Government Regulation of Condominium Conversion

Robert M. Schlein
I. INTRODUCTION

The condominium form of ownership,¹ virtually unknown in the United States twenty years ago,² has become an important seg-

* Staff Member, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

¹ One definition of “condominium” is found in the California condominium statute.

A condominium is an estate in real property consisting of an undivided interest in common in a portion of a parcel of real property together with a separate interest in space in a residential, industrial or commercial building on such real property, such as an apartment, office or store. A condominium may include in addition a separate interest in other portions of such real property.

CAL. CIV. CODE § 783 (West Supp. 1979). “Condominium” may also be defined in a specifically residential context as:

Individual ownership in fee simple of a one-family unit in a multifamily structure coupled with ownership of an undivided interest in the land and in all other parts of the structure held in common with all of the other owners of one-family units.

RAMSEY, CONDOMINIUM: THE NEW LOOK IN CO-OPS 3 (1961) quoted in Cribbet, Condominium—Home Ownership for Megalopolis?, 61 MICH. L. REV. 1207, 1209 (1963). This article uses “condominium” to represent a form of real estate ownership characterized by the inseparable combination of two distinct property interests: the individual ownership of dwelling space coupled with an undivided interest in common areas. “Unit” will refer only to the dwelling space owned in fee simple.

This article does not specifically deal with cooperatives, where a building is owned by a corporation whose shareholders are the residents of the building. These shareholders lease their apartments from the corporation and pay rent calculated to maintain the building. Condominium ownership offers greater financial flexibility for residents and for lending institutions because each unit may be mortgaged separately.

ment of the residential real estate market. For all fifty states now have condominium statutes prescribing procedures for establishing and maintaining condominium developments. For many persons seeking shelter, condominiums combine the best features of apartment living and home ownership.

Condominiums may be established in new, suburban construction, with clusters of townhouse units situated on large tracts of land with common facilities, including swimming pools and health clubs. New high-rise construction also accommodates this form of ownership in the city and the suburbs. In addition, rental apartments in existing buildings can be sold as condominiums, with the apartment/unit owners receiving undivided interests in common areas and facilities and managing the building through an association. The sale of rental apartments in this fashion is known as "condominium conversion."

If a landlord decides to convert a rental apartment building, he may offer his tenants the opportunity to purchase the apartments they inhabit before the apartments are offered for sale to the general public. If the tenant declines the offer, the landlord will attempt to sell the unit to someone else, and if there are readily available buyers the non-purchasing tenant will be evicted as quickly as possible. If many buildings in a community are undergoing the same process, the amount of available rental housing is reduced, and the displaced tenants have no place to move. Senator William Proxmire has called this dislocation "the most intractable of all the problems spawned by the condominium boom."

This article concerns state and municipal efforts to regulate condominium conversion for the protection of tenants, first discussing the characteristics of condominiums and their advantages and disadvantages to individuals and to the urban environment. Attention will then focus on attempts by the town of Brookline, Massachusetts, to restrict condominium conversion, and on Grace v. Town of

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* A list of citations to condominium statutes is found in 1A P. Rohan & M. Reskin, Condominium Law and Practice app-1 (1979).

**Brookline**, the recent Massachusetts Supreme Judicial Court decision upholding a 1978 Brookline by-law, which regulated conversion. The article will then proceed to inquire whether non-compensatory government regulation of condominium conversion may effect a "taking" of property under the Fifth Amendment, requiring the payment of compensation. Finally, the New York state condominium conversion statutes will be described as an example of state-wide regulation which attempts to balance the interests of tenants with the needs of landlords more comprehensively than is possible under a local, piecemeal approach.

### II. Condominiums

#### A. Policy Aspects of Condominium Conversion

Condominium conversion is an issue involving difficult policy questions which must be considered before a decision can be reached as to whether or how conversion should be regulated. Condominiums offer significant advantages to individuals and to the environment in which they exist, yet their promotion causes hardship to others. The goal of any sound regulatory scheme is to minimize the hardships while realizing the benefits of conversion.

A major factor favoring conversion is the significant financial advantages which accrue to a condominium owner. Condominiums are a form of real estate and in a favorable market are a profitable investment. As an owner pays off the mortgage used to purchase the dwelling, he builds an increment of value above the remaining indebtedness. This growing increment is a financial asset, to be realized on the resale of the unit or to be used as security for new

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* While condominium conversion affects cities throughout the nation, each situation is unique because it is shaped by local politics and statutory provisions. The particular situation in Brookline is presented as one example of the context of the problem and its resolution.

* The government may be found to have appropriated the use of private property by regulation. See text at notes 97-112 infra.


* A good example of a favorable real estate market may be found in Brookline, Massachusetts, the Boston suburb whose experience with condominium conversion regulation is described in the text at notes 34-96 infra. The cost of an average home in Brookline rose 86 percent between 1970 and 1979. HARBRIDGE HOUSE, INC., CONDOMINIUM CONVERSION IN BROOKLINE: AN ANALYSIS OF HOW CONVERSIONS TAKE PLACE IN BROOKLINE, AND OF HOW THEY AFFECT THE TOWN'S RESIDENTS AND ITS FISCAL CONDITION IV-14 (1979) (hereinafter cited as HARBRIDGE HOUSE, INC.).
loans. The federal government subsidizes condominium ownership, as it subsidizes all home ownership, by allowing the deduction of payments for mortgage interest and property taxes from the calculation of taxable income. These deductions are not available to renters.

