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Rental Market Protection through the Conversion Moratorium: Legal Limits and Alternatives

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RENTAL MARKET PROTECTION THROUGH THE CONVERSION MORATORIUM: LEGAL LIMITS AND ALTERNATIVES

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In this Article, the authors take a critical look at moratoriums recently imposed upon the conversion of rental units to condominiums. The authors particularly emphasize the potential constitutional problems with these moratoriums under the taking, due process and equal protection clauses of the United States Constitution, as well as possible problems under the preemption doctrine. The Article concludes by examining alternative legislative action that would serve the moratorium's primary purpose of protecting rental markets from erosion without exposure to a moratorium's potential constitutional limitations.

In the twenty-one short years since 1958 when Puerto Rico became the first United States jurisdiction to adopt a statute allowing the creation of condominiums,[1] the concept of individual ownership of units in multi-family residential developments has gained remarkable popularity.[2] The United States Department of Housing and Urban Development estimates that by the year 2000, one-half of the entire United States population will reside in condominiums.[3] The rampant spread of condominiums, due in part to con-

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1. Horizontal Property Act, P.R. Laws Ann. tit. 31, §§ 1291-1293K (1967) (current version at P.R. LAWS ANN. tit. 31, §§ 1291-1294d (Supp. 1979)).

2. Since 1958, all fifty states have passed condominium enabling legislation. *See* Rohan, *The "Model Condominium Code"—A Blueprint for Modernizing Condominium Legislation*, 78 COLUM. L. REV. 587 (1978) [hereinafter cited as Rohan, *Blueprint*]. These statutes allow conveyance to a purchaser of fee simple title to his or her unit plus an undivided interest in common areas of the building, such as hallways, parking lots, lobbies, underlying land and recreational facilities, as a tenant in common with other unit owners. *Id.* at 587 n.3. Unit owners typically have their own mortgages, are taxed separately, and are not responsible for their neighbors' mortgages, much like a scheme of cooperative ownership. Unlike cooperative members, however, condominium owners directly own their dwelling units. *See* HOUS. & DEV. REP. (BNA) 25:0011 (1978) (defining cooperative arrangements and distinguishing them from condominiums).

3. 125 CONG. REC. H7346, 7347 (daily ed. Sept. 5, 1979) (remarks of Rep. Rosenthal) [hereinafter cited as Rosenthal remarks].

versions of existing rental units,[4] predominantly in urban areas,[5] is nothing short of phenomenal.[6]

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4. Recent statistics from the United States Department of Housing and Urban Development indicate that between 1970 and 1975, 100,000 of the 1,255,000 additional condominium units in existence were created by conversion of rental units. *Id.* About 250,000 new conversions occurred in the four years between 1975 and 1979. *See* Chicago Tribune, July 27, 1980, § 14, at 1, col. 1 (reviewing HUD study entitled "The Conversion of Rental Housing to Condominiums and Cooperatives") [hereinafter cited as Review of 1980 HUD study]; [1980] HOUS. & DEV. REP. (BNA) 116 (a summary of the report may be obtained from HUD, Division of Policy Studies, Room 8118, 451 7th Street, S.W., Washington, D.C. 20410).

5. *See* K. ROMNEY, CONDOMINIUM DEVELOPMENT GUIDE § 17.02[1] (Cum. Supp. 1979) (citing I UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, CONDOMINIUM/CO-OPERATIVE STUDY (1975)) (condominium conversion activity has largely been confined to mature urban areas such as Chicago, Houston, and cities throughout California).

6. To understand fully the condominium conversion phenomenon, and resulting conversion moratoriums and other legislative responses, it is necessary to examine the social, economic and demographic underpinnings of the conversion phenomenon. A number of factors have contributed to the recent extremely active condominium conversion market—many are peculiar to conversions, though some apply to newly constructed condominiums as well. Interest among unit buyers has been stimulated by: (1) a scarcity of available land within commuting distance of urban centers, leading to emphasis on high density residential patterns and thus on multi-family solutions such as the condominium; (2) increased cost of constructing new single-family homes and condominiums; (3) changing life styles (including smaller household sizes, growing numbers of empty nesters, greater mobility and increased interest in leisure activities) leading to demand for on-site amenities and recreational facilities and for freedom from maintenance obligations; (4) the generally lower cost of condominiums as compared to detached homes; (5) the tax benefits of homeownership due to deductibility of interest costs and property taxes; (6) the high premium placed on home ownership as an investment and inflation hedge during periods of chronic inflation, particularly among young marrieds and singles who were formerly a prime component of the rental market; and (7) the greater availability of condominium purchase money financing due to recent policy changes authorizing Federal Housing Administration (FHA) insurance of mortgages on condominium units in existing non-FHA insured multi-family projects, *see* [1980] HOUS. & DEV. REP. (BNA) 354, Veterans Administration insurance on unit mortgages, and secondary markets for resale of condominium mortgages to the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association.

Owners of rental buildings increasingly have turned to conversion because of numerous factors affecting profitability, including a quicker return on equity yielded by condominium conversion as contrasted with operation of a building as a rental project, a higher sales price received from converters than from investors in rental property (due to the greater market value of the building as a condominium), the removal of some of the former tax incentives for purchase and ownership of existing rental housing (such as changes in accelerated depreciation provisions brought about by the 1976 tax reforms, *see* I.R.C. § 167(J)(2), (5)), and a fear of future legislation disadvantageous to rental building owners (such as rent controls and further changes in tax laws). Also significant are the general inflationary increases in operating costs of rental buildings and the inability of landlords to market units at rents permitting an acceptable profit margin. In fact, it has been estimated that rents in Chicago increased only 50.6% from 1967 to 1978, while operating costs generally increased by 100%. SHLAES & CO., CONDOMINIUM CONVERSION IN CHICAGO: FACTS AND ISSUES (1979). The reasons for the disparity between rents and operating costs, as suggested by a recent study on condominium conversion in Chicago, are inflation in energy costs and property taxes:

> Two elements of apartment building operating expenses, heat and property taxes, have risen considerably faster than the overall inflation rate. Landlords must often assume the heating costs for all apartment units in older buildings serviced by one

Government has responded to the condominium conversion phenomenon by introducing a variety of restrictive legislation at all levels—federal,[7] state,[8] and municipal[9]—focusing on both disclosure to prospective purchasers and protection of current tenants. Typical provisions require 120 days' notice to tenants of the landlord's intent to convert[10] and grant tenants the right to an automatic lease extension,[11] the right of first refusal to purchase their units,[12] and the right to relocation assistance upon declining to purchase.[13] Other legislative enactments require that the developer submit a licensed engineer's report on the building's structural and mechanical sys-

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main boiler. The expense of renovating the heating system so that units can be assessed individually may be prohibitive for an individual landlord. However, a converter would be more likely to make this and other energy efficient improvements because the condominium buyers would provide the cash to pay for the renovations and could derive some long term benefits from these changes as home owners. Also, the assessment of rental property has remained constant at 33% of market value since 1976, while the assessment of individual homes has dropped from 22% in 1975 to 16% in 1977. The larger property tax on apartment buildings is another incentive for conversion.

D. HAIDER, ECONOMICS, HOUSING AND CONDOMINIUM DEVELOPMENT vi (1980) [hereinafter cited as HAIDER study].

7. *See* H.R. 5175, 96th Cong., 1st Sess. (1979) [hereinafter cited as the 1979 Bill]. *See* notes 42-46 and accompanying text *infra*.

8. *See, e.g.*, CAL. CIV. CODE §§ 1350-1360 (West Supp. 1980); Condominium Property Act, ILL. REV. STAT. ch. 30, §§ 301-331 (1979); Condominium Act, N.Y. REAL PROP. LAW §§ 339-d to 339-ii (McKinney Supp. 1979). For a complete list of state condominium legislation, see 1A P. ROHAN & M. RESKIN, CONDOMINIUM LAW & PRACTICE, app. B-1 (1980) [hereinafter cited as ROHAN].

9. *See, e.g.*, CHICAGO, ILL., CODE § 100.2-1 to -12 (1977) (developers must give 120 days' notice of intent to convert; during this period, tenants are guaranteed the right of first refusal to purchase their apartments); PHILADELPHIA, PA., CODE § 9-1201 to -1208 (1979) (18-month moratorium on condominium conversions; additional regulatory provisions operative following moratorium period); New York City Rent and Eviction Regs. § 55 (these regulations may be found following N.Y. UNCONSOL. LAW § 8700 (McKinney 1974); NEW YORK, N.Y., ADMIN. CODE § YY51-6.0(c)(9) (1975 & Supp. 1979) (35% of tenants must consent to conversion); Marin County, Cal., Ordinance No. 2122 (Sept. 24, 1974) (effective Oct. 24, 1974) (conversions prohibited when rental vacancy rate falls below 5% or when multi-family housing falls below 25% of total housing stock); LOS ANGELES, CAL., MUN. CODE ch. I, art. 2-5, § 12.52(E)(3) (right of first refusal guaranteed tenants); Arlington County, Va., Condominium Regulations (Jan. 12, 1974) (60-day notice of conversion to tenants; off-street parking restrictions).

10. *See, e.g.*, CHICAGO, ILL., MUN. CODE § 100.2-6 (1978). *See also* Uniform Condominium Act § 4-110(a) (West 1978) (expressly providing for 120 days' notice before tenants may be required to vacate).

11. ILL. REV. STAT. ch. 30, § 330 (1979) (tenants have the "right to extend . . . on the same terms and conditions and for the same rental . . . .").

12. The right of first refusal is routinely guaranteed to tenants. *See, e.g.*, CHICAGO, ILL., MUN. CODE § 100.2-6(c) (1978); LOS ANGELES, CAL., MUN. CODE ch. I, art. 2-5, § 12.52(E)(3) (1979).

13. The federal bill introduced by Representative Rosenthal proposes that the household displaced because of converted rental units is to be compensated for up to $400 in reasonable moving expenses. 1979 Bill, *supra* note 7, § 301. Another statutory method of providing tenants with relocation assistance is to cancel their outstanding rent payments. *See, e.g.*, N.J. STAT. ANN. § 2A:18-61.10 (West Cum. Supp. 1979) (waiver of one month's rent).

tems, their expected life and estimated replacement costs, as well as a statement disclosing estimated assessments and reserves, and that the developer extend to purchasers warranties on major systems, backed up in some cases by a special escrow of funds from unit sale proceeds.[14]

These widespread attempts by lawmakers to protect tenants and consumers have already been scrutinized thoroughly elsewhere.[15] Recently, however, government has responded to condominium conversions by enacting outright prohibitions of conversions in the form of temporary conversion moratoriums. Legislative moratoriums (examined in Part I) have yet to be fully tested in the courts; however, some conclusions can be drawn by examining judicial approaches to analogous state exercises of police power in statutes designed to control rents or to freeze development through zoning measures or through utility moratoriums (Part II). By exploring the judiciary's response to development freeze and rent control cases, this Article attempts to delineate the constitutional boundaries of condominium conversion moratoriums (Part III). Concluding that moratoriums are not the most desirable form of government intervention into the housing market, the Article turns to consideration of alternative means to protect rental markets (Part IV).

I. CONVERSION MORATORIUM LEGISLATION

The condominium concept was once seen as a possible remedy for the problem of housing the urban poor.[16] In fact, one goal of the Housing and Urban Development Act of 1968 (1968 Act)[17] was to encourage home ownership by low income families,[18] and in light of both the scarcity of urban land and high construction costs, multi-unit condominium dwellings seemed a natural means to achieve urban home ownership. Despite this expectation,

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14. *See, e.g.*, FLA. STAT. ANN. §§ 718.203, 718.3025 (West Cum. Supp. 1979); VA. CODE §§ 55-79.79, 55-79.94 (Cum. Supp. 1980).

