and unfair to force many tenants who do not have the available cash to buy a cooperative or condominium to give up their desirable apartments where many of them have lived for long periods of time. This is particularly true in the cases of elderly persons who, while having sufficient funds to pay their rent promptly as they have for many years, are unable to provide large outlays of money required in the conversions.[38]

One other stated objective of the higher percentage was that it would discourage sponsors from resorting to dubious, if not illegal practices in obtaining the requisite tenant approval.[39] Because of the fear

[34] NEW YORK, N.Y. RENT REG. §§ 55(c)(3)(a), (f)(3)(b) (1973); NEW YORK, N.Y. ADMIN. CODE § YY51-6(c)(9). Under the rent stabilization law, the 35% figure is determined at the date the plan is declared effective and may include purchases of units vacated after the presentation of the plan. *See* CODE OF THE REAL ESTATE INDUS. STABILIZATION ASS'N OF NEW YORK CITY, INC. § 61 (1969); Kovarsky v. Housing & Dev. Admin., 31 N.Y.2d 184, 286 N.E.2d 882, 335 N.Y.S.2d 383 (1972).

[35] This practice may also result in higher unit prices since the sponsor will have to compensate for nonrevenue producing rental units previously held off the market. *See* 1 CONDOMINIUM REP., May 1973, at 6.

[36] *See* Westside Tenants Union, The Myths and Facts of Cooperative Conversions 3 (1973) (unpublished memorandum). This memorandum additionally asserts that a substantial number of cooperative subscribers invest primarily for speculative purposes. Further, the prices presented to the tenants are usually twice the building's true market value.

[37] *Id.*

[38] N.Y. Attorney General Press Release (Mar. 8, 1973), re: S. 881, A. 751, N.Y. 1973-74 Sess.

[39] *See* Rugaber, *'Condominium Craze' Brings Complaints Over Lack of Protection for Consumers*, N.Y. Times, June 2, 1974, at 1, col. 5; N.Y. Times, Mar. 11, 1973, § 8, at 1, col. 6. From a marketing standpoint, the pressure to achieve an effective plan is par-

of eviction naturally ancillary to conversion and the cost of protracted litigation, tenant groups have been at a distinct disadvantage in resisting such tactics through available legal remedies.[40] However, tenants have prevailed where they could prove that a sponsor has resorted to harassment, such as allowing periodic breakdowns in essential services, discriminatory repurchase agreements,[41] payment of cash bonuses to induce tenants to vacate their apartments, and misrepresentations either in the offering plan or as to the number of tenants who have already agreed to purchase.

Courts have allowed class actions on behalf of tenants in proceedings in the nature of mandamus against the Attorney General[42] seeking to have him declare a conversion plan ineffective.[43] Class actions against the sponsor and management of the cooperative or condominium have also been permitted in cases seeking determinations of rental tenants' rights.[44] Additionally, the Attorney General has subpoena power to investigate alleged wrongdoings associated with a conversion plan independent of any proceedings involving tenants.[45]

Two cases illustrative of the conditions under which some conversions have been attempted are *Gilligan v. Tishman Realty and Construction Co.*[46] and *Richards v. Kaskel.*[47] In *Gilligan*, the court found that the sponsor of a cooperative conversion plan had apparently resorted to illegal methods, "all in an effort to stampede the tenants into

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ticularly strong with cooperatives since the tax advantages can only be realized when 80% of the association's revenues are derived from proprietary leases. *See* INT. REV. CODE of 1954, § 216(a). *See also* Kaster, *Co-ops and Condominiums — the Sponsors' Viewpoint*, N.Y.U. 28TH INST. FED. TAX. 99 (1970); Taylor, *Tax Aspects of Real Estate Cooperatives*, N.Y.U. 18TH INST. FED. TAX. 97 (1960).

40 For a general discussion of the growth and characteristics of tenants' rights movements, see Indritz, *The Tenants' Rights Movement*, 1 N.M.L. REV. 1 (1971).

41 Unless it is part of the offering plan, any agreement on the part of a landlord or sponsor to repurchase an apartment from a purchasing tenant will be considered discriminatory. *See* note 51 *infra*.