The psychological value of home ownership is important as well. Urban areas have few single family houses, and condominiums may provide the only means for an individual who wishes to live in the city to own his own home. A survey of condominium purchasers in one community has concluded: "It seems clear... that condominiums are seen by purchasers as filling one of the most basic desires in American society—the desire to achieve the security and stability of home ownership."

Cities and towns may also benefit from condominium conversion. Conversion tends to increase the tax base because the units in a building are assessed separately at figures that aggregate far more than the value of the building as a rental property. Other benefits of condominium conversion cannot be measured so precisely. Neighborhood stability may be promoted, as residents tend to stay longer in units they own rather than rent. Pride of ownership may lead to better maintenance of the buildings and lessen deterioration of the housing stock of a city or town. One author in the field has concluded: "It is increasingly apparent that occupier ownership in the form of cooperatives and condominiums offers the best long range solution to the problem of urban decay."
Government subsidy of condominiums might provide these advantages to low-income families and their neighborhoods and be a viable solution to the difficulties of public housing. 17

The benefits of condominium conversion must be balanced against formidable disadvantages. First, the very high return on investment 18 accruing to developers causes those with sufficient capital to try to convert as many buildings as they can and to sell them as quickly as possible. Unscrupulous developers may therefore not disclose important information on the condition of the converted building or on financing, or may engage in high-pressure sales tactics. 19 Second, tenants residing in the building at the time it is converted may not wish to purchase their apartments because they do not plan to remain in the neighborhood for a long period or do not like their apartments enough to justify a large expenditure of funds. More important, tenants often simply cannot afford to purchase their apartments. Mortgage and property tax payments are significantly higher than rent on the same unit. 20 While income tax deductions may bring the total cost within reach, the purchaser must make payments each month on mortgage and taxes, and not realize the income tax benefits of ownership until he receives a refund from the Internal Revenue Service the following year. In addition, the savings resulting from an income tax deduction are less for taxpayers with lower incomes than for those with high incomes, 21 who can more likely afford to purchase in the first instance.

These policy considerations all are present whenever a city or town decides to regulate condominium conversions. Before this ar-

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18 A study of condominium conversion in Brookline prepared for the Board of Selectmen found an average 20 percent profit to the developer before taxes. Harbridge House, Inc., supra note 10, at V-23.

19 See Barber, The Condominium Conspiracy, Playboy, Nov., 1979, at 140.

20 The average monthly carrying cost after taxes for apartments which had an average rent of $345 per month before conversion was $481 for a married couple filing jointly. Harbridge House, Inc., supra note 10, at III-64.

article turns to a discussion of one community's experience with condominium conversion regulation, an understanding of the legal structure on which condominiums are built is necessary.

B. Condominiums in Statutes and Common Law

When a person buys an apartment, he actually acquires two pieces of property joined together. The purchaser is the sole owner of the apartment itself, with the boundaries usually set by a description in the condominium master deed, and is a co-owner with the other purchasers of the common areas and facilities which comprise the rest of the property. These facilities include the hallways, elevators, and plumbing and heating systems, and may include the land on which the building is situated. An association of owners, governed by its own by-laws, maintains the commonly-owned property. The unit owners pay a fee to the association for this maintenance, and are liable for assessment for extraordinary repairs undertaken by the association.

This arrangement is provided for by statute in all fifty states. The condominium statutes set out procedures for the creation of condominiums, a system for describing the units within a building, and provide for the continuing administration of the building by the association. The statutes also may include provisions for such matters as liens on individual units for overdue association fees.

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22 See note 1 supra. Three documents recorded at the local registry of deeds define the characteristics of a condominium. The first is the condominium declaration, or master deed, which submits the entire property to the provisions of the applicable state condominium statute, describes the property, and describes the units it contains. Second, there is the unit deed which is the instrument that conveys an individual unit to a purchaser. Finally, the by-laws of the condominium are the rules by which the owners agree to manage the property. See 1 P. ROHAN & M. RESKIN, CONDOMINIUM LAW AND PRACTICE § 7.02-.04 (1978).

23 See note 22 supra. The following language is from a sample condominium declaration:

"Each Unit consists of the space:

(i) bounded by the walls, floors and ceilings of such Unit as shown on the Condominium Plat, provided, however, that the wall, floor and ceiling materials, other than the finished surface thereof (e.g., paint, wallcoverings), shall be Common Elements. . . . (emphasis in original). Lippman, Drafting the Condominium Declaration and Bylaws, in PRACTISING LAW INSTITUTE, CONVERTING RENTAL HOUSING INTO CONDOMINIUMS 39, 62 (1975) (Real Estate Law and Practice Course Handbook Series, No. 107).

24 Condominiums may be created on leased land. See 1A P. ROHAN & M. RESKIN, CONDOMINIUM LAW AND PRACTICE ch. 19 (1978).


26 See note 4 supra.

27 The statutes specify the required contents of the condominium declaration, the by-laws, and the unit deeds described in note 22 supra.
and assessments, the insurance required to be maintained for the common areas, and disposition of the property if the building is destroyed. The statutes' importance is to simplify and make workable this complex form of real estate ownership.

The characteristics of condominiums described above may be created without a condominium statute, using the common law estates in land. The drafting problems are confusing, however, and it is easier to convey condominiums by reference to an enabling statute. Mortgage lenders and title insurance companies may not allow funds to be released for condominium purchases without the regularity provided by a condominium statute.