15. *See* Rohan, *Blueprint*, *supra* note 2, at 599; ROHAN, *supra* note 8, § 3A.05; Comment, *Tenant Protection in Condominium Conversions: The New York Experience*, 48 ST. JOHN'S L. REV. 978, 987-91 (1974).

16. *See* Quirk & Wien, *Homeownership for the Poor: Tenant Condominiums, The Housing and Urban Development Act of 1968, and the Rockerfeller Program*, 54 CORNELL L. REV. 811 (1969); Teaford, *Homeownership for Low-Income Families: The Condominium*, 21 HASTINGS L.J. 243 (1970); Comment, *Condominiums and the 1968 Housing and Urban Development Act: Putting the Poor in Their Place*, 43 S. CAL. L. REV. 309 (1970).

17. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, tit. 1, 82 Stat. 476 (1968) (codified in scattered sections of 12 U.S.C. (Supp. IV 1969)) [hereinafter cited as 1968 Act].

18. 12 U.S.C. § 1715y (1976). The stated purpose of § 1715y was to provide additional access to private home ownership for lower income families in states where title and ownership to real property could be acquired by individual owners in multi-family arrangements. Up to one-third of the new housing units contemplated by the 1968 Act were to be owner—rather than renter—occupied, and a substantial interest subsidy was made available for condominium purchase money mortgages to low-income buyers. *Id.*

the financial risks of rental building ownership[19] and an extremely active conversion market,[20] many contend that the benefits of condominiums to low and middle income families have failed to materialize.[21]

With the increased popularity of condominiums has come a heated controversy over the impact of conversions on the social and economic structure of urban communities, accompanied by calls for government intervention. Conversion proponents claim that developers improve the quality of the housing stock by rehabilitating older buildings into condominiums,[22] while opponents argue that the improvements are cosmetic only.[23] Opponents assert that by displacing tenants unable or unwilling to purchase their units, conversions impose a disproportionate hardship on the elderly, on young married couples, and on tenants with fixed or lower incomes and no accumulated wealth.[24] Proponents respond that conversions bring a new infusion of middle class stability to the inner city, which in turn expands the tax base, improves the quality of urban services and results in better upkeep of property.[25] Further complicating the cost-benefit equation,[26] conversions are

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19. One of the prime factors contributing to the financial risks involved in rental building ownership in recent years has been inflationary operating costs. According to one report, although building costs increased 88% and fuel/utility costs rose 99% between 1970 and 1978, rents only increased about 47%. Chicago Tribune, June 9, 1979, § N1, at 8, col. 1.

20. *See* note 6 *supra*.

21. Although it is not altogether clear why the condominium may have failed as a low-income housing tool, many have concluded that condominium conversions actively undermine the low-income housing stock by reducing the availability and increasing the cost of rental housing, while concurrently making home ownership less attainable than ever for the poor. *See, e.g.*, Comment, *The Condominium Conversion Problem: Causes and Solutions*, 1980 DUKE L.J. 306, 317. *But see* Review of 1980 HUD study, *supra* note 4 (asserting that condominium conversions have played only a small role in reducing available rental units and that the demand for home ownership is the true driving force behind the conversions).

22. *See* note 26 *infra*. A recent HUD study was, however, unable to confirm this view. *See* [1980] HOUS. & DEV. REP. (BNA) 116.

23. G. LONGHINI & D. LAUBER, CONDOMINIUM CONVERSION REGULATIONS: PROTECTING TENANTS 2 (1976) (American Planning Association, PAS Report No. 343); Comment, *The Condominium Conversion Problem: Causes and Solutions*, 1980 DUKE L.J. 306-17; Comment, *Tenant Protection in Condominium Conversions: The New York Experience* 48 ST. JOHN'S L. REV. 978, 983 (1974).

24. *See* NATIONAL COUNCIL OF SENIOR CITIZENS, CONDOMINIUM CONVERSION: OPTIONS FOR TENANT AND RENTAL MARKET PROTECTION (1979), *reprinted in Condominium Housing Issues: Hearings on S. 612 Before the Subcom. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing and Urban Affairs*, 96th Cong., 1st Sess. 65, 100-02 (1979). *See also* Levin, *Neighborhood Development and the Displacement of the Elderly*, 18 URB. L. ANN. 223 (1980) (advocating policies to mitigate harmful displacement without adversely affecting tax base).

25. *See* ROHAN, *supra* note 8, § 3A.05, at 3A-9.

26. The costs and benefits of condominium conversions are well summarized in the HAIDER study of Chicago conversions:

> Conversions increase the market value of housing stock in the central city, thus slowing the shift of investment from the city to the suburbs. It is also possible that tax savings from mortgage interest and property tax deductions provide an increased

said to deplete the rental housing stock, consequently driving up rents in the remaining apartments.[27] At the same time, some have suggested that condominium converters, by removing units from the rental market, have created artificial demand for condominiums and caused lower vacancy rates and higher rents, which, in turn stimulate panic buying of converted units.[28] The negative aspects of the cost-benefit function have sparked conversion moratorium legislation.

It is somewhat misleading to speak of conversion moratorium legislation as if it comprises a uniform body of consistent state laws. On the contrary, conversion moratoriums vary significantly, but generally can be categorized as absolute prohibitions of conversions or as prohibitions contingent upon an inadequate supply of rental housing.[29] Absolute prohibitions have been adopted in more than fifteen United States cities, including Chicago[30] and Evanston,[31] Illinois, Washington, D.C.,[32] Philadelphia, Pennsylvania,[33] and

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source of expenditures in a community. Once investment flows into a neighborhood for condominium units, other flows and investment are likely to occur, such as rehabilitation and redevelopment of the area. An increase in the percentage of home owners versus renters may stimulate greater participation in the political process. Home owners generally perceive a greater investment in their community and are likely to experience less turnover than renters. Finally, condo conversions may increase the tax base since the market value of a building is always higher after conversion.

The major liability of condo conversion is the sudden and substantial displacement of renters, especially the elderly, who are unable to purchase their unit. The smaller the community and the smaller its rental stock, the greater the hardships associated with conversion. Also, tenants are often pressured into buying units which have little more than cosmetic changes. The new owner must then invest a substantial amount to properly renovate the unit and the common areas. Finally, successive increases in the standard deduction have sharply eroded the value of home ownership tax deductions for those with low and moderate incomes.

HAIDER study, *supra* note 6, at vii.

27. C. RHYNE, W. RHYNE & P. ASCH, MUNICIPALITIES AND MULTIPLE RESIDENTIAL HOUSING: CONDOMINIUMS AND RENT CONTROL 62 (1975).

28. Because vacancy rates in rental housing in several urban markets have fallen below 5%, *see* note 38 *infra*, and because condominium conversions further deplete available rental housing, it would be reasonable to expect panic buying of condominium units. A recent study by HUD, however, did not confirm this expectation. It found that only one-third of tenants purchase condominiums when their building is converted. *See* [1980] HOUS. & DEV. REP. (BNA) 116. It may be that panic buying has not widely occurred because almost one-half of tenants cannot afford the purchase price of their converted units. *Id.*

29. Although such contingent prohibitions are perhaps not commonly considered to be moratoriums, they do have the effect of an outright moratorium when the requisite conditions occur. There is a temporary suspension of conversions in both instances.

30. CHICAGO, ILL., MUN. CODE §§ 100.2-1 to -12 (1977). Under this ordinance, a forty-day moratorium was imposed on any conversion of condominiums involving thirty or more apartments.

31. EVANSTON, ILL., MUN. CODE §§ 69-0-78 (prohibiting conversion for 90 days) & 92-0-78 (extending moratorium on conversion for an additional 90 days) (1978).

32. D.C. Act 3-44, 25 D.C. Reg. 10363 (1979). Under this Emergency Condominium and Cooperative Stabilization Act of 1979, a ninety-day moratorium was imposed on conversions to condominiums and cooperatives.

33. PHILADELPHIA, PA., CODE §§ 9-1201 to -1208 (1979) (prohibiting conversion for an eighteen month period).

San Francisco, California.[34] Under these moratoriums, conversions are brought to a total halt for the professed purpose of allowing a cooling-off period to give the legislatures time to study the housing market and develop condominium regulations. The second legislative pattern—conditioning permission to convert upon rental market fluctuations—was adopted in the District of Columbia[35] and in Los Angeles, California.[36] The District of Columbia statute provides for annual calculation and certification of the rental vacancy rate in the District. Housing units classified as "high rent housing accommodation"[37] may be converted without regard to the vacancy rate, but if the rate drops below three percent[38] other units may be converted only with the written consent of a majority of tenants.[39] The Los Angeles ordinance also makes approval of conversion contingent on rental market conditions. Conversion will be prohibited in Los Angeles if the vacancy rate[40] of the planning area in which the property is located is five percent or less, and if the cumulative effect of successive conversion projects on the rental housing market is significant.[41] Although the restrictive legis-

34. SAN FRANCISCO, CAL., MUN. CODE, SUBDIVISION CODE § 1396 (1979) (limiting conversions to a maximum of 1,000 units per year).

35. D.C. CODE §§ 5-1281 to -1282 (Cum. Supp. V 1978).

36. LOS ANGELES, CAL., MUN. CODE § 12.5.2 (1979). A bill recently introduced in the California Assembly also would have conditioned approval of the conversion of rental units upon an adequate supply of rental housing, as well as upon the ability of tenants to participate in the proposed conversion. This bill would have prohibited conversions in cities with less than a 5% vacancy rate unless 80% of the building's tenants were financially able to participate. This bill was not acted upon, however, and automatically died at the end of the session concluding February 1, 1980. *See* ROHAN, *supra* note 8, § 3A.05[3], at 3A-16.84.

37. The term "high rent housing accommodation" is defined as:

> any housing accommodation in the District of Columbia for which the total monthly rent exceeds an amount computed for such housing accommodation as follows: (i) multiply the number of rental units in the following categories by the corresponding rent: (I) $212.50 for one bedroom rental units; (II) $267 for two bedroom rental units; (III) $375 for three or more bedroom rental units; and (IV) $162.50 for efficiency rental units; and (ii) total the results obtained in phase (i).

D.C. CODE § 5-1281(b)(1)(B) (Cum. Supp. 1978).

38. Real estate experts consider a five percent vacancy rate the minimum rate allowable to permit tenant mobility and avoid artificial rent inflation. HAIDER study, *supra* note 6, at 28. U.S. Bureau of Census figures showed a national vacancy rate of approximately 5% in 1978, with the vacancy rate decreasing in subsequent years.

39. The District of Columbia law provides that if a majority of heads of households in a building consent to the conversion, it may proceed regardless of the vacancy rate. D.C. CODE § 5-1281(b)(2) (Cum. Supp. V 1978).

40. The term "vacancy rate" refers "to the most current vacancy rate for multiple-family dwelling units as published by the Department of City Planning in its Biannual Housing Inventory and Vacancy Estimate, or other estimate or survey satisfactory to the Advisory Agency." LOS ANGELES, CAL., MUN. CODE § 12.5.2 (1979).

41. The following factors are determinative in a finding of significant cumulative effect:

> (a) the number of tenants who are willing and able to purchase a unit in the building; (b) the number of units in the building; (c) the number of units which would be eliminated in case conversion occurred in order to satisfy Municipal Code parking requirements; (d) the adequacy of the relocation assistance plan proposed by the subdivider; and (e) any other factors pertinent to the determination.

Id.

lation passed in Washington, D.C. and Los Angeles may have the effect of prohibiting a particular conversion at any given time, these ordinances are not nearly as restrictive in scope as the absolute moratoriums adopted in other jurisdictions.