42 In New York, this is accomplished through an Article 78 proceeding. *See* N.Y. CIV. PRAC. §§ 7801-06 (McKinney 1963).

43 *See* Whalen v. Lefkowitz, (Sup. Ct. Bronx County), in 170 N.Y.L.J. 55 Sept. 18, 1973, at 19, col. 3, *rev'd sub nom.* Parkchester Apts. Co. v. Lefkowitz, 44 App. Div. 2d 442, 355 N.Y.S.2d 592 (1st Dep't 1974). In reversing, the court denied the right of a nonpurchasing tenant to bring the class action where he was not faced with the threat of eviction. *See also* Schumann v. 250 Tenants Corp., 65 Misc. 2d 253, 317 N.Y.S.2d 500 (Sup. Ct. N.Y. County 1970).

44 Richards v. Kaskel, 32 N.Y.2d 524, 300 N.E.2d 388, 347 N.Y.S.2d 1 (1973); Gilligan v. Tishman Realty & Constr. Co., 283 App. Div. 157, 126 N.Y.S.2d 813 (1st Dep't 1953); Judson v. Frankel, 279 App. Div. 372, 110 N.Y.S.2d 156 (1st Dep't 1952); *cf.* Tuvim v. 10 E. 30 Corp., 32 N.Y.2d 541, 300 N.E.2d 397, 347 N.Y.S.2d 13 (1973).

45 Greenthal & Co. v. Lefkowitz, 32 N.Y.2d 457, 299 N.E.2d 657, 346 N.Y.S.2d 234 (1973).

46 283 App. Div. 157, 126 N.Y.S.2d 813 (1st Dep't 1953), *aff'd*, 306 N.Y. 974, 120 N.E.2d 230 (1954).

47 32 N.Y.2d 524, 300 N.E.2d 388, 347 N.Y.S.2d 1 (1973).

purchasing or vacating their apartments."[48] In particular, the sponsor had been accused of threatening tenants that they would be "sleeping in Central Park,"[49] and that their apartments would be sold "right out from under them"[50] if they did not purchase. Newspaper releases and statements to the effect that the building had been sold to a tenant group were made with the intent to mislead the tenants into believing that a sufficient percentage of apartment units had been sold. Likewise, a number of apartments had been sold to tenants under a caveat in which the sponsor agreed to repurchase the units within a stated period, usually at a profit.[51]

The *Richards* case involved a plan to convert a rent stabilized apartment building to cooperative ownership. As in *Gilligan*, the plan was not well received by the tenants despite several amendments substantially discounting the purchase price to residents and offering a two-year repurchase agreement to those tenants willing to sign up within a ninety day period. When the requisite 35 percent was not attained, the sponsor's sales agents informed recalcitrant tenants that the plan had "gone over the top," *i.e.*, that the necessary number had agreed to purchase their apartments when, in fact, they had not. Faced with the threat of eviction and the possibility of losing the reduced prices of the introductory offering, a sufficient number succumbed.[52]

Although the tenants in both actions were able to obtain relief, this has not always been the case. Unless the group bringing the action can prove specific illegality, it will seldom be successful. The substance of a valid complaint must be founded upon more than the mere frustration of being confronted with an allegedly unfair conversion plan.[53] As the court in *Gilligan* pointed out:

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48 283 App. Div. at 161, 126 N.Y.S.2d at 817.

49 *Id.* at 163, 126 N.Y.S.2d at 818.

50 *Id.*

51 A repurchase agreement is not discriminatory per se, provided it is available to all the tenants. Richards v. Kaskel, 69 Misc. 2d 435, 330 N.Y.S.2d 582 (Sup. Ct. N.Y. County 1972), *aff'd*, 32 N.Y.2d 524, 300 N.E.2d 388, 347 N.Y.S.2d 1 (1973).

52 Recognizing the pressures on tenants under such circumstances, the *Richards* court quoted the following pertinent passage from *Gilligan*:

> Obviously the most obsessing fear of a tenant confronted with a co-operative proposal, and the most paralyzing weapon in the arsenal of the promoter . . . is the possibility that 80% of the tenants [the percentage there required] will purchase stock and that immediate application will be made for the eviction of the nonpurchasing tenants. In a tight rental market, when it is most difficult to obtain comparable dwelling space, tenants check the sales to their cotenants; and if they feel that substantial progress is being made toward procuring the dreaded [percentage], many will perforce capitulate.