To convey a condominium at common law would require that the unit be described precisely in an individual deed, with a separate deed needed to convey the co-ownership interest in the common area. Such deeds would necessarily be quite long and expensive to produce since they could not be in a standard form, but would have to be different for each building. Provision would also have to be made for common management and other matters ordinarily covered by statute.

It is within the context of the above legal and policy considerations that cities and towns make decisions on condominium conversion regulation. Before evaluating the constitutional limitations, if any, on such regulation, the power of a municipality to deal independently with condominium conversion will be examined by discussing in detail the history of attempted condominium conversion control in Brookline, Massachusetts.

III. EVICTION CONTROL IN BROOKLINE, MASSACHUSETTS

The Boston metropolitan area is characterized by a large number of communities which, while starting out as distinct localities, have tended to merge visually as the population of the region has grown. Municipal boundaries, however, have not been altered and local governmental entities still act with considerable indepen-
The Town of Brookline is a good example. Being both convenient to downtown Boston and a desirable place to live, Brookline has been sharply affected by the growing popularity of condominiums. Landlords who are unsatisfied with the regulated return on their investment in apartment buildings under rent control have been seeking to sell to eager condominium buyers. Long-time elderly and low-income residents are unwilling or unable to purchase their units, and Brookline has responded to the problem by restricting evictions for condominium conversion.

Regulation of the landlord-tenant relationship has been a persistent and controversial issue in Brookline as the town has sought to protect its residents from unreasonable evictions and rents. While condominium conversion is a comparatively recent cause of tenant eviction, the town has regulated rents and evictions within its borders since 1969. Court decisions involving the power of the town to determine the permissible grounds for evictions in the rent control context are directly relevant to the present authority of Brookline to regulate evictions for condominium conversion because the same authority, exercised through the local rent control by-law, is used to regulate conversion-related evictions. Before continuing to those cases, a general understanding of the scope of municipal authority in Massachusetts is necessary.

Prior to 1966, municipal power in Massachusetts was in accord with "Dillon's Rule," which stated that a municipality could regulate local matters only pursuant to an express grant of authority from the state legislature (also known in Massachusetts as the

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44 In 1973, 100 to 150 apartments were being converted to condominiums each year out of approximately 11,000 apartments under rent control. In 1977, the rate of conversion had risen to about 500 units annually. Selectmen's Advisory Committee Recommendation in Record Before Brookline Special Town Meeting (July 25, 1978).

45 Brookline has the highest percentage of elderly residents in the state. Id.

46 Answer of the Justices, 356 Mass. 769, 770-71, 250 N.E.2d 450, 452 (1969) (declined to render advisory opinion to state legislature as to home-rule power of municipality to adopt rent control for want of a "solemn occasion").

The following section is known as "Dillon's Rule":

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensible. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.

1 J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237 (5th ed. 1911) (emphasis in original).
General Court). A court would not uphold a by-law or ordinance unless the municipality could show such authority to pass the law.\textsuperscript{37} Cities and towns were not considered an independent level of government, but were subordinate agencies of the state government, administering delegated authority.\textsuperscript{38} General enabling legislation passed by the legislature granted all the cities and towns in the state the authority to regulate a particular matter, while special enabling legislation permitted one or more named municipalities to assume control over a situation which affected them particularly. This close state supervision of local affairs was a heavy burden on the legislature.\textsuperscript{39}

In 1966 the Massachusetts electorate approved amendment article 89,\textsuperscript{40} which substantially modified the state's system of municipal authority by establishing "home rule."\textsuperscript{41} The stated intent of the amendment was to "grant and confirm to the people of every city and town the right of self-government in local matters . . . ."\textsuperscript{42} Section 6 of the amendment permitted cities and towns to exercise any power the General Court could confer on them so long as it was not inconsistent with the state constitution or the general laws of the state.\textsuperscript{43} This broad grant was limited to a great degree by section 7, which specifically excluded the power to regulate

\textsuperscript{38} Id.
\textsuperscript{39} In four years surveyed, nearly 20 percent of the 15,809 bills introduced in the General Court were related to the affairs of cities and towns. 14 ANN. SURVEY OF MASS. LAW § 16.1, n.1 (1968).
\textsuperscript{40} MASS. CONST. amend. art. 89.

Home rule legislation is different in each state, and a survey of every jurisdiction is beyond the scope of this article. See 2 R. 
EICKHOFF 
& M. MEIER, THE LAW OF MUNICIPAL CORPORATIONS BY EUGENE McQUILLIN §§ 4.28-.29, 4.82-.83, 9.08-9.08(c) (3d. ed. 1979), and 

The Massachusetts home rule amendment is described in detail in this article because of its importance in the cases discussed. See MASS. CONST. amend. art. 89. It is also representative of home rule legislation, with language taken directly from the American Municipal Association's Model Act. See Sandalow, supra, at 675-76.

\textsuperscript{42} MASS. CONST. amend. art. 89, § 1.

\textsuperscript{43} Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter.

MASS. CONST. amend. art. 89, § 6.
most elections, to tax, to borrow money, to dispose of park land, to enact civil law, or to define or punish a felony.\textsuperscript{44} For all other functions, however, municipalities had the power to independently pass law unless otherwise restricted, a reversal of the old policy of not having the power to pass law unless authorized.