Condominium controls have also been under consideration at the federal level. In September 1979, Representative Rosenthal introduced a conversion moratorium bill in the United States House of Representatives.[42] This Bill calls for a three-year moratorium on condominium or cooperative conversions and, although it would not impose an outright ban, it would effectively prohibit conversions by denying the use of federal grants, insurance, "federally related loans"[43] and instruments of interstate commerce in connection with conversions. Penalties for violation would include, for lenders, loss of federal insurance and other federal assistance, and for developers, criminal sanctions of imprisonment (up to five years) and fines (up to $50,000).[44]

The 1979 Bill also provides that during the moratorium period a presidential commission is to be appointed to study problems resulting from conversions and to report its findings and recommendations to Congress. Presumably, action taken on the recommendations would then obviate the need for the moratorium. The bill would, however, operate on a continuing basis by putting pressure on local communities to assume responsibility for policing and possibly prohibiting conversions: the Secretary of Housing and Urban Development is given authority to withhold Community Development Block Grants[45] when he or she determines that a governmental unit has permitted "conversion of residential rental units for low or moderate income households to units for higher income persons . . . unless all of the persons displaced . . . are assured of obtaining decent, safe, and sanitary rental housing with rental charges similar to those units from which such persons were displaced."[46] Because separate threshold findings would be made as a prerequisite to each conversion, the effect of this provision on developers would be similar to that of the governmental approval requirements discussed above.

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42. 1979 Bill, *supra* note 7.

43. Section 105(3) defines a federally related loan to include, *inter alia*, any loan by a lender who is regulated by, or whose deposits are insured by, any federal agency; or any loan made in connection with a federally administered housing program; or any loan to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage Association, or the Federal Home Loan Mortgage Corporation. *Id.* § 105(3).

44. *Id.* §§ 101(b), 103(b).

45. Community Development Block Grants are grants to states and units of general local government authorized by the Secretary of Housing and Urban Development to help finance community development activities in accordance with the Housing and Community Development Act of 1974, Pub. L. No. 93-383, §§ 101-118, 88 Stat. 633 (1974) (codified at 42 U.S.C. §§ 5301-5317 (1976)).

46. 1979 Bill, *supra* note 7, § 121(a). Other provisions of the bill would provide for relocation assistance to displaced tenants, *id.* § 301, and revise the Internal Revenue Code to: (1) treat the profits of conversion as ordinary income rather than capital gains; (2) make certain moving expenses deductible for displaced tenants; and (3) improve depreciation deductions for rehabilitating rental housing, *id.* §§ 401-403.

The crucial question raised by the above analysis of various forms of condominium conversion moratoriums is whether these legislative actions will survive constitutional scrutiny. This issue is addressed next. Given the dearth of court decisions regarding condominium moratoriums themselves, consideration is first directed to the general constitutional restrictions on state land use regulation and the applications of these principles in areas analogous to conversion moratoriums. Some fruitful conclusions are generated by this analysis.

II. PARALLEL CASES: DEVELOPMENT FREEZES AND RENT CONTROLS

The Police Power

Condominium conversion moratoriums, like development freezes and rent control statutes, involve governmental intrusions into private property rights in the interest of protecting the public welfare. Moreover, the imposition of rent controls, development freezes or conversion moratoriums illustrates the government's exercise of its police power to legislate for the enhancement and preservation of the health, welfare and safety of its citizens.[47] It is well established that the police power may be used for these purposes, even when detrimental to private property rights.[48] Consequently, governmental controls on both land use[49] and the financial return derived from land ownership[50] have been widely upheld. The police power is not, however, absolute.

The Taking Clause

The primary constitutional limit on the government's right to control the use and development of private property through the police power is the "taking clause." Part of the fifth amendment, the taking clause provides that "private property [shall not] be taken for public use, without just compensation."[51] This restriction on uncompensated takings has been applied to state and local governments through the fourteenth amendment.[52] In addi-

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47. *See* notes 60-83 & 84-112 and accompanying text *infra*.

48. *See* cases cited in notes 49 & 50 *infra*.

49. *See* Board of Supervisors v. DeGroff Enterprises, Inc., 214 Va. 235, 198 S.E.2d 600 (1973) (the legislative branch of a local government has wide discretion to enact and amend zoning ordinances through exercise of its police power); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (a zoning ordinance that limits the use of private property to its natural uses because of that property's interrelation to contiguous water is not unreasonable or confiscatory).

50. *See* Block v. Hirsh, 256 U.S. 135 (1920) (wartime rent control law upheld); Westchester West No. 2 Ltd. Partnership v. Montgomery County, 276 Md. 448, 348 A.2d 856 (1975) (county rent control law held to be constitutional); People *ex rel.* Durham Realty Corp. v. La Fetra, 230 N.Y. 429, 130 N.E. 601 (state may regulate prices by restricting landlords to collecting only "reasonable rents"), *appeal dismissed*, 257 U.S. 665 (1921).

51. U.S. CONST. amend. V.

52. Chicago, B & Q. R.R. v. Chicago, 166 U.S. 226, 239 (1897).

tion, forty-eight state constitutions contain versions of the taking clause.[53] Thus, the restriction is a significant one.

It is not, however, always clear whether governmental restrictions placed upon land use are merely the legitimate exercise of the police power, not requiring compensation to the landowner, or whether they rise to the level of a taking that is constitutionally impermissible unless the landowner is awarded just compensation. No bright line test has yet been developed to resolve unequivocally the question of whether governmental limitations have so interfered with some incident of land ownership as to require transfer of that incident to the government and compensation to the owner.[54] The latest[55] test was articulated by the United States Supreme Court in *Penn Central Transportation Co. v. New York City*.[56] There, the owners of New York's Grand Central Terminal filed suit charging that the refusal of the New York Landmarks Preservation Commission to approve plans for construction of a fifty-story office tower above the Terminal constituted a taking of property without just compensation. Rejecting the landowner's contention, the Court held that the restrictions placed upon the development of the Terminal did not constitute a taking of the landowner's property for constitutional purposes.[57] In so holding, the Court established the latest criteria for analyzing whether a taking has occurred: it is necessary to focus both on the character of the government's action and on the nature and extent of the interference with the landowner's rights in the parcel as a whole.[58] In *Penn Central*, the Court held that the New York statute did not effect a taking because the government's action did not deny the landowner all its pre-existing property rights and because the landowner was, even under the restriction, still able to generate a reasonable return on its investment.[59]

It is within the purview of the police power, restrained primarily by the taking clause, that government has enacted moratoriums on condominium

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53. *See* Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 470 (1977) [hereinafter cited as Ellickson].

54. In Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978), Justice Brennan readily admitted that the particular circumstances of each case are determinative of whether the restrictions imposed by the government will be rendered invalid by its failure to provide the landowner with just compensation. *Id.* at 124.

55. Numerous theories, tests and approaches have been developed by a variety of commentators to distinguish takings from police power regulations. *See generally* E. FREUND, THE POLICE POWER §· 511, at 546-47 (1904) (the distinction lies in the relation that the affected property bears to the evil addressed); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1183-84 (1967) (articulating four factors deemed critical in classifying government action as a compensable taking); Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 67 (1964) (economic advantages gained by the government and taken from individuals are determinative of whether the act is a taking).

56. 438 U.S. 104 (1978).

57. *Id.* at 138. The Court noted that its holding was limited to the facts.

58. *Id.* at 130-31.

59. *Id.* at 135-36. *See* text accompanying notes 106-149 *infra*.

conversions. Although it is not yet clear, because the judiciary has yet to examine, whether these moratoriums are constitutional under the recent *Penn Central* standards, this Article later undertakes such an analysis. First, however, other constitutional grounds for challenging condominium conversion moratoriums, such as the due process and equal protection clauses, must be considered. Government imposed freezes on development and rent controls offer an opportunity to consider taking clause challenges to government incursions into property rights and to explore other potential constitutional infirmities of condominium conversion moratoriums.

Development Freezes

A moratorium on building permits or utility extensions, like a prohibition of condominium conversions, raises the question of how extensively the state may limit a landowner's right to develop and use his or her property so as to enhance its economic value. Judicial response to the development freeze concept is illustrated by *Construction Industry Association v. City of Petaluma*.[60] There, the city had created an "urban extension line" as a boundary for expansion during the next twenty years. For at least fifteen years the city would neither annex land nor extend utilities beyond that line. Within this perimeter, new construction of buildings with five or more units was to be limited to five hundred units annually. The trial court observed that the freedom to travel, which encompassed the right to enter and live in any municipality in the country, had long been recognized as a fundamental constitutional right that could not be abridged absent a showing of a compelling state interest.[61] The City alleged that its sewer and water systems were unable to accommodate unrestricted population growth and that it had an inherent right to control growth and protect its "small town characteristics" through its zoning power.[62] These interests, the City asserted, were sufficiently compelling to justify the exclusionary expansion line ordinance.[63] The court disagreed, finding as a fact that the City's sewer capacity and water supply were capable of handling more growth than the urban extension line allowed, and holding that where a city's water limitations are self-imposed, based upon restricted population levels, a compelling state interest is absent.[64] Finally, the trial court held that a zoning regulation with the purpose of excluding additional residents in any degree also did not represent a compelling governmental interest.[65]

60. 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

61. *Id.* at 581. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumenstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

62. 375 F. Supp. at 583.

63. *Id.*

64. *Id.* The district court found that the city's sewer treatment facilities were capable of serving between 6,000 and 12,000 more people, and that the city was able to grow at the rate indicated by market and demographic projections without incurring a crisis in its water supply. *Id.* at 578.

65. *Id.* at 586.

On appeal, the Court of Appeals for the Ninth Circuit reversed, and held that the plaintiffs—the construction industry association and landowners—had no standing to claim that the City's plan was an abridgement of the right to travel of third parties.[66] The court of appeals also rejected, for the first time,[67] the plaintiffs' claims that the city plan was arbitrary and unreasonable and thus violated the fourteenth amendment's due process clause.[68] Instead the court sustained the municipality's exercise of its police power to restrict growth through zoning regulations within the concept of the public welfare.[69]

Other courts reviewing development freezes have arrived at like conclusions, in the process shedding some light on factors that determine the constitutionality of such legislation. In *Cappture Realty Corp. v. Board of Adjustment*,[70] the New Jersey Superior Court examined a three-year moratorium (with exceptions available through special permits) on construction in a flood plain. The court concluded that a moratorium for this period was an appropriate exercise of the police power and did not deprive landowners of their property without just compensation.[71] The salient factor in the court's decision was the municipality's close involvement with other governments in a regional flood control project requiring extensive planning. In the court's view, this cooperative process bore a substantial relationship to health, safety and welfare, and the moratorium was a justifiable means of allowing effective planning to proceed.[72]

Similarly, in *Smoke Rise, Inc. v. Washington Suburban Sanitary Commission*,[73] a federal district court reviewed various sewer hookup moratoriums imposed by the Maryland Secretary of Health and Mental Hygiene. The moratoriums were intended to prevent further discharges of raw, inadequately treated sewage into Maryland waters.[74] The court upheld the Health Department's exercise of police power through the sewer moratoriums despite two fifth amendment challenges to their constitutional-

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66. 522 F.2d 897, 905 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

67. The district court considered solely the plaintiffs' challenge based upon the constitutional right to travel, believing it unnecessary to evaluate alternative challenges to the plan's constitutionality either under the commerce clause or under the equal protection clause of the fourteenth amendment. *See id.* at 905 n.8.

68. *Id.* at 908-09.

69. In holding the city's housing and zoning plan constitutional, the court of appeals observed that "[t]he concept of public welfare is broad and inclusive [and] [t]he values it represents are spiritual as well as physical, aesthetic as well as monetary." *Id.* at 906 (citing Berman v. Parker, 348 U.S. 26, 33 (1954)). Accordingly, it was held that the public welfare of Petaluma was served by the enactment of zoning ordinances that effected a development freeze intended to preserve the town's open spaces, low density of population, and small town character, and to ensure orderly and deliberate growth. *Id.* at 909.

70. 133 N.J. Super. 216, 336 A.2d 30 (1975).