32 N.Y.2d at 537, 300 N.E.2d at 394, 347 N.Y.S.2d at 9-10, *quoting* Gilligan v. Tishman Realty & Constr. Co., 283 App. Div. 157, 162, 126 N.Y.S.2d 813, 818 (1st Dep't 1953), *aff'd*, 306 N.Y. 974, 120 N.E.2d 230 (1954).

53 Since the building being converted is likely to be old, tenants often will object

> [A]n owner in search of profit may properly give impulse to a cooperative movement to purchase his building. He may promulgate the plan, he may present it to his tenants, and in so doing he may explain the advantages of the plan and properly persuade them to purchase apartments. He may expound the applicable law — correctly — and if that law strikes the tenants as harsh and oppressive the owner is under no obligation to soften literal compliance by one jot. Nothing will be found in the [regulations] . . . inhibiting such activities of an owner. The [owner's] . . . good faith is tested by the spirit and the letter of the emergency rent statutes and regulations; and not by tenants' notions of fair play.[54]

THE LEGISLATIVE RESPONSE

Perhaps the one event that brought the entire conversion controversy to a head in New York was the announcement of the plans to convert the Parkchester apartment complex to condominium ownership. Parkchester was by far the most ambitious conversion attempted and, if successful, would have set the stage for other large-scale conversions both in the New York City area and throughout other major metropolitan areas. Parkchester is a large, multi-building complex located in the Bronx, New York, consisting of 12,271 rental units. The complex was built 32 years ago, and was purchased by its present owners in 1968.[55] Toward the end of 1972, a plan to convert the north quadrant[56] of Parkchester into a condominium was announced. The north quadrant consists of 16 buildings containing 3,985 residential units.[57] Although Parkchester was substantially rent controlled, the sponsor waived his

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to the price being demanded for the unit. Tenants are at a disadvantage insofar as they have often paid for improvements in their apartments which would be lost if they were forced to vacate. In particular, they will expect physical improvements to be made. In Schumann v. 250 Tenants Corp., 65 Misc. 2d 253, 317 N.Y.S.2d 500 (Sup. Ct. N.Y. County 1970), tenants challenged an offering plan on the ground that estimates for capital improvements did not include the replacement of old windows and plumbing fixtures. The court rejected this contention, stating that these items were still serviceable and not in need of replacement. Underlying the complaint of the tenants was a basic resistance to the idea of conversion. The remaining objections focused upon the undemocratic aspect of the 35% rule, the high prices, and the unwillingness of elderly tenants to commit a substantial portion of their life savings to purchase the apartment. The court rejected these arguments, stating that there was no indication of fraud or misrepresentation. *Id.* at 260-62, 317 N.Y.S.2d at 508-10.

54 283 App. Div. at 160, 126 N.Y.S.2d at 815-16.

55 N.Y. Times, Nov. 18, 1973, § 3, at 1, col. 1.

56 *See* 1 CONDOMINIUM REP., Feb. 1973, at 8. On November 13, 1973, plans were announced to submit the entire Parkchester complex to condominium ownership. The filing has temporarily been rejected by the Attorney General pending the outcome of current litigation over the north quadrant offering. *See* N.Y. Times, Nov. 20, 1973, at 43, col. 1. If successful, this conversion alone would have a significant impact on the number of available middle income rentals in New York City.

57 *See* Offering Plan, *supra* note 20, pt. 1, at 1.

eviction rights,[58] which enabled him to convert the building without meeting the 35 percent requirement.[59]

Despite the fact that the tenants were not faced with the possible loss of housing in the event they decided against purchasing, the magnitude of the profits potentially realizable on the conversion crystallized tenant resentment throughout the city against sponsors speculating in a housing market already beset with extreme difficulties.[60]

On July 1, 1974 a statewide conversion law became effective in New York.[61] It imposes mandatory conditions in four major areas and provides for additional requirements which may be deemed necessary by the Attorney General in his discretion.