A. Regulation of Rents and Evictions Under Home Rule

Brookline sought to use the new power conferred by the home rule amendment to stabilize its rental housing market. The town's citizens were well aware of the demand for apartments in their neighborhoods and wanted to prevent displacement caused by landlords seeking unreasonable rents. In June, 1969, the Town Meeting voted to adopt a rent control by-law under the home rule power granted by amendment article 89.\textsuperscript{45}

A Brookline landlord brought an action to strike down the by-law as exceeding the power of the town.\textsuperscript{46} The landlord argued that the power to regulate rents and evictions was withheld from cities and towns by the limitation imposed by section 7(5) of amendment article 89,\textsuperscript{47} which prohibits a municipality from enacting civil law governing a civil relationship, except as incident to an independent municipal power.\textsuperscript{48} The town urged that the authority over rent and evictions was included in the broad grant of power contained in section 6, which was not circumscribed in this instance by the limits of section 7.\textsuperscript{49}

The Supreme Judicial Court of Massachusetts, affirming an interlocutory decree below, held in \textit{Marshal House, Inc. v. Rent Review & Grievance Board of Brookline}\textsuperscript{50} that the authority to regulate rents and evictions was not within the power of the town. The court used a two-part analysis: it sought first to determine if the by-law was a civil law governing a civil relationship, and second, if

\begin{itemize}
  \item \textsuperscript{44} Id. § 7.
  \item \textsuperscript{45} Marshal House, Inc. v. Rent Review & Grievance Bd. of Brookline, 357 Mass. 709, 710, 712, 260 N.E.2d 200, 202, 203 (1970).
  \item \textsuperscript{46} Id. at 709, 260 N.E.2d at 200.
  \item \textsuperscript{47} Nothing in this article shall be deemed to grant to any city or town the power to . . . enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power . . . .
  \textsuperscript{MASS. CONST. amend. art. 89, § 7.}
  \item \textsuperscript{48} Marshal House, Inc. v. Rent Review & Grievance Bd. of Brookline, 357 Mass. 709, 712, 260 N.E.2d 200, 205 (1970).
  \item \textsuperscript{49} Id.
  \item \textsuperscript{50} 357 Mass. 709, 260 N.E.2d 200 (1970).
\end{itemize}
it was such law, whether the passage of the by-law was incident to an independent municipal power. The court considered the meaning of section 7(5) in light of its legislative history and found that its language was to be construed broadly and prohibited municipalities from legislating on some matters, even though they were not included in existing state law.\(^5\) Continuing to the second question, whether the by-law was incident to the town’s independent police power to protect the health, welfare, and safety of its citizens, the court found that while some aspects of the landlord-tenant relationship might be regulated by the town for health and safety reasons, rent control was an independent objective, and not part of the municipal police power.\(^6\) Rent control was thus not incident to an independent municipal power, and was a civil law affecting a civil relationship. The court therefore held that Brookline’s by-law was within the prohibition of section 7(5) and that rents could not be regulated by a city or town absent express enabling legislation from the state.\(^7\)

**B. Condominium Conversion Regulation Under the General Rent Control Statute**

The state legislature provided the needed express enabling legislation shortly after *Marshal House, Inc. v. Rent Review & Grievance Board of Brookline* was decided, a general rent control statute\(^8\) for cities and towns with populations greater than fifty thousand persons, effective in individual municipalities upon acceptance by their governing bodies.\(^9\) The statute prohibited evictions from rent-controlled units except on certain grounds set forth in the law. Two permissible grounds for evictions of importance to this discussion were: first, eviction because the landlord or his family sought to occupy the unit, and second, eviction for a “just

\(^5\) *Id.* at 713-16, 260 N.E.2d at 204-05.

\(^6\) *Id.* at 718, 260 N.E.2d at 207.

\(^7\) *Id.* at 719-20, 260 N.E.2d at 207-08.


\(^9\) When a statute is to take effect upon its acceptance by a city or town, the acceptance is made by a vote of the city council, in a city, or by a majority vote of the town meeting, in a town. Mass. Gen. Laws Ann. ch. 4, § 4 (West Supp. 1979).
Brookline accepted rent control pursuant to this general rent control statute, and in August, 1972, its rent control board promulgated guidelines which were to be met before certificates of eviction were issued to developers for condominium conversion. These guidelines required: (1) the recording of a master deed; (2) a signed purchase and sale agreement for the unit; (3) that the tenant to be evicted have had the right of first refusal to purchase; (4) that the sale was for the occupancy of the purchaser; and (5) that the purchase and sale agreement not contain repurchase or option provisions. An “Emergency Regulation” promulgated in January, 1973, additionally required:

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

Finally, in March, 1973, the rent control board issued a regulation under the general rent control statute prohibiting the issuance of certificates of eviction for condominium conversion.

The January and March, 1973, regulations were challenged by a developer denied certificates of eviction by the board for noncompliance with the January “Emergency Regulation.” The question in this case, Zussman v. Rent Control Board of Brookline, was...
whether condominium conversion constituted "just cause" for eviction under the general rent control statute. If it did constitute a permissible reason for eviction, the Board's regulations were in conflict with the statute.

The court did not confine itself to an interpretation of the words "just cause," but instead examined the entire rent control statute and found in it certain provisions that indicated an intent of the legislature to accommodate the need for rent control with a policy of encouraging home ownership. Because condominiums are a form of home ownership, the rent control board was held to have no authority to restrict conversion under the statute. The court reasoned that to allow the board that authority would frustrate the policy implicit in the statute. The 1973 regulations were struck down, and the trial court's decree ordering issuance of certificates of eviction was affirmed.