71. *Id.* at 221, 336 A.2d at 32-33.

72. *Id.* at 221, 336 A.2d at 33.

73. 400 F. Supp. 1369 (D. Md. 1975).

74. *Id.* at 1373.

ity.[75] In *Smoke Rise*, the plaintiffs first argued that the imposition of the moratoriums constituted a taking of private property without just compensation. In rejecting this contention, the court analyzed the moratoriums under two distinct tests for gauging whether a taking has occurred. Under the traditional test articulated by Professor Freund,[76] it reasoned that the purpose of the moratoriums was to prevent a public harm, not to promote a public gain, and therefore no compensable taking had occurred.[77] Applying a more modern test—that no taking has occurred unless the property is rendered worthless or useless[78] —the court also found a taking to be lacking.[79] The same result would probably have been reached under the newest taking test articulated in *Penn Central*.[80]

The *Smoke Rise* plaintiffs' second fifth amendment challenge was that they were deprived of their property without due process of law because the moratoriums were an unreasonable means for the state to use in achieving its objectives. To resolve this issue, the court measured the reasonableness of the moratoriums as to both their purpose and their duration. Reasoning that a sewer hookup moratorium would help avert further discharges of raw sewage into Maryland waters, the court found the moratorium reasonable in purpose.[81] Reasoning that a five-year period for such a prohibition would be acceptable in view of the scope of the city's sewer problem and noting the interjurisdictional complexity of the sewage treatment problem and the defendant's participation in an ongoing comprehensive planning process, the court also found the moratorium reasonable in duration.[82] Thus, the court concluded that the plaintiffs had not been denied due process under the fifth amendment.[83]

Like the development freezes examined in these cases, a condominium conversion moratorium removes development rights and restricts landowners' use of their property. It is clear, therefore, that the reasoning employed

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75. The court quite properly distinguished the separate clauses of the fifth amendment as addressing two independent issues: "[A] claim of *deprivation* of property without due process cannot be blended as one and the same with the claim that property has been *taken* for public use, without just compensation." *Id.* at 1381 (emphasis in original).

76. *See* E. FREUND, THE POLICE POWER § 511, at 546-47 (1904). Whether a compensable taking has occurred under the Freund test is determined by applying a harm-benefit dichotomy which Professor Freund articulated as follows:

> [I]t may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful. . . . From this results the difference between the power of eminent domain and the police power, that the former recognises [sic] a right to compensation, while the latter on principle does not.

Id.

77. 400 F. Supp. at 1382.

78. *See* Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956, 963 (1st Cir. 1972).

79. 400 F. Supp. at 1383.

80. *See* notes 55-59 and accompanying test *supra*.

81. 400 F. Supp. at 1385.

82. *Id.* at 1386.

83. *Id.* at 1390.

by the courts in *Construction Industry Association, Cappture* and *Smoke Rise*, where the courts repulsed constitutional challenges to development freezes, should be applicable to moratoriums on condominium conversion. Another analogy may be drawn from rent control cases.

Rent Control

Rent control legislation addresses many of the same housing market conditions as conversion moratoriums. Owners of rental buildings subject to either restriction are necessarily precluded from obtaining a higher return on the use of their buildings had such controls not been adopted. During their relatively long history,[84] rent control statutes have been challenged as unconstitutional takings of property without compensation,[85] and as violative of both due process[86] and equal protection.[87] When the statutory restriction is deemed reasonable, however, such challenges have been readily rejected.[88]

Although courts have upheld statutes limiting the rents landlords could charge despite claims that private property has been unconstitutionally taken for public use without just compensation, a variety of approaches to this fifth amendment contention have been taken. In *Teeval Co. v. Stern* ,[89] the New York Appellate Court looked to the purpose underlying the challenged rent control statute—to cope effectively with a housing emergency in the state of New York—and noted that a landlord would only be forced to operate his or her property at a loss "now and then."[90] In light of the statute's purpose and its occasional, not constant, hardship on landlords, the court found justification for its decision that no unconstitutional taking of landlord property had occurred. In an earlier case upholding a rent control provision, *People* ex rel. *Durham Realty Corp. v. La Fetra*,[91] the same court had reasoned differently arriving at the same result. The *La Fetra* court emphasized the point raised by the Freund test,[92] namely, that the right to compensation

84. Rent control statutes were challenged as early as 1921. *See* Block v. Hirsh, 256 U.S. 135 (1921).

85. Teeval Co. v. Stern, 301 N.Y. 346, 93 N.E.2d 884, *cert. denied*, 340 U.S. 876 (1950).

86. Bowles v. Willingham, 321 U.S. 503 (1944).

87. Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948); Marcus Brown Co. v. Feldman, 256 U.S. 170 (1921).

88. *See, e.g.*, Block v. Hirsh, 256 U.S. 135 (1921) (statute allowing tenant to continue occupancy notwithstanding the expiration of lease and establishing a commission to set fair rent charges held to be constitutional); Kragman v. Sullivan, 582 F.2d 131 (1st Cir. 1978) (statute requiring rent board's approval of rent increase held reasonable, deferring to the legislature's judgment that the act was necessary and reasonable); Teeval v. Stern, 301 N.Y. 346, 93 N.E.2d 884, *cert. denied*, 340 U.S. 876 (1950) (rent control statute that reestablished prior rent levels found valid as it was enacted to counteract a passing emergency). *Cf.* United States Trust Co. v. New Jersey, 431 U.S. 1 (1976) (holding that judicial deference to a legislative assessment of reasonableness and necessity is not appropriate when the state's self-interest is at stake).

89. 301 N.Y. 346, 93 N.E.2d 884, *cert. denied*, 340 U.S. 876 (1950).

90. *Id.* at 362, 93 N.E.2d at 890.

91. 231 N.Y. 429, 130 N.E. 601, *error dismissed*, 257 U.S. 665 (1921).

92. *See* note 76 and accompanying text *supra*.

depends upon whether the restriction prevents harm (in which case compensation is not required) or produces a benefit to the public (requiring compensation). The court held that the rent control provision was addressed to curing a potential harm to the public and, thus, was a proper subject for the state's police power unrestrained by the taking clause.[93]

In addition to determining whether the government's exercise of its police power effected a compensable taking, courts have examined rent control statutes to assure compliance with due process standards of reasonableness both in terms of purpose and duration.[94] Following the lead of earlier federal cases,[95] courts have traditionally found the existence of emergency conditions (like a housing scarcity) to be a necessary requirement for and justification of the imposition of rent controls.[96] A few recent cases, however, have departed from the emergency requirement. For example, in *Westchester West No. 2 Ltd. Partnership v. Montgomery County*,[97] the Maryland Supreme Court held that the constitutionality of a rent control statute does not depend solely upon the existence of an emergency shortage in rental housing; rather, it depends upon whether the law, "as an exercise of the state's police power, bears a real and substantial relation to the public health, morals, safety, and welfare of the citizens of [the] state."[98] In *Westchester*, the rising cost of housing and a moratorium restricting new housing construction were cited by the court as factors justifying rent controls.[99] Likewise, the California Supreme Court, in *Birkenfield v. City of Berkeley*,[100] recently eliminated the requirement of showing a "serious public emergency" as a justification for imposition of rent controls, noting that its sole concern was "whether the [legislative] measure reasonably relate[d] to a legitimate governmental purpose."[101] The importance of these recent decisions lies in their recognition that numerous governmental purposes can justify rent control as an exercise of police power.[102] As a result, a broader

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93. 230 N.Y. at 444, 130 N.E. at 606. The public harm abated by the rent control legislation was the practice followed by many landlords of charging oppressively high rents during a period when the "inadequacy of housing facilities in cities had become a matter of world-wide concern . . . ." *Id.* at 438, 130 N.E. at 603-04.

94. *See* Block v. Hirsh, 256 U.S. 135 (1921).

95. *Id.* at 154. Since the Supreme Court's decision in *Block*, it has been settled that rent control, exercised pursuant to the war power, does not deprive landlords of property without due process of law. *See* Wilson v. Brown, 137 F.2d 348 (Emer. Ct. App. 1943); Taylor v. Brown, 137 F.2d 654 (Emer. Ct. App. 1943).

96. *See* Birkenfield v. City of Berkeley, 17 Cal. 3d 129, 156, 550 P.2d 1001, 1020, 130 Cal. Rptr. 465, 485 (1976) (listing the jurisdictions that continue to treat the existence of a grave emergency as a due process prerequisite).

97. 276 Md. 448, 348 A.2d 856 (1975).

98. *Id.* at 463-64, 348 A.2d at 865.

99. *Id.*

100. 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976).

101. *Id.* at 159, 550 P.2d at 1023, 130 Cal. Rptr. at 487.

102. Generally, the reasonableness of the governmental purpose must be demonstrated by at least some legislative fact finding supporting the exercise of police power. As the court stated in

application of rent controls may now be possible, provided such controls meet other constitutional standards.

One such standard is the requirement that rent controls be of reasonable duration. For instance, in *Block v. Hirsch*,[103] a wartime rent restriction of two years was held reasonable by the United States Supreme Court, which found that "[a] limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change."[104] Under modern rent control statutes, procedures for periodic legislative or administrative adjustment of rent ceilings[105] will probably deflect challenges to the duration of the restriction, but in a proper case, a rent control provision could be held to be for an unreasonable term.[106]

The final challenge to the constitutionality of rent control statutes is that unreasonable distinctions drawn by an ordinance constitute a violation of equal protection. The Supreme Court has consistently rejected such challenges, holding instead that legislative classifications are reasonable in view of the rationale for imposing the rent controls. In *Marcus Brown Holding Co. v. Feldman*,[107] the Court upheld the constitutionality of a rent control statute which did not apply to buildings occupied for business purposes, to buildings under construction, or to hotels, finding that "the classification was too obviously justified to need explanation . . . ."[108] The Court, recognizing congressional authority to create exemptions to rent control statutes in *Woods v. Miller Co.*,[109] held that Congress "can select those areas or classes of property where the need seems the greatest."[110] In sum, as long as the classification is reasonable, distinctions drawn by rent control statutes will not be found to contravene the equal protection clause.

Stern and *La Fetra* showed that rent control does not constitute a taking in violation of the fifth amendment, *Westchester* and *Birkenfield* indicated

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Durham, "whether or not a public emergency exists was a question of fact . . . [for] the [l]egislature . . . ." 230 N.Y. 429, 440, 130 N.E. 601, 604 (1921). Nevertheless, in spite of the weight generally accorded to legislative fact finding, Chartleton Corp. v. Sinclair, 264 U.S. 543 (1924), held that the reviewing court can take independent notice of matters of public knowledge, such as new building activity or a diminished need for government employee housing. *Id.* at 547-49. Thus, the underlying facts justifying rent control can either be found by the legislature or noticed by the reviewing court.

103. 256 U.S. 135 (1921).

104. *Id.* at 157.

105. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 40 app., §§ 1-7, -8 (West 1979); New York Local Emergency Housing Rent Control Act, N.Y. UNCONSOL. LAW § 8603 (McKinney 1974) (upheld in 8200 Realty Corp. v. Lindsay, 60 Misc. 2d 248, 304 N.Y.S.2d 384 (1969)); D.C. CODE ENCYCL. §§ 45-1631, -1632 (West 1979).

106. For example, a rent control provision extending beyond the alleviation of the housing shortage that motivated its enactment could be successfully attacked if the plaintiff could meet the burden of showing the absence of a current emergency. *See* Albigese v. Jersey City, 127 N.J. Super. 101, 109, 316 A.2d 483, 490 (1974).

107. 256 U.S. 170 (1921).

108. *Id.* at 199.

109. 333 U.S. 138 (1948).