First, as a condition to any conversion plan, whether it is for a rent controlled building in New York City or a typical leasehold tenancy anywhere throughout the state, 35 percent of the tenants must agree to purchase their apartments before the plan can be declared effective.[62] There is a maximum period of one year in which to achieve the requisite percentage. If the plan fails to become effective within the one year period, it is deemed void and no new conversion plan can be submitted for at least 18 months.[63]

In continuing with the 35 percent figure the legislature apparently agreed with the argument set forth by landlords that a higher percentage would be for the most part unattainable and would effectively put

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58 *Id.* at 13.

59 The New York Court of Appeals, in De Minicis v. 148 E. 83d St., Inc., 15 N.Y.2d 432, 209 N.E.2d 63, 261 N.Y.S.2d 1 (1965), determined that failure to comply with rent and eviction regulations would not bar the effectiveness of an offering plan. Failure to achieve the 35% agreement would only bar the eviction of statutory tenants. Of the 81 conversions in New York during 1972, only six took place outside the 35% rule. *See* note 18 *supra.*

60 The sponsor, electing to convert the building outside the 35% rule, could have either waited for the apartments to become vacant before offering it for public sale, or he could have sold it while still occupied by a tenant. In the latter situation, the buyer would have purchased the unit subject to the tenant's rights and with none of the eviction procedures available to him. *See, e.g.*, Offering Plan, *supra* note 20, pt. 1, at 51, wherein the purchaser must agree to assume the seller's rights and obligations under the existing tenancy.

Where the right to bring eviction proceedings no longer exists, units could, for the most part, only be sold when they became vacant, thus requiring the sponsor to wait a considerably longer period of time before all units could be sold. *See* N.Y. Times, Mar. 18, 1973, § 8, at 1, col. 1. The waiver of eviction rights did not automatically ensure smooth sailing for the Parkchester conversion plan. The tenants contended that unit prices were far too high in view of the age of the buildings and the sponsor's original acquisition costs. *See* Whalen v. Parkchester Apts., Co. (Sup. Ct. Bronx County), in 170 N.Y.L.J. 55, Sept. 18, 1973, at 19, col. 6, *rev'd sub nom.* Parkchester Apts., Co. v. Lefkowitz, 44 App. Div. 2d 442, 355 N.Y.S.2d 592 (1st Dep't 1974). *See also* note 27 *supra.*

61 N.Y. GEN. BUS. LAW § 352-e (McKinney 1968), *as amended*, N.Y. SESS. LAWS [1974], ch. 1021, § 2 (McKinney).

62 *Id.* § 352-e(2-a)(1)(i).

63 *Id.* § 352-e(2-a)(1)(ii).

an end to all conversions. However, the significant feature of the new law is that obtaining purchases from 35 percent of the tenants is a precondition to the conversion itself. Under the rent regulations, attaining the requisite percentage relates only to the right to bring eviction proceedings. Thus, sponsors will no longer have the option to offer units for sale as they become vacant without prior tenant approval as was the case with Parkchester.[64]

Second, the law calls for a two year moratorium on evictions during the period of the conversion. The no-eviction rule applies specifically to written leases with discretionary or automatic end-of-term clauses.[65] Thus, a person whose lease expires during the period of conversion may not be forced to vacate his apartment. It is interesting that this same provision does not run to rent controlled units. However, the Attorney General may in his discretion require the offering plan to waive eviction rights against rent controlled tenants for at least the same period. Further, he may also require that no unconscionable rent increases be imposed upon those whose leases have expired during the two year moratorium.[66] It is to be expected that the Attorney General will require these conditions as part of any offering plan.

Third, "warehousing" is no longer permitted. The sponsor of any conversion plan is required to submit an affidavit indicating that the vacancy rate for the five months immediately prior to submitting the plan was not more than double that for the preceding two year period.[67]

Fourth, tenants are given a 15-day period in which to review the proposed conversion plan when it is submitted to the Attorney General.[68] The purpose of this provision is to allow the tenants to make any objections to the plan or the circumstances surrounding the conversion prior to its acceptance for filing.