The court in Zussman construed a particular rent control statute, and the opinion should not be read to say that it is per se improper to restrict condominium conversion in Massachusetts or that prohibitions on the conversion of rent-controlled apartments to condominiums cannot stand. The regulations in Zussman were struck down only because of the policy of encouraging home ownership found in the general rent control statute.

In a jurisdiction with a rent control statute lacking provisions which demonstrate such an ancillary purpose, the regulation or bans on evictions from rent-controlled apartments might be upheld as advancing the purpose of the statute. A special rent control statute for Brookline lacking the provisions fatal to the regulations

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82 These provisions stated that the renting of apartments in a cooperative and in owner-occupied two or three family houses was exempt from rent control; that a tenant could be evicted if the landlord sought possession for his use or the use of a member of his family; and that a tenant might be evicted if he refused the landlord access for the purpose of showing the unit to a prospective purchaser. The court viewed the last provision as contemplating the sale of rental units for occupation by the purchaser. Id. at 566-67, 326 N.E.2d at 879.

83 Id. at 569, 326 N.E.2d at 880. The decree is set out in full at note 3 in the opinion.

The court did not discuss § 9(e) of the general rent control statute, which stated that the provisions for eviction in that section were intended as additional restrictions on the landlord's right to recover possession of a rental unit: landlords were not to use the "just cause" subsection alone as grounds for eviction. While the court did hold that condominium conversion constituted "just cause" for eviction, this subsection may explain the emphasis on a broad policy analysis in the opinion.

in Zussman had already been passed by the state legislature, and the town turned to this statute for authority to continue regulation of condominium conversion.

C. Condominium Conversion Pursuant to the Special Rent Control Statute

The special rent control statute, passed on Brookline's petition at the same time as the general rent control statute examined in Zussman v. Rent Control Board, provided for rent and eviction control in that town alone, and permitted Brookline to establish by by-law its own standards for regulating evictions. Soon after Zussman was decided, the town revoked its acceptance of the general rent control statute at a town meeting and, as of January 1, 1976, controlled rents and evictions under the authority granted it by the special statute. Because of this change, the town was no longer bound by the policy of encouraging home ownership enunciated in Zussman, although its eviction by-law at the time paralleled the permissible grounds for eviction under the general rent control statute.

On July 25, 1978, a town meeting amended the rent and eviction by-law. The effect of the amendment was to make certificates of

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66 Chapter 843 was passed in compliance with Mass. Const. amend. art. 89, § 8. Marshal House, Inc. v. Rent Control Bd. of Brookline, 358 Mass. 686, 697-98, 266 N.E.2d 876, 884 (1971). (This is a different decision than the Marshal House opinion discussed in the text).
67 Under section eight of the Home Rule Amendment, one of the enumerated instances in which the legislature has the power to enact special laws is "on petition filed or approved by the voters of a city or town, or the mayor and city council, or other legislative body, of a city, or the town meeting of a town, with respect to a law relating to that city or town . . . ." Mass. Const. amend. art. 89, § 8(1).
69 The statute's emergency preamble recited the conditions peculiar to Brookline which made a special law necessary: "The general court finds . . . that a serious public emergency exists in the town of Brookline . . . which emergency has been created by housing demolition, an expanding student population, [and] a substantial elderly population . . . ." Id. § 1.
70 The provisions, as amended, read:
71 "Section 9. Evictions. (a) No person shall bring any action to recover possession of a controlled rental unit unless: . . . (8) the landlord seeks to recover possession in good faith for use and occupancy of himself or his children, parents, brother, sister, father-in-law, mother-in-law, son-in-law, or daughter-in-law, except that if the unit is a condominium unit occupied by a tenant who was in possession thereof at the time the landlord acquired ownership, then the Board shall not issue a Certificate of Eviction hereunder for a period of six months from the date when the Board determines that the
eviction unavailable to developers for condominium conversion, and to make unit purchasers take title to their condominium with the occupant in possession if that occupant refused to vacate voluntarily. The purchaser was not to be issued a certificate of eviction until six months after the rent control board determined that the facts in a petition for a certificate were true. If the board determined according to its own standards that a hardship existed for the tenant, the certificate of eviction could be delayed an additional six months.69

The impediment to condominium conversion created by the amendments was quite limited compared to other possible methods of regulating conversion. The by-law did not affect real property law by prohibiting the conversion of apartment buildings from rental to condominium properties or by forbidding the conveyance of individual units.70 Nor was the unit purchaser prevented from eventually evicting the tenant and taking possession of the unit after the prescribed waiting period.71 The by-law also did not prohibit the purchaser, now the landlord of a single apartment, from seeking a rent increase under local rent control rules to provide a fair return on the investment and expenses associated with owning the condominium. Because the costs of apartment ownership are

facts attested to in the Landlord's Petition are valid and in compliance herewith; and if the Board determines that a hardship exists, then the Board may extend the period between the determination of validity and compliance hereunder and the date for issuance of the Certificate for an additional period of up to six months. . . . (10) the landlord seeks to recover possession for any other just cause, provided that his purpose is not in conflict with the provisions and purposes of this act. The submission of a unit to Chapter 183A of the General Laws of Massachusetts [the condominium statute] shall not be deemed just cause hereunder." (emphasis added indicates language added pursuant to amendment).