110. *Id.* at 145.

that the courts will allow government to enact rent control statutes even though an emergency may not exist, and *Woods* revealed the minimal judicial scrutiny accorded classifications drawn by legislative rent control measures. If rent control cases can be analogized to conversion moratoriums, it appears that a properly drawn moratorium will be upheld. Although rent controls and conversion moratoriums are similar devices for rental market protection, their compatibility is not a foregone conclusion. In *Zussman v. Rent Control Board*,[111] a landlord had attempted to evict tenants in his rent-controlled building so that he could convert the building to condominiums. The *Zussman* court held for the landlord, citing the potential suitability of condominium ownership as a low income housing device and concluding that "accommodation of the [Rent Control] Act to a policy of encouraging home ownership in condominium form is not in conflict with its provisions and purposes."[112] It is necessary, therefore, to examine rent control statutes and condominium conversion moratoriums on a case by case basis to determine whether they comply with constitutional mandates.

III. Constitutional Analysis of the Conversion Moratorium

The Taking Clause

The first step in a constitutional analysis of the condominium conversion moratorium is a determination of whether such a moratorium constitutes a taking requiring the government to provide the property owner with just compensation. The recent test for making this determination, established by the Supreme Court in *Penn Central Transportation Co. v. New York City*,[113] requires courts to focus both on the character of the action taken by the government, and on the nature and extent of the interference with rights in the property as a whole.[114]

Under the first prong of this test, the character of the government's action in regulating land use generally can be described in one of two ways: the state can physically invade the property,[115] or can enact a series of regulations as part of a public program.[116] A taking may be more readily found when the interference with property is characterized as a physical invasion.[117] When imposing a conversion moratorium, however, the government acts through a regulatory scheme that prohibits the conversion of

111. 367 Mass. 561, 326 N.E.2d 876 (1975).

112. *Id.* at 567, 326 N.E.2d at 879.

113. 438 U.S. 104, 130-31 (1978).

114. *Id.* For further discussion of *Penn Central* and the Court's establishment of the latest "taking" test, see notes 52-57 and accompanying text *supra*.

115. *See* United States v. Causby, 328 U.S. 256, 262 n.7 (1945) (the Court recognized that the flight of government planes over the property owner's land constituted a use of such land).

116. Among the examples of governmental action through enactment of regulations are land-use regulations, zoning laws, and tax provisions. *See* Penn Central Transp. Co. v. New York City, 438 U.S. at 124-25.

117. *Id.* at 124.

rental units, effecting an intrusion on the landlord's property rights without actual physical invasion of the property itself. Therefore, the application of the first part of the *Penn Central* test to condominium conversion moratoriums indicates that moratoriums do not constitute a taking for which compensation is required.

After determining the character of the government's action, courts must inquire into the nature and extent of the interference with the landowner's rights in the property as a complete parcel. Making this inquiry in the factual setting of *Penn Central*, Justice Brennan focused primarily upon the legislation's economic impact on the landowner's use of the property, stating that it is necessary to determine whether the effect of the legislation was of such a magnitude that "there must be an exercise of eminent domain and compensation to sustain [it]."[118] Consequently, the Court found it pertinent to ascertain whether the landowner was able to obtain a "reasonable return" on his or her investment,[119] and whether the landowner had been denied all uses of his or her pre-existing property rights.[120] The Supreme Court concluded that the application of the New York statute did not effect a "taking" of the landowner's property.[121]

In analyzing the constitutionality of conversion moratoriums in light of the second prong of the *Penn Central* test, it appears that the impact of such legislation may not rise to the level of a taking. A landlord will continue to obtain some return from the rental units he or she owns even if a moratorium is imposed on condominium conversions. In addition, a condominium conversion moratorium does not deny the property owner all use of his or her pre-existing property rights. Therefore, the second step of the *Penn Central* test indicates that a prohibition of condominium conversions probably does not constitute a constitutionally impermissible "taking."

The Supreme Court recently has acknowledged that, as of yet, "no precise rule [exists that] determines when property has been taken."[122] Instead, a variety of factors must be considered: the character of the governmental action,[123] the economic impact of the regulation,[124] its interference with reasonable investment expectations,[125] and the comparative effect on private and public interests.[126] Consequently, although one can draw the preliminary conclusion that condominium conversion moratoriums do not violate the taking clause, courts will necessarily have to analyze the type of statute contested and the facts under which the case is brought in relation to the above mentioned factors to resolve the issue.

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118. Penn Central Transp. Co. v. New York City, 438 U.S. at 136 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).

119. *Id.* at 136.

120. *Id.* at 136-37.

121. *Id.* at 138.

122. Agins v. City of Tiburon, ___ U.S. ___, ___, 100 S.Ct. 2138, 2141 (1980).

123. Penn Central Transp. Co. v. New York City, 438 U.S. at 130.

124. Kaiser Aetna v. United States, 444 U.S 164, 175 (1979).

125. *Id.*

126. Agins v. City Tiburon, ___ U.S. at ___, 100 S.Ct. at 2141.

The constitutionality of a particular conversion moratorium is not, however, guaranteed solely by ascertaining that a taking has not occurred. It is also necessary that the restrictive legislation satisfy due process standards of reasonableness as to purpose and duration as well as an equal protection requirement that the moratorium not contain unreasonable classifications. These prerequisites to a clean bill of constitutional health are examined below.

Due Process Standards of Reasonableness

As the development freeze and rent control cases discussed earlier suggest, restrictions on use and development of private property must satisfy due process standards. Several noteworthy due process issues were raised recently in *Chicago Real Estate Board, Inc. v. City of Chicago*,[127] a challenge to Chicago's conversion moratorium. Specifically, it was argued that condominium conversions are not a proper subject for the police power because ownership of property does not affect its use and thus bears no relationship to the general welfare; that the conversion moratorium was an arbitrary restraint upon alienation and upon the right to acquire and to own property, bearing no reasonable relationship to a legitimate state interest; and, finally, that compensation to would-be converters was required because the private disadvantage incurred outweighed public benefits attributable to the restriction.[128] Unfortunately, because the moratorium expired before trial, the case was dismissed as moot and the court reached no decision on the merits.[129]

Only the first of the three arguments raised in *Chicago Real Estate* has been addressed to any extent by the courts. In a substantial line of cases, state courts have invalidated attempts to regulate condominium development through zoning ordinances enacted under the governments' exercise of the police power.[130] The courts have recognized that although the manner in which property is used may have such an adverse effect on the health, safety and general welfare of the public as to warrant regulation of the use of property, the identity of the owner or the form of ownership of the land bears no legitimate relationship to the use of the property.[131] The courts have found, therefore, that condominium conversions, which merely represent a change in ownership and not a change in use, are not a proper subject for restrictive zoning ordinances.[132]

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127. *See* amended complaint to Chicago Real Estate Bd., Inc. v. City of Chicago, No. 79 C 1284 (N.D. Ill. Apr. 3, 1979) (order granting temporary restraining order).

128. *Id.*

129. No. 79 C 1284 (N.D. Ill. July 26, 1979).

130. *See* cases cited in note 132 *infra*.

131. *See* cases cited in note 132 *infra*.

132. In Kaufman & Broad, Inc. v. Board of Supervisors, 20 Pa. Commw. Ct. 116, 340 A.2d 909 (1975), the court found that condominiums are not uses but are merely a method of expressing realty ownership: "[A] condominium cannot be a use itself. Therefore, the subject of con-

The key to constitutionality of a police power restriction under both the due process and equal protection standards is reasonableness. The goal sought to be achieved through the exercise of police power must be a legitimate subject of governmental power, and the means employed must rationally relate to achievement of that goal.[133] Court decisions on development moratoriums, rent controls, and other police power restrictions offer some hints about how a conversion moratorium might fare under the reasonableness standard.

Reasonableness of Purpose

Probably the central argument of moratorium proponents is that conversion of rental units into condominiums depletes the supply and increases the cost of rental housing units to the detriment of poor and elderly, fixed income tenants. A moratorium, they suggest, allows time for additional rental units to enter the market and breaks the cycle of rising rents and panic condominium buying. Critics of unrestricted conversions assert that it is appropriate to use the police power to assure an adequate choice of housing to serve persons with varying needs and income levels. Whether the courts would agree is not, however, clear, as a sampling of the case law shows.

In *Board of Supervisors v. DeGroff Enterprises, Inc.*,[134] traditional zoning power was held inadequate to support an ordinance requiring developers of fifty or more residential units to commit fifteen percent of the units to low

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dominiums is not a proper subject to raise in these proceedings. If a use is permitted, the municipality cannot regulate the manner of ownership of the legal estate." *Id.* at 120, 340 A.2d at 911. Similarly, in City of Miami Beach v. Arlen King Cole Condominium Ass'n, 302 So. 2d 777 (Fla. Dist. Ct. App. 1974), the court denied the claim of municipal zoning authorities that the conversion of an apartment hotel to condominiums caused the property to lose its status as a pre-existing nonconforming use. The court held that "[c]hanging the type of ownership of real estate upon which a nonconforming use is located will not destroy a valid existing nonconforming use." *Id.* at 779. Finally, in Bridge Park Co. v. Borough of Highland Park, 113 N.J. Super. 219, 273 A.2d 397 (1971), the municipality attempted to block the plaintiff's planned condominium conversion by applying a zoning ordinance restricting the ownership of "garden apartments." The court held, however, that it was beyond the government's power to regulate the ownership of property under the guise of the zoning power. *Id.* at 222, 273 A.2d at 399. In so holding, the court concluded that the word "use" referred to physical use of the property, not to ownership. *Id.* Therefore, a zoning ordinance regulating the use of property could not be applied to regulate forms of property ownership.

133. As a result of the judicial determinations discussed in note 132 *supra*, several states have enacted legislation expressly prohibiting the regulation of condominiums through local land use controls. For example, N.J. STAT. ANN. § 46.8B-29 (West Cum. Supp. 1980) provides: "All laws, ordinances and regulations concerning planning, subdivision or zoning shall be construed and applied with reference to the nature and use of the condominium without regard to the form of ownership." This prohibition on the enactment of discriminatory zoning ordinances based upon the form of ownership was recently sustained in Hampshire House Sponsor Corp. v. Borough of Fort Lee, 172 N.J. Super. 426, 412 A.2d 816 (1979). *See also* FLA. STAT. ANN. § 718.507 (West Cum. Supp. 1980); VA. CODE § 55-79.43 (Cum. Supp. 1980). *But cf.* N.C. GEN. STAT. § 47A-27 (1976) (allowing municipal zoning commissions to adopt supplemental rules and regulations governing condominium projects).

134. 214 Va. 235, 198 S.E.2d 600 (1973).

and moderate income tenants as a prerequisite to rezoning or site plan approval. The Virginia Supreme Court did not question whether providing such housing was a legitimate public purpose, but only whether that purpose could be accomplished through an ordinance resting upon the police power alone. Noting that an earlier ordinance with the opposite impact had been invalidated,[135] and concluding that the effect of that decision was to prohibit socio-economic zoning, the court held that the ordinance in question exceeded the bounds of the police power. In reaching this decision, the court found that the intent of the legislature in enacting the zoning enabling act[136] was to allow only traditional zoning ordinances regulating physical characteristics and tending neither to include nor exclude any particular socio-economic group.[137]

A contrary result was reached in *Southern Burlington County NAACP v. Township of Mount Laurel*.[138] At issue was a township ordinance that allowed only single-family detached dwellings and made no provision for attached townhouses, apartments or mobile homes. Although townhouses and apartments were allowed in planned unit developments, the four such developments that had been approved offered only medium and upper income units. Affirming the trial court's order that the township provide for low and moderate income housing, the New Jersey Supreme Court concluded that a municipality must, in its land use regulations, make possible an appropriate variety and choice of housing.[139] The court reasoned that the authority to regulate land use is encompassed within the state's police power, which is delegated to municipalities by zoning enabling acts. The court stated that police power enactments must conform to constitutional requirements of due process and equal protection; therefore, such statutes must promote the public health, safety, morals or general welfare, and to further the general welfare, a municipality must provide adequate housing for all socio-economic groups. Accordingly, the court held that failure to provide such housing was a facial violation of the constitution and shifted the burden of establishing the ordinance's validity to the municipality.[140]

DeGroff and *Mount Laurel* illustrate the differences among court opinions as to whether the police power can be used to ensure that a community offers housing serving the needs of all income groups. Additional doubt has been cast on the issue by the United States Supreme Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[141]

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135. *Id.* at 237-38, 198 S.E.2d at 601-02 (citing Board of Supervisors v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959), where the court invalidated a zoning ordinance which had been created to exclude low and middle income groups from certain localities).