It should be noted that this law applies to the filing of condominium and cooperative conversion plans and does not completely preempt local regulations governing a sponsor's right to evict nonpurchasing tenants.[69] However, such regulations are superseded to the extent that the statute calls for a two-year moratorium on evictions and gives the Attorney General added discretionary powers.

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[64] *See* text accompanying notes 58-59 *supra*.

[65] N.Y. GEN. BUS. LAW § 352-e(2-a)(1)(iii), *added by* N.Y. SESS. LAWS [1974], ch. 1021, § 2 (McKinney).

[66] *Id.*

[67] *Id.* § 352-e(2-a)(1)(iv). *See* text accompanying notes 32-34 *supra*.

[68] N.Y. GEN. BUS. LAW § 352-e(2-a)(2), *added by* N.Y. SESS. LAWS [1974], ch. 1021, § 2 (McKinney).

[69] *See* note 23 *supra*.

Certainly, New York's new law contains several positive features aimed at alleviating many of the more controversial aspects surrounding conversions in high density population areas. In this respect the eviction moratorium, the anti-warehousing provision and the opportunity for tenant review are well suited to these objectives. Whether the 35 percent rule, which must be met as a precondition to any conversion throughout the state, equally satisfies legitimate tenant interests without unnecessarily hindering the growth of the housing market is yet to be determined.

The effectiveness of the New York statute will likewise be examined by other localities considering percentage-oriented conversion requirements. One Maryland county is currently considering a conversion bill which would require 35 percent tenant concurrence as opposed to agreement to purchase in order for the plan to take place. There are additional notice requirements and a thirty-day option period in which tenants may elect to purchase their units.[70]

Alternatively, a state may totally delegate control over conversions to the locality in which the conversion is planned. For example, the Massachusetts legislature recently enacted a bill which would authorize the city of Newton to subject a plan to any conditions or limitations which it determined was necessary for the "public convenience."[71] This bill has been criticized for its total lack of any clear and specific standards.[72]

Marin County, California, has recently enacted a conversion ordinance specifically tied to local housing conditions.[73] The ordinance, *inter alia,* prohibits condominium conversions where the rental vacancy rate in the county falls below five percent, or where the ratio of multifamily accommodations in the county falls below 25 percent of the total housing stock. All units in the proposed conversion must be free of building code violations and brought up to 1974 code standards, regardless of when the structure was built. Further, a reasonable percentage of the units being converted must be set aside for moderate income families and priced accordingly.

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[70] Proposed County Ordinance, Bill No. 29-74 (Montgomery County, Md., June 18, 1974). This bill has been attacked as being unconstitutional, first because it is in contravention of certain provisions of the Maryland condominium statutes, and second because it represents an impermissible delegation of authority by a municipal corporation. *See* Letter No. 74.091 from the County Attorney, Montgomery County, Md., to the County Executive, June 18, 1974; Opinion Letter from William B. Beebe, Esq. (on file in the St. John's Law Review office).

[71] MASS. SESS. LAWS [1974], ch. 847 (West).

[72] *See* Boston Herald, Aug. 11, 1974, at 46, col. 6.

[73] MARIN COUNTY, CAL., ORDINANCE No. 2122 (Sept. 24, 1974) (effective Oct. 24, 1974).

Two major metropolitan areas, San Francisco and Washington, D.C., have temporarily banned conversion altogether until more appropriate legislative controls can be formulated.[74]

CONCLUSION

In light of the growing sensitivity within various communities to the impact which cooperative and condominium conversion can have, sponsors would be well-advised to formulate their plans in such a way as to recognize the legitimate needs of their tenants and the substantial adverse effect which loss of housing accommodations can have on them.[75] Any legislative action aimed at controlling the conversion of rental units must take account of the following: (1) a substantial portion of urban tenants have a low to middle income earning capacity, many being in upper age brackets and living on fixed incomes; (2) large scale conversions, as exemplified by Parkchester, have their strongest impact on the low to middle income segment of the population; (3) inasmuch as many cities have extremely low vacancy rates, there is little likelihood that displaced tenants will find comparable housing accommodations at similar cost elsewhere; (4) individual unit ownership represents a positive influence since it tends to maintain stability by creating a vested interest in living in the urban environment, and generally ensures maintenance and upgrading of the individually owned units; and (5) a landlord's legitimate right to alienate his property should be protected where it is not otherwise disruptive of the needs of the community.