69 This arrangement has since been changed. The Town Meeting amended the rent control by-law in 1979 to prohibit issuance of certificates of eviction to recover possession from tenants who had been in continuous occupancy since a time prior to the recording of a master deed. Article 32, Warrant of Brookline Town Meeting (May 7, 1979). The 1978 by-law amendment is described and analyzed in this article because it is the subject of the only case on the issue, Grace v. Town of Brookline, 79 Mass. Adv. Sh. 2257, 399 N.E.2d 1038 (1979), and because the conclusions reached in light of Grace apply beyond the particular situation in Brookline.


70 These options were not available to the town under the special rent control statute or any other law.

71 This was changed by a later amendment. See note 69 supra.
greater than the cost of renting the same unit before conversion,\textsuperscript{73} there would be grounds for a rent increase\textsuperscript{73} which could force the tenant to vacate.

No statistics are available on the impact of the 1978 regulation.\textsuperscript{74} Individual purchasers were probably reluctant to commit the funds required when they could not be guaranteed possession for as long as a year, and persons arriving from outside the Boston area sought immediate shelter. Furthermore, banks did not like to finance these purchases.\textsuperscript{75} The Brookline by-law was potentially a major deterrent to the sale of converted apartments.

Three parties brought an action to strike down the 1978 by-law amendments.\textsuperscript{76} They asserted that the power to regulate evictions granted by the special rent control statute did not give Brookline the power to regulate condominium conversion,\textsuperscript{77} and also claimed that the amendments constituted a “taking” of property and a denial of equal protection of the laws.\textsuperscript{78} The plaintiffs relied heavily on \textit{Zussman v. Rent Control Board of Brookline},\textsuperscript{79} which had struck down the earlier condominium conversion regulations enacted pursuant to the general rent control statute, arguing that the

\textsuperscript{73} See note 20 supra.
\textsuperscript{74} Two plaintiffs who challenged the by-law amendments in \textit{Grace v. Town of Brookline}, 79 Mass. Adv. Sh. 2257, 399 N.E.2d 1038 (1979), petitioned the rent control board for increases in the authorized rents for their units. They received increases in the amount they sought. \textit{Id.} at 2262 n.10, 399 N.E.2d at 1041.
\textsuperscript{75} Statistics on the number of apartments converted by recording master deeds pursuant to the Massachusetts condominium enabling statute, \textit{MASS. GEN. LAWS ANN. ch. 183A, § 2} (West 1977), do not reflect the impact of the by-law amendments because there is no way of determining (i) how many of these units were actually marketed, and (ii) of those units that were marketed, how many were not sold because of the law. The number of owners discouraged from converting at all likewise cannot be ascertained.
\textsuperscript{76} The mortgage financing of one plaintiff in \textit{Grace v. Town of Brookline}, 79 Mass. Adv. Sh. 2257, 399 N.E.2d 1038 (1979) was cancelled because she was unable to occupy the unit. \textit{Id.} at 2262, 399 N.E.2d at 1041. The Massachusetts Supreme Judicial Court had stated previously: “Purchasers of condominiums would be ill-advised to make full payment for a unit without any assurance that possession could be recovered, and financing for the transaction could not be expected to be available.” \textit{Zussman v. Rent Control Bd. of Brookline}, 367 Mass. 561, 326 N.E.2d 876, 880 (1975).
\textsuperscript{77} The plaintiffs were a developer, a unit purchaser whose condominium was occupied by a tenant who lived there prior to the sale, and a party who had signed a purchase and sale agreement and sold her previous residence in anticipation of occupying a condominium but who had lost her financing because she was unable to move into the unit. \textit{Grace v. Town of Brookline}, 79 Mass. Adv. Sh. 2257, 2261-62, 399 N.E.2d 1038, 1041 (1979).
\textsuperscript{78} Id. at 2263, 399 N.E.2d at 1042.
\textsuperscript{79} Id. at 2271, 399 N.E.2d at 1045. A discussion of the “taking” issue will be postponed until the Fifth Amendment has been considered in detail. See text at notes 113-21 infra.
emphasis of that opinion was not on the differences between the two rent control statutes, but on the provision for the condominium concept in the Massachusetts General Laws and the public need for home ownership. The plaintiffs urged that Brookline not be allowed to frustrate state policy similarly with restrictions on condominium conversion under another rent control statute.

The defendants pointed out the differences between the general rent control statute which was the authority for the regulations struck down in Zussman, and the broad language of the special rent control statute. Brookline had special problems, the town argued, and the legislature had given it the power to deal with those problems as it saw fit.

The Massachusetts Supreme Judicial Court, in Grace v. Town of Brookline, upheld the by-law amendments, distinguishing Zussman because the regulations had been struck down in that case because "the [Rent Control] Board had accorded insufficient recognition to the policy, implicit in c. 842 [the general rent control statute], of encouraging home ownership." The court reiterated the difference between the two statutes and its conclusion in an earlier decision that the statutes, passed at the same time, evidenced the legislature's realization that a unique problem existed in Brookline. It therefore declined to read the general statute's accommodation to a policy of encouraging home ownership into the

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**Note:** While there were certain nuances of Chapter 842 [the general rent control statute] which the Court discussed in reaching its conclusions [in Zussman], the real emphasis of the opinion was on the fact that the condominium concept had been specifically provided for by the legislature in Chapter 183A, and that condominiums offered city dwellers significant advantages over rental housing and could be well suited to the housing problems of low income families.