136. VA. CODE § 15.1-486 (Cum. Supp. 1979). This act permitted any county or municipality to enact zoning ordinances for various purposes.

137. 214 Va. at 238, 198 S.E.2d at 602.

138. 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

139. *Id.* at 174, 336 A.2d at 724.

140. *Id.* at 185, 336 A.2d at 730.

141. 429 U.S. 252 (1977).

where the Court held that absent proof of racially discriminatory intent, a municipality's refusal to rezone property so as to provide multi-family housing for low and moderate income tenants did not constitute a violation of the fourteenth amendment. The *Arlington Heights* decision suggests that a local government need not act affirmatively to remedy a lack of low income housing so long as the lack of such housing is not caused by its own intentional action.[142] At first blush, *Arlington Heights* appears to have little applicability to a conversion moratorium which, in the first place, involves voluntary action rather than inaction and, in the second place, is aimed at socio-economic rather than racial distinctions.[143] The reasoning of the opinion, however, could be extended to protect the rights of the condominium converter who, arguably, does not intend and is not responsible for racially discriminatory housing conditions in the inner city, notwithstanding the effect that his or her actions may have in reducing the supply of low income housing. Nevertheless, both rent control cases and zoning cases like *Mount Laurel* suggest that protecting the low and moderate income housing supply is a reasonable purpose for a police power enactment;[144] this principle would seem to apply to a properly drawn condominium conversion moratorium as well.

Rent control and zoning cases present certain other parallels to the conversion moratorium in terms of reasonableness of purpose. As previously indicated, opponents of condominium conversions often complain that conversions feed the upward spiral of rents and housing costs, ultimately squeezing buyers and renters alike. It can be argued that a conversion moratorium is a legitimate governmental effort to stem inflationary trends in the housing market and the economy in general. Particularly under current unprecedented rates of inflation, a conversion moratorium imposed for the express purpose of halting the steep rise in housing costs might be held a reasonable exercise of police power. On the other hand, the tactic would be subject to the counterargument, applicable to any governmentally-imposed freeze, that the pressure to convert will merely be contained for the moratorium's duration and, when the regulation is lifted or lapses, conversions will burst forth with even greater force.

One additional rationale offered for the conversion moratorium is that time is needed to develop a comprehensive approach to the problem of rental housing shortages. Breathing space to develop a master plan often has been

142. The Court noted that had the Village rezoned to keep out minorities, as opposed to merely rejecting the respondent's application for a zoning change, the case would have been far different. *Id.* at 267.

143. Although the two are certainly related, a more rigorous standard of review clearly applies in cases dealing with racial classifications. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967); Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Korematsu v. United States, 323 U.S. 214, 216 (1944).

144. In Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976), the court of appeals rested its decision sustaining the constitutionality of a zoning plan partly on a finding that the plan offered a new balance of housing to minorities and low and moderate income persons. *Id.* at 908 n.16.

held a legitimate objective of a general development freeze.[145] In *Chicago Real Estate*,[146] the district court had the following to say about planning and conversion restrictions:

> [I]f the City has a plan to resolve or minimize the impact, social and economic, on the community of the rush of conversions of rental units to condominiums, it will have to come forward with that plan, and we can assume that that plan will be within the appropriate exercise of its regulatory power. What is not within the appropriate exercise of its regulatory powers, however is the 40-day moratorium which has been imposed to give the City time to formulate that plan.[147]

It is possible that the *Chicago Real Estate* court meant in this passage that a conversion moratorium merits different treatment than a development freeze where the need for planning time has been regarded as a valid reason for halting development. More likely, however, the court may have been suggesting that, as a matter of procedural due process, a restriction on conversions must be grounded in fact-findings demonstrating that the moratorium relates to resolving a housing problem it purports to address. In other words, at the outset, the requisite plan may simply be to develop a plan of action. This is defensible as long as the legislature has made some fact-findings tending to show that the claimed rental housing shortages actually exist and that the planning to take place during the moratorium is part of the search for a solution.

In sum, if a governmental unit can demonstrate that a restriction on condominium conversions is designed to protect low and moderate income housing supplies, control inflation in housing costs, allow time for comprehensive planning or, in limited cases, prevent overloading of support services,[148] the

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145. *See* Ellickson, *supra* note 53, at 502.

146. *See* notes 128-130 and accompanying text *supra*.

147. No. 79 C 1284 at 9 (N.D. Ill. Apr. 3, 1979) (partial transcript of the proceedings; order granting temporary restraining order).

148. A governmental purpose that has been suggested as a justification for land use regulation, such as a development moratorium, is the continuing obligation of the local government to provide vital support services to growth areas. *See* cases discussed at notes 138-144 *supra*. This argument usually has little applicability to conversion moratoriums because the change in ownership upon conversion of a rental building to a condominium does not alter the need for services, and, in fact, may increase the tax base and therefore improve service capacity. The support service argument may become relevant, however, in very limited cases. In Goldman v. Town of Dennis, 78 Mass. Adv. Sh. 1236, 375 N.E.2d 1212 (1978), the court upheld a zoning bylaw prohibiting conversion of certain nonconforming vacation cottage colonies to single family condominiums unless certain standards, such as minimum lot sizes, were met. The court found that the town "could reasonably believe that conversion of a cottage colony to single family use under condominium type ownership would encourage expansion of use beyond the short summer season." *Id.* at 1238, 375 N.E.2d at 1214. This reasoning would not, however, apply to most conversions in urban areas.

Other cases have held that zoning ordinances may not be applied to condominiums in a discriminatory manner. *See* cases cited in note 33 *supra*. Therefore, it is uncertain whether the governmental purpose of limiting condominium conversions in order to provide support services to growth areas will be a justifiable purpose for enacting zoning regulations pertaining solely to condominium conversions.

restriction will probably be found to be based upon a reasonable purpose and, therefore, held a legitimate exercise of police power.

Reasonableness of Duration

In addition to a reasonable purpose, the strictures of due process require that a land use restriction have a reasonable duration. A moratorium extending indefinitely would be the clearest example of an unconstitutional restraint on alienation. When the restriction is somehow limited in time, the appropriate period may vary widely depending upon the scope of the problem the moratorium was designed to address. In *Golden v. Planning Board of Ramapo*,[149] the court upheld a zoning restriction of up to eighteen years on development of new subdivisions while necessary capital improvements were being installed. In sustaining the amendatory zoning ordinance, the court noted that the restraint was for a definite, though lengthy, term and that its impact on landowners would be mitigated by interim reductions in assessed valuation and the prospect of appreciated value when the improvements were completed.[150] On the other hand, the appropriate duration of a land use restriction would be shorter when the legislative intent is to allow time for development of zoning controls or capital improvement programs based upon comprehensive planning.[151] An appropriate duration for a condominium conversion moratorium would be relatively short because the restriction is more likely to be keyed to planning than to capital facilities construction.[152]

Of course, certain conversion moratorium legislation, like most rent control laws, have built-in controls on duration allowing for periodic reassessment of the need for and the dimensions of the restrictions.[153] In cases of rent controls, this reevaluation is accomplished through periodic review and adjustment of rent ceilings to accord with variations in factors such as the Consumer Price Index or standard operating costs for rental buildings.[154] Conversion restrictions activated when rental vacancy rates fall below a specified level have a similar effect. In short, however the duration of a conversion moratorium is determined, a thoughtfully drawn ordinance set-

149. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

150. *Id.* at 382, 285 N.E.2d at 304, 334 N.Y.S.2d at 155-56.

151. *See* Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369 (D. Md. 1975) (five year moratorium on sewer extensions and private septic tanks upheld); Cappture Realty Corp. v. Board of Adjustment, 133 N.J. Super. 216, 336 A.2d 30 (1975) (four years held to be a reasonable duration for restricting construction in a flood plain).

152. The court in *Smoke Rise* suggested that if a city chooses to impose a moratorium keyed to solve a planning problem, then the city must remedy the problem and end the moratorium with dispatch. 400 F. Supp. at 1386.

153. *See* D.C. CODE ENCYCL. § 5-1282 (Cum Supp. V 1978) (the mayor shall, at least every twelve months, certify the percentage of all privately owned rental units which are not high rent housing accommodations and the vacancy rate for such accommodations; these figures will be used to determine eligibility for condominium conversion).

154. C. RHYNE, W. RHYNE & P. ASCH, MUNICIPALITIES AND MULTIPLE RESIDENTIAL HOUSING: CONDOMINIUMS AND RENT CONTROLS 80-82 (1975).

ting either a definite and short, or an objectively determined term, should meet constitutional standards.

Equal Protection Requirement of Reasonable Classifications

In addition to being reasonable as to both purpose and duration, a valid condominium conversion moratorium must be reasonable in one other respect. Distinctions drawn by the moratorium ordinance (e.g., between newly constructed and conversion condominiums, or among buildings of various sizes) must not be arbitrary to accord with equal protection clause principles. For such legislative classifications to survive under the equal protection clause, they "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[155] Rent control cases suggest that the distinctions drawn in a land use regulation do not violate the fourteenth amendment even though not perfectly related to the statute's purpose as long as they have some rational basis.[156] For instance, rent controls affecting only buildings over a certain size, or only certain types of housing accommodations, have generally been upheld.[157] Special treatment of hotels, buildings occupied by businesses and housing in the process of construction has also been upheld,[158] the latter under the rationale that, in a tight housing market, government has a legitimate interest in encouraging an increase in housing supply.

Of course, all conversion moratoriums draw a distinction between persons desiring to rent and persons desiring to own. Nevertheless, this distinction would apparently withstand scrutiny under the equal protection clause; if protection of low and moderate income housing supplies is a legitimate governmental goal, then special protection for renters—the primary users of such housing—should be constitutional although discriminatory. Several equal protection challenges to condominium conversion moratorium statutes are illustrated by the now-expired Chicago moratorium ordinance.[159]

The Chicago ordinance prohibited for a period of forty days any conversions of buildings having thirty or more units. Contained in this prohibition were some legislative classifications arguably vulnerable to equal protection challenge because of their questionable relationship to a legitimate governmental interest. First, the statute affected those persons owning buildings with over thirty units, but not owners of smaller buildings; second, it differentiated between condominium converters and builders of new condominiums; and finally, it singled out housing consumers desiring to rent and afforded them protection at the expense of consumers desiring to pur-

155. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920), *quoted in* Reed v. Reed, 404 U.S. 71, 76 (1971).

156. *See* notes 107-110 and accompanying text *supra*.

157. *See* Albigese v. City of Jersey City, 127 N.J. Super. 101, 116, 316 A.2d 483, 491 (1974).

158. Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 198-99 (1921).