The landlord-sponsor's ability to refuse lease renewals or bring eviction proceedings should be judged primarily in terms of the housing market in which the proposed conversion is taking place. Consequently, a required percentage of tenant purchases or approvals is questionable. It is to be noted that the original statutory scheme in New York which provided for eviction of rent controlled, *i.e.*, statutory tenants, when a certain percentage of tenant purchases had been achieved, was as much a measure designed to test the genuineness of the offering, as it was a recognition of a housing shortage. Ironically, a substantial number of

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74 BNA HOUSING & DEV. REP. 420 (Sept. 9, 1974).

75 Sponsors would also be well-advised to provide an adequate reserve fund from the proceeds of the sale of units. A reserve fund is normally used to take care of any repairs or replacements facing the cooperative or condominium association after its initial formation. An adequate reserve fund would do much to answer tenant complaints concerning the physical quality of the building being converted. *See* note 53 *supra*. The sponsor of Parkchester has provided for a $500,000 reserve fund. *See* Offering Plan, *supra* note 20, pt. 1, at 17-18. This amounts to a little more than $125 per unit. Whether the amount provided is adequate depends on the accuracy of engineering reports.

tenants faced eviction in any event when the minimum percentage had been achieved. Further, percentage requirements have been a continuing source of friction both between the landlord and resisting tenants and between tenant factions within a given complex. The spectre of conversion in tight housing markets under such percentage oriented regulations has placed the tenant between the proverbial rock and a hard place. Likewise, the inability of a sponsor to successfully convert because of the possible failure to achieve sufficient tenant approval undoubtedly increases the prospect for deceptive and fraudulent practices, as exemplified by the growing amount of litigation in this area.

If alternative methods for the protection of tenant housing are available, one may question whether a percentage requirement has any relevant value. It is hardly a meaningful test of the genuineness of the conversion, at least in those states, such as New York, where regulatory agencies strictly scrutinize the offering. When applied on a statewide basis, independent of any consideration of the locality and characteristics of the rental units or the relative degree of transience of the tenants, the percentage requirement would appear to be irrelevant if not counterproductive. Especially is this the case where the regulations are expanded to control not only the right to evict but the very right to convert. At least one court in declaring a similar scheme unconstitutional has characterized it as an arbitrary denial of the basic rights attendant to property ownership.[76]

It is recommended as an alternative that where the housing situation of a given area requires some form of tenant tenure protection, provisions controlling evictions, lease renewals, and permissible rental increases can be specifically formulated. Thus, a bill could incorporate regulations which would (1) prevent eviction of rent controlled tenants; (2) guarantee lease renewals for a minimum number of years; and (3) regulate the maximum permissible rent increase to be allowed on renewal. It is suggested that these or similar controls would far better achieve their objectives than would percentage regulations.

Undoubtedly, any regulations which provide for prolonged tenant occupancy present difficulties for the sponsor who cannot dispose of his units in a relatively short time period. Further, he is faced with the day-to-day practical problems of operating a mixed rental-condominum development. However, in view of the relatively high profit which can be realized in a conversion, the delay and inconvenience experienced

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[76] Rothman v. Borough of Ft. Lee, No. L*21679-73 P.W. (Super. Ct. Bergen County, N.J., June 14, 1974). The court declared Ft. Lee's local ordinance unconstitutionally vague and not justified under any rent emergency situation when applied to luxury apartments.

seems a proper compromise when balanced against the needs of the tenant population.[77]

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[77] The delay factor, of course, would be determined by vacancy turnover rates. In New York City, for example, where long-term tenancies in rent controlled and rent stabilized units are common, existing turnover rates of 0.83% and 0.89% respectively indicate the maximum probable delay which the sponsor of any plan would face before all units in a given complex would be fully converted. *See* HOUSING REPORT, *supra* note 4, § E, pt. 1, at 3.