The defendants were the town, the rent control board and the Attorney General as defendant-intervener. Grace v. Town of Brookline, 79 Mass. Adv. Sh. 2257, 2257 n.2, 399 N.E.2d 1038, 1038. The Attorney General was allowed to intervene because the by-law as amended had been approved by him pursuant to Massachusetts General Law ch. 40, § 32. Id. at 2258 n.3, 399 N.E.2d at 1039. That statute requires town by-laws to be submitted to the Attorney General for approval before they take effect.

See note 67 supra.


Id. at 2265, 399 N.E.2d at 1042.

special statute. The court found that the by-law amendments furthered the purposes of the special rent control statute—the control of abnormally high rents and the maintainence of a rental housing market. The justices observed that the by-law amendments fairly accommodated the interests of building owners and condominium purchasers by continuing to permit conversion, while allowing the new owners a reasonable return as landlords. Further, they noted that conversion was not impeded at all if the tenant chose to buy the unit or vacate voluntarily.

While the opinion in Grace v. Town of Brookline upheld a municipal regulation of condominium conversion, it would be inaccurate to cite the case as generally upholding municipal power to regulate condominiums as a form of ownership. Brookline had the benefit of special enabling legislation from the state. In deciding whether there is a general municipal power to regulate condominiums, it would be more appropriate to look to the situation in Marshal House, Inc. v. Rent Review and Grievance Bd. of Brookline, in which the Massachusetts court held that there was no independent power under the home rule amendments to the Massachusetts constitution to regulate rents or affect landlord-tenant law. There was no enabling legislation to support the rent control bylaw in that instance, and using the reasoning of Marshal House it appears that the power to regulate condominium conversion is not within the municipal police power in Massachusetts and in other states with similar home rule legislation.

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88 Id. at 2266-67, 399 N.E.2d at 1043.
89 Id. at 2267, 399 N.E.2d at 1043.
90 Id. With regard to the Massachusetts condominium statute, the court found no legislative policy within the statute either favoring or disfavoring condominium conversion. The purpose of the statute was to clarify the condominium's legal status in Massachusetts—see text at notes 26-31 supra—and not to grant this form of ownership a special status.
The court reasoned that the current rate of condominium conversion was not unforeseen when the condominium statute was enacted in 1963. Special legislation, such as the special rent control statute for Brookline, was the response to condominium conversion. Grace v. Town of Brookline, 79 Mass. Adv. Sh. 2257, 2268 n.16, 399 N.E.2d 1038, 1044 (1979).
92 See text at notes 46-53 supra.
93 Nor may condominium conversion be regulated under the zoning power, because zoning regulates use of land, not form of ownership. Many jurisdictions have adopted the “look-alike” rule by case or statute; under this rule, if a particular use, such as multi-family dwellings, is permitted, that use must be allowed regardless of the form of ownership. In other words, if the building looks like a permitted rental apartment building, the fact that it is
This is a fortunate result because complete freedom for municipalities to regulate condominium conversion would not be desirable as a matter of policy. Municipal efforts to control condominium conversion have not followed any consistent pattern, and uncertainty as to a particular community's regulatory scheme might well impair investment.94 Condominium conversion regulation is more appropriately formulated at the state level, resulting in a consistent law, not a patchwork of irregular local ordinances. For this reason, the Uniform Condominium Act forbids discrimination by municipalities against the condominium form of ownership.95 A Model Condominium Code developed by a prominent author in the condominium field also forbids local regulation of condominiums.96

The next problem to be addressed, then, is ascertaining the limits on the power of state government to regulate condominium conversion. The primary issue is whether a particular law regulates the use of private property in the public interest, or whether it effectively appropriates the property in question for a public purpose.

owned as condominiums will not make it susceptible to additional regulation under the zoning power. See Note, Condominiums and Zoning, 48 St. John's L. Rev. 957 (1974), and Annot., 71 A.L.R.3d 866 (1976).

The look-alike rule is sometimes found in the state condominium statute itself. For example, the Florida Condominium Act provides:

All laws, ordinances, and regulations concerning buildings or zoning shall be construed and applied with reference to the nature and use of such property, without regard to the form of ownership. No law, ordinance, or regulation shall establish any requirement concerning the use, location, placement, or construction of buildings or other improvements which are, or may thereafter be, subjected to the condominium form of ownership, unless such requirement shall be equally applicable to all buildings and improvements of the same kind not then, or thereafter to be, subjected to the condominium form of ownership.


Form of ownership may affect use, however, and if the new use is not permitted, regulation by form of ownership may then be allowed. In Goldman v. Town of Dennis, 78 Mass. Adv. Sh. 1236, 375 N.E.2d 1212 (1978), the court held that conversion of a cottage colony to condominiums was a change from summer vacation use to year round residential use, which the zoning board of appeals had the power to regulate.


96 Rohan, supra note 16, at 578.
IV. FIFTH AMENDMENT LIMITS ON STATE REGULATION OF CONDOMINIUM CONVERSION

This section will discuss the restrictions on state legislation with respect to condominium conversion imposed by the Fifth Amendment of the United States Constitution. It will first set out the factors that are considered in determining whether a particular government regulation acts as a taking of property, and then apply those factors to the Brookline by-law upheld in Grace and to a hypothetical complete ban on condominium conversion to determine the limits on state power to legislate on the issue.