159. *See* CHICAGO, ILL., MUN. CODE § 100.2-1 to -12 (1977).

chase condominium units. These three distinctions would presumably be found permissible if reasonably related to the purpose for which moratoriums are enacted, namely, to protect the low and moderate income housing supply and assure that rental housing is available to those who need or want it. Classifications distinguishing larger from smaller buildings certainly help to ensure a greater availability of rental housing, and although a line drawn at thirty units seems arbitrary, that demarcation does serve a state interest in affording an administratively convenient way to keep sufficient rental units available.[160]

On the other hand, newly constructed units might reasonably be singled out for favorable treatment in an effort to increase the overall housing supply and thus reduce the pressure placed on existing units by consumer demand. The last legislative classification—between renters and would-be owners—is related to the moratorium's purpose to protect renters, even though it may be overbroad in protecting renters at all income levels. Because equal protection does not require perfectly drawn classifications,[161] all the differentials established by the Chicago moratorium appear defensible. Ultimately, however, whether these relationships are substantial enough to withstand constitutional attack is a question for the trier of fact—and one not resolved in *Chicago Real Estate*, which was dismissed for mootness.[162]

Preemption

A final constitutional basis for challenging a state or federal condominium conversion moratorium is the preemption doctrine. In general, the doctrine of preemption operates when a higher level of government with power to enact legislation in a particular field legislates in such a way as to demonstrate its intent to occupy totally the regulation of that field, or when it passes a statute conflicting with legislation of the lower level government.[163] In either of these cases, legislation of the lower level government

160. Carmichael v. Southern Coal Co., 301 U.S. 495, 511 (1937). *See also* Frontiero v. Richardson, 411 U.S. 677, 690 (1973) (dicta).

161. New Orleans v. Dukes, 472 U.S. 297, 303 (1976). *See also* Katzenbach v. Morgan, 384 U.S. 641 (1966).

162. *See* notes 128-130 and accompanying text *supra*.

163. The doctrine of preemption under federal law stems from the supremacy clause of the United States Constitution:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, para. 2.

Of the numerous United States Supreme Court cases which have dealt with, and in the process explained, the doctrine of preemption, none has so clearly stated when the doctrine operates as Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947). Starting with the assumption, made clear by many previous cases, that the police powers of the states were not to be superseded by federal law in the absence of clear congressional intent to preempt, the Court stated:

> Such [an intent] may be evidenced in several ways. The scheme of federal legislation may be so pervasive as to make reasonable the inference that Congress left no

will be found to be preempted by the higher level's enactments, and therefore void.[164] Because moratoriums have been adopted or considered by all levels of state government[165] and by the federal government,[166] preemption questions may arise.

That preemption should be a legitimate concern of municipalities is evidenced by a recent successful court challenge to a conversion moratorium based upon a preemption argument. In *Claridge House One, Inc. v. Borough of Verona*,[167] the plaintiffs claimed that a Verona municipal ordinance imposing a one-year moratorium on conversions was preempted by a state eviction statute setting forth procedures for eviction of tenants who did not wish to purchase their converted units. In holding the conversion moratorium invalid, the court reasoned that the local prohibition of conversions, which effectively prohibited, for a period of time, the eviction of nonpurchasing tenants, could not coexist with the state statute, the purpose of which was to enable and regulate such evictions.[168]

Legislators are also aware of potential preemption problems. Federal condominium legislation currently under consideration expressly avoids

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> room for the States to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Or the state policy may produce a result inconsistent with the objective of the federal statute.

Id. at 230. *See also* Jones v. Rath Packing Co., 430 U.S. 519 (1977); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973); Perez v. Campbell, 402 U.S. 637 (1971).

The doctrine of preemption also operates between state and local governments. It is the law of numerous states that where the state has delegated to its municipalities the power to enact ordinances concerning certain subject matters, the municipalities may exercise concurrent jurisdiction with the state over those matters, *see, e.g.*, Eanes v. City of Detroit, 279 Mich. 531, 533, 272 N.W. 896, 897 (1937); King v. City of Tulsa, 415 P.2d 606, 611 (Okla. Crim. 1966); Edmonds School Dist. No. 15 v. City of Mountlake Terrace, 77 Wash. 2d 609, 614, 465 P.2d 177, 180 (1970), but that where the municipal law conflicts with a state enactment, the local law may not stand. *See, e.g.*, Rinzler v. Carson, 262 So. 2d 661, 668 (Fla. 1972); Boyle v. Campbell, 450 S.W.2d 265, 268 (Ky. 1970); State *ex rel.* City of Charleston v. Hutchinson, 154 W. Va. 585, 593, 176 S.E.2d 691, 696 (1970). In addition, where a state legislature has enacted laws concerning a matter of state-wide interest, courts in at least two states may find that the state has appropriated the field of regulation and that local government units may not pass legislation concerning that field. *See* City of Tucson v. Arizona Alpha of Sigma Alpha Epsilon, 67 Ariz. 330, 336, 195 P.2d 562, 565 (1948); Summer v. Township of Teaneck, 53 N.J. 548, 554, 251 A.2d 761, 764 (1969).

It should be noted, though, that in some jurisdictions the problem of preemption of municipal law by state enactments is of somewhat less importance in many instances. In these jurisdictions, the regulations of a home-rule municipality are controlling over state statutes in cases of conflict when the municipal law pertains to a purely local matter. *See, e.g.*, Vela v. People, 174 Colo. 465, 466, 484 P.2d 1204, 1205 (1971); City of Springfield v. Ushman, 71 Ill. App. 112, 116, 388 N.E.2d 1357, 1360 (1979); State v. Romich, 67 Idaho 229, 233, 176 P.2d 204, 206 (1946).

164. *See* note 163 *supra*.

165. *See* notes 8 & 9 and accompanying text *supra*.

166. *See* note 169 and accompanying text *infra*; note 7 and accompanying text *supra*.

167. No. 79-2765 (D.N.J. Dec. 28, 1979).

168. *Id.*

preempting the field of tenant protection.[169] On the other hand, the Model Condominium Code being prepared for adoption by state legislatures contains a blanket prohibition of local regulation of the condominium form of ownership.[170] At present, however, the preemption of municipal ordinances by state law will vary from state to state depending upon the particular delegation of power by a state to its municipal corporations, the extent to which each state legislature has asserted control over the field of condominium regulation, and the existence or degree of conflict between state and municipal enactments in this field.[171]

IV. Alternative Approaches to Rental Market Protection

The preceding discussion suggests that a properly drawn condominium conversion moratorium would withstand challenges under the taking, due process and equal protection clauses; however, this is not to imply either that prevailing judicial interpretations leading to these conclusions are satisfactory or that moratoriums are the only, or even the most desirable, means of preserving and protecting rental markets. On the contrary, a number of alternatives to conversion moratoriums exist, including compensation for conversion rights and various regulatory schemes designed to retard conversions or to protect tenants.

Compensation for Conversion Rights

Although compensation of condominium developers for restricting their conversion rights seems a logical means of affording government a free hand in rental market protection, recent court decisions militate against the conclusion that compensation will be compelled under the taking clause. In fact, the United States Supreme Court rejected a property owner's claim for compensation based upon a development restriction in *Penn Central Transportation Co. v. New York City*.[172] There, the owners of Grand Central Terminal had filed suit charging that the City's refusal to approve plans for constructing a fifty story office tower over the Terminal constituted a taking of the property without just compensation. The Court rejected the claim, reasoning that the City's application of its landmarks law to disallow the construction did not interfere with present uses of the Terminal and thus did "not interfere with what must be regarded as Penn Central's primary expectation concerning use of the parcel."[173] Thus, *Penn Central* appears to stand for the proposition that restriction of future development expectations is not compensable if the property continues to have some economic value in its present use.[174]

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169. S. 2719, 96th Cong., 2d Sess. § 508 (1980).
170. *See* Rohan, *Blueprint*, *supra* note 2, at 592.
171. *See* note 163 *supra*.
172. 438 U.S. 104 (1978).
173. *Id.* at 136.
174. *Id.* at 137. *See also* text accompanying notes 56-59 *supra*.

The Supreme Court's more recent decision in *Agins v. City of Tiburon* [175] supports this conclusion. In *Agins*, an owner of a five acre parcel sought compensatory relief from the effect of a zoning modification ordinance that, in essence, limited the use of the parcel either to open space or to a maximum of five single family dwellings and open space uses. The Court denied the property owner's claim for compensation, finding that the zoning ordinance did not effect a taking of the property.[176] In so holding, the Court stated that regardless of whether the aggrieved landowner seeks compensation through eminent domain proceedings or in an action to recover compensation for inverse condemnation,[177] it must be shown that a taking of the property has occurred. *Agins* appears, therefore, to deny property owners compensation proportionate to the restriction of development rights caused by zoning ordinances. Put simply, if it is found that a taking has occurred then the property owner will be fully compensated; however, if the restrictions do not amount to a taking then the property owner will not be compensated in any amount and the restriction will be upheld as a valid exercise of police power.

The conclusion that properly drafted conversion moratoriums probably are not a taking requiring compensation [178] does not mean that some moratoriums [179] or longer term regulatory actions having the effect of restricting condominium conversions might not be found to be a taking. Compensation of would-be converters could both allow government flexibility in regulating the rental housing market and ensure that constitutional conflicts are avoided.[180] Various regulatory schemes—such as pre-approval prohibitions of conversion,[181] bans on conversions in specified zones [182] or outright,

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175. ___ U.S. ___, 100 S.Ct. 2138 (1980).

176. *Id.* at ___, 100 S.Ct. 2140-41.

177. There are several differences between eminent domain and inverse condemnation. Eminent domain refers to a legal proceeding in which a government asserts its authority to condemn property. United States v. Clark, ___ U.S. ___, ___, 100 S.Ct. 1127, 1129 (1980). Inverse condemnation proceedings, on the other hand, are those in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted. *Id.* at ___, 100 S.Ct. at 1130. Eminent domain proceedings generally require affirmative action on the part of the government to condemn the property in question. Inverse condemnation proceedings originate when the government merely uses or occupies the land. This shifts the burden to the landowner to discover the encroachment and to take affirmative steps to recover just compensation. *Id.*

178. *See* text accompanying notes 113-127 *supra*.

179. In fact, in a recent challenge to Chicago's conversion moratorium, the district court found that an across-the-board moratorium on condominium conversions could amount to a taking of property without due process. Chicago Real Estate Bd. v. City of Chicago, No. 79-C1284 (N.D. Ill. Apr. 3, 1979).

180. Of course, government's right to restrict conversions is limited by the due process requirements of reasonableness in purpose and duration. *See* notes 129-154 and accompanying text *supra*.

181. *See, e.g.*, notes 35-41 and accompanying text *supra*.

182. Although the authors are unaware of any jurisdiction in which such scheme has been adopted, disparate geographic zoning has been used and upheld in other contexts.

across-the-board prohibitions[183]—could employ a compensation provision for owners of rental buildings whose development rights are, after all, nullified.

Professor Dunham, an early supporter of the price mechanism as a method of land use allocation,[184] noted that the compensation principle has not been applied in land use regulation, as it has in the case of property taken under the eminent domain theory,[185] because of our constitutional history of requiring that property be destined for a public use, in the physical sense, as a prerequisite to compensation.[186] As noted earlier, however, public use has come to be interpreted as equivalent to public purpose. Restriction of roadside land development to preserve scenic qualities has become as valid a use of police power as appropriation of the land to widen the road. Thus, there is no serious limitation on the power of government to choose to compensate those who suffer loss as a result of a planning decision. Consequently, it can be persuasively argued that government should "have the power and responsibility to charge the individual owner for the increase in value of his property due to a planning scheme (even if the benefit accrues against the will of some of the owners) and the power and duty to compensate those whose property has suffered."[187]

Though not as sweeping as the Dunham formulation, various theories of compensation for partial taking of use and development rights have been suggested. The Freund harm/benefit test is an example.[188] Under that test, the right to compensation arises when land value is affected by regulations designed to confer a public benefit, but not when the aim is to prevent harm. An obvious difficulty with this test is in deciding how to categorize a given regulation. For example, a prohibition of certain uses of a beach bordering an ocean may be designed both to prevent shoreline erosion (and thus prevent a public harm) and to provide public access to waterside amenities (and thus confer a public benefit). Without greater specificity, such a basis for awarding compensation is not particularly helpful.

Certain refinements to the Freund test have been suggested by Professor Ellickson in the form of defenses to the *prima facie* case made out by the harm/benefit distinction.[189] Ellickson suggests that a landowner's claim that prevention of his or her non-harmful land use has led to a significant decrease in the value of his or her land could be defeated by the local govern-

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183. *See* notes 29-34 and accompanying text *supra*.

184. Dunham, *Property, City Planning and Liberty*, in LAW AND LAND 34-38 (C. Haar ed. 1964) [hereinafter cited as Dunham].

185. *Id.* at 36. *See generally* P. NICHOLS, EMINENT DOMAIN §§ 7.1-.21 (3d ed. 1950); Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949).

186. Dunham, *supra* note 184, at 36-37.

187. *Id.* at 36.

188. E. FREUND, THE POLICE POWER § 511, at 546-47 (1904).

189. Ellickson, *supra* note 53, at 419-20.

ment's proof that: (1) the prohibition is efficient, and (2) it should be evident to the owner that "as a taxpayer his own long-term self-interest in avoiding the administrative costs of minor compensatory payments makes it fair to deny him compensation."[190] On the other hand, a landowner could defeat the local government's claim that the use of the land is harmful by proving that the regulatory ordinance is grossly inefficient in that its costs exceed its benefits. Should the landowner prevail, appropriate compensation would be set. Where the regulation delays development, as do moratoriums or ordinances having comparable effects, rather than prevents development altogether, the suggested measure of damages is interest—at conventional rates applied in damage actions—for the period of delay upon a principal amount equal to the diminution in land value caused by the restriction.

Judicial application of these principles is illustrated by *Lomarch Corp. v. Mayor of Englewood*,[191] where a landowner applied for approval to subdivide land designated by the city on its official map as a park. Because the applicable law allowed the city to reserve the land for one year during which it could decide whether to purchase or condemn, the New Jersey Supreme Court noted that the city's action had the effect of a one year freeze on development. Thus, the court found that a taking had occurred and that the city had an implied duty to pay adequate compensation to the landowner for the temporary taking and deprivation of use.[192] Compensation was set at the value of a one-year option to purchase the parcel, a sum which would, at a minimum, reflect carrying charges such as taxes.

The reasoning suggested by Professor Ellickson and applied in *Lomarch* transfers easily to condominium conversion moratoriums or long-term ordinances that have like effects on conversion. The diminution in value of the property caused by the city's regulation would be the difference between the value of the property as a rental building and as a condominium. Compensation, then, would equal a reasonable return on that amount for the term of the conversion prohibition. This approach would have the advantage of allowing municipalities to regulate conversions while at the same time forcing them to recognize the costs of that regulation. Additionally, developers would be given an incentive to keep their buildings operative for the regulatory period, even when faced with rising operating costs. Finally, an award based upon diminution in value due to the moratorium would not compensate owners for any loss of value due to cessation of operations or decreased maintenance expenditures and, thus, would also tend to encourage maintenance of existing rental housing.

Unrestricted Conversion with Tenant Protection

Short of passing a moratorium on condominium conversions, or perhaps as an outgrowth of studies made during a moratorium period, many municipal

190. *Id.* at 419.
191. 51 N.J. 108, 237 A.2d 881 (1968).
192. *Id.* at 113, 237 A.2d at 884.

and state governments have allowed conversions to proceed unrestricted but have concurrently enacted provisions that embody tenant and unit buyer protections.[193] A bill recently passed by the United States Senate contains representative provisions.[194] First, it contains an anti-fraud provision designed to protect against false or misleading sales approaches.[195] Second, it requires developers in conversions to warrant any repairs or improvements they make in the building for a one year period.[196] Third, it calls for 120 days' notice to tenants of the developer's intent to convert, during which time the tenant cannot be evicted except for cause.[197] Fourth, it grants tenants a 90-day right of first refusal to purchase their units.[198] Finally, it requires developers to provide tenants with an engineering report on the building's structural and mechanical systems and their expected useful life as well as a list of uncured building code violations.[199]

All of these techniques, as well as similar ones enacted locally,[200] are possible alternatives to condominium conversion moratoriums. They have in common the fact that they leave rental housing supply conditions to the free play of market forces while focusing on curing some of the ill effects created by conversions. To conversion proponents, such an approach is clearly preferable to those (like moratoriums) which operate by direct governmental manipulation of the housing market, even though its effect may be to retard severely condominium conversion.[201]

Alternative Methods of Condominium Conversion Regulation

A condominium conversion moratorium is, of course, designed to protect the low and moderate income housing market. The alternatives to moratoriums already discussed are extremes: on the one hand there is total control and denial of conversion rights by the government, and on the other

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193. *See* note 200 *infra*.

194. S. 2719, 96th Cong., 2d Sess. (1980) (titled the Housing and Community Development Act of 1980, passed by the Senate on June 21, 1980).

195. *Id.* § 505(a).

196. *Id.* § 506(a)(1).

197. *Id.* § 506(a)(2).

198. *Id.* § 507(a).

199. *Id.*

200. Other regulatory responses include ordinances that prohibit eviction of tenants of rental buildings merely for the purpose of converting the building to condominiums (*see* BROOKLINE, MASS., BY-LAWS, art. XXXVLLL, § 9; Grace v. Town of Brookline, ___ Mass. ___, 399 N.E.2d 1038 (1979)), requirements that a certain percentage of tenants agree to a proposed conversion (*see* D.C. CODE ENCYCL. §§ 5-1281, -1282 (West Cum. Supp. 1978)), and ordinances that tie permissible conversion to a regional vacancy rate (*see* N.Y. GEN. BUS. LAW § 352-eeee (McKinney Cum. Supp. 1979)). For a comprehensive discussion of these regulatory schemes, see Comment, *The Condominium Conversion Problem: Causes and Solutions*, 1980 DUKE L.J. 306, 320-30.

201. *See, e.g.*, Grace v. Town of Brookline, ___ Mass. ___, 399 N.E.2d 1038 (1979) (upholding ordinance that banned eviction of rental tenants in converting buildings and noting that this ordinance would retard the pace of conversions).

there is the unrestrained right to convert with government protection of tenants and consumers. In the middle ground are a number of alternatives to moratoriums that would equally effectively guard against erosion of rental markets by retarding, but not prohibiting, condominium conversions.

One obvious approach is for government to create tax incentives for owners either to maintain their buildings as rentals or to sell the units at prices that low and moderate income buyers can afford.[202] The incentive might operate through property tax mechanisms, such as increased assessment rates for condominiums or tax breaks for owners of low and moderate income rental properties. The income tax law could provide other incentives. A bill recently introduced in the United States Senate propounds a two-pronged approach.[203] First, recognizing that condominium prices are driven up as most residential rental building owners are forced to sell to professional condominium converters to avoid ordinary income tax treatment,[204] the bill would allow capital gains treatment to a landlord on the sale of his or her building to tenants, or to any other party where the terms and conditions of the conversion had been negotiated with a tenants' organization.[205] Second, the bill would encourage reinvestment of the seller's proceeds in residential property by allowing him or her to defer up to one-half of the gain on such a sale for the portion of the proceeds reinvested.[206] Excise taxes on the transfers of units as condominiums have also been proposed and adopted.[207]

Another alternative means of preserving the rental housing stock is through legislation allowing only partial conversions whereby developers are required to maintain a certain number of units as rentals after conversion. This approach would seem consistent with the reasoning in *Southern Burlington County NAACP v. Township of Mount Laurel*.[208] It raises problems, however, because the goals of owners and of renters may be incompatible and because the developer must be prepared to assume a long-term role as an absentee landlord.

To assure minimum displacement of renters, local governments might also require approval by a specified percentage of tenants as a prerequisite to conversion. For example, the City of San Francisco allows only those conversions approved by at least thirty-five percent of the building's tenants.[209]

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202. Converting landowners often offer units to tenants at reduced prices, *see Some Tenants Snap Up Co-ops at Discount Prices*, N.Y. Times, Dec. 9, 1979, § 8, at 1, col. 1, but this does not necessarily mean that these prices are so reduced that low or moderate income buyers can afford them.

203. S. 2969, 96th Cong., 2d Sess. (1980) (bill entitled Real Estate Construction and Retation Tax Incentives Act of 1980); 126 CONG. REC. S9848 (daily ed. July 24, 1980).

204. *See* 126 CONG. REC. S9847 (daily ed. July 24, 1980) (remarks of Sen. Williams).

205. *Id.* at S9847-48.

206. *Id.*

207. *See* Mansfield, *County Is Asked to Tax Condominium Conversions*, Washington Post, Nov. 3, 1979, § C, at 1, col. 5 (discussed in Comment, *The Condominium Conversion Problem: Causes and Solutions*, 1980 DUKE L.J. 307, 327.

208. *See* notes 138-140 and accompanying text *supra*.

209. *See* Rosenthal remarks, *supra* note 3, at H7348.

New York City also has enacted a hybrid form of the approval mechanism.[210] There, a developer who plans to evict nonpurchasing tenants must obtain the consent of thirty-five percent of the tenants to purchase their apartments before conversion.[211] A potential problem with the tenant approval approach is the possibility of landlord harassment and intimidation of nonconsenting tenants. In addition, a mechanism for conversion control based solely upon tenant approvals has a somewhat haphazard impact on areawide housing goals.

A final alternative for governments seeking rental market protection is to require approval of a planning commission or other governmental agency as a precondition to conversion, with the standards for approval being such factors as: preservation of a mix of housing types and of rental versus owner occupied units; assurance of adequate low and moderate income housing; and prevention of displacement and neighborhood disruption.[212] Examples of this type of legislation are found in several California communities, including Concord, Pleasant Hill and Walnut Creek.[213] These laws function somewhat like zoning ordinances and present similar difficulties in interpreting the standards in particular cases.

V. CONCLUSION

This Article has suggested that a carefully drafted conversion moratorium is likely to be upheld as constitutional as long as it is reasonable in purpose and duration. Although the alternative techniques discussed in the preceding section might be more desirable, the rent control and development freeze cases suggest that a properly drawn moratorium will be an available mechanism in the future for those who take the position that rental markets can benefit from direct government regulation. Several principles have emerged from this analysis as potentially important elements of a moratorium which is both effective and constitutional.

First, because the purpose of the moratorium is to protect the rental housing market, it should be applied, if at all, at the local level. Large scale efforts, such as the Rosenthal proposal for a national moratorium, do not adequately recognize the fact that rental markets are predominantly local. For consumers of rental housing, the market is citywide or metropolitan, rather than national. Therefore, a nationwide or even statewide moratorium is probably too broad-brushed a technique to be both effective and reasonable under the constitutional standards.

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210. New York City Rent Stabilization Law, § YY51-6.0(c)(9)(a) of the Administrative Code of the City of New York, *as codified in*, UNCONSOL. LAWS (65) § YY51-6.0(c)(9)(a).

211. *Id.*

212. *See Condominium Conversion: Options for Tenant and Rental Market Protection: Hearings on S.612 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs*, 96th Cong., 1st Sess. 164-66 (1979).

213. *Id.*

Second, a conversion moratorium triggered by some measure of rental housing supply, such as the rental vacancy ratio, is probably more effective and more likely to be constitutional than an outright moratorium. A statistically based ordinance contains built-in assurances that both its purpose and its duration are reasonable. A precondition to the institution of the conversion moratorium is fact-finding supporting such a prohibition. Consequently, the regulation is activated or lifted, as the case may be, according to the occurrence of the relevant conditions.

To be effective, regulation of condominium conversions must be part of a larger housing policy of assuring adequate low and moderate income housing and must be tailored to local housing needs and conditions. Those who would advocate moratoriums on conversions without adequate fact-finding should take care, lest, by applying too blunt an instrument, they cripple what may be one of the most positive and healthful trends in urban residential real estate in recent decades.