A. Limitations on Governmental Regulation of Property

When the government restricts the use of privately owned property, one of two powers is being exercised: the police power to protect the health, safety, and welfare of its citizens, or the eminent domain power, the traditional authority of the sovereign to appropriate private land for public use. No clear test exists for determining when a particular governmental act is an exercise of the police power or the power of eminent domain. That the two powers be distinguished is crucial because of the constitutional requirement of payment of compensation to the owner of property taken by eminent domain and the non-compensatory nature of an exercise of the police power for the public benefit.

Unfortunately, the recent United States Supreme Court decisions on the “taking” issue have been “essentially ad hoc, factual inquiries” in which the Court has considered the benefit to the

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97 “No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. The requirement of compensation for a taking of property by the government was applied to the states through the due process clause of the Fourteenth Amendment in Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897).

98 “The term ‘police power’ has no exact definition. ... In its best known and most traditional uses, the police power is employed to protect the health, safety, and morals of the community ...” Sax, Takings and the Police Power, 74 YALE L.J. 36, 36 n.6 (1964).

99 “The power of eminent domain is an attribute of sovereignty, and inheres in every independent State.” Georgia v. City of Chattanooga, 264 U.S. 472, 480 (1924).

100 “The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” Armstrong v. United States, 364 U.S. 40, 49 (1960).

101 Nor may the power of eminent domain be exercised for a private purpose. Missouri Pac. Ry. v. Nebraska, 164 U.S. 403, 417 (1896).

public of the government regulation in question, and the detriment suffered by the regulated party. If the private owner has not been deprived of all reasonable use of his property, the regulations generally have been found to be within the police power.\textsuperscript{108} The Court has not established any standard test to make this determination.\textsuperscript{104} The latest "taking" case decided by the Supreme Court, \textit{Penn Central Transportation Co. v. City of New York},\textsuperscript{108} did set out some of the factors used in making such decisions. These factors will provide some guidance in assessing whether government regulation of condominium conversion might ever be held to be a "taking."

The first consideration in \textit{Penn Central}, where the Court held that rejection by a city commission of a plan to erect an office building above Grand Central Terminal did not constitute a "taking," was the economic impact of the government regulation on the claimant. The Court noted that it had long realized that government could not function if it had to pay compensation for every change in the general law which affected private property,\textsuperscript{108} and that the government must be permitted the freedom to regulate property in a way that diminishes its value even if the regulation deprives the owner of the property's most beneficial use.\textsuperscript{107}

Part of the inquiry into the economic impact of the governmental action on a particular claimant was whether the action interfered "with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes."\textsuperscript{108} Such interests were required to be "distinct, investment-backed expectations,"\textsuperscript{109} not merely vague speculations on possible future uses of the affected property. This is an important question because "taking" analysis is not necessary if the regulation does not interfere with a legitimate property in-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{104} "[T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." \textit{Penn Central Transp. Co. v. City of New York}, 438 U.S. 104, 124 (1978).
\item \textsuperscript{108} \textit{Id.} at 124.
\end{enumerate}
\end{footnotesize}
terest because the claimant then has no right to compensation.

The second factor considered by the Court in Penn Central to determine whether a governmental action constituted a compensable “taking” of property was the nature of the measure. A physical invasion of the property caused by the government, such as the flooding of land behind a dam, would be a “taking” in most circumstances. On the other hand, a social program “adjusting the benefits and burdens of economic life to promote the common good” was less likely to be so characterized. Land use restrictions were cited by the Court as an example of the latter kind of program which would not be deemed a “taking,” even though such regulation caused a lessening of the property’s value.

B. Condominium Conversion Regulation as a “Taking” of Property

The plaintiffs in Grace v. Town of Brookline apparently conceded that government might lawfully regulate the use of property without effecting a “taking.” In light of the many decisions confirming land use regulation under the police power, this was not a startling concession. The plaintiffs argued, however, that the town had chosen to permit a particular use, multi-unit dwellings, and by its amended rent control by-law was determining who, as between the owner and the tenant, was to enjoy the permitted residential use. The withholding of the right of the owner to possess the property, they concluded, was an appropriation of the property for a public purpose.

The Massachusetts Supreme Judicial Court agreed that the right to occupy the property was denied to the plaintiff owner. It would not, however, distinguish this denial from the redistribution of rights in any property subject to rent control. The court drew upon state and federal court decisions which have long held that rent control is a permissible exercise of the police power, and not a

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110 Id.
111 Id.
112 Id. at 125.
116 Id. at 2272-73, 399 N.E.2d at 1045.
"taking."\textsuperscript{117} The court found that the by-law amendments did not exceed those other forms of regulation, previously declared constitutional, designed to ease the housing shortage. Therefore, the court did not take its analysis further to determine what degree of state regulation would amount to a "taking."\textsuperscript{118}

In reaching its conclusion, the court indicated that it was quite aware that the plaintiffs' properties were not rendered worthless by the town's actions, citing the landlord/purchaser's right to receive a fair rent.\textsuperscript{119} Perhaps the plaintiff developer could have made out a stronger case by arguing that the diminution of the value of the property, one of the tests used to determine when a "taking" has occurred,\textsuperscript{120} should not be measured by the return on his investment through rent, but by the decrease in the market value of the building as a whole caused by the regulation. This would surely not have led to a different result, but would have caused the court to treat the "taking" argument more fully.\textsuperscript{121}

The court in \textit{Grace} dealt with a limited impediment to condominium conversion. Could condominium conversion regulation ever amount to a "taking" of the property of the rental landlord? To speculate on this question, an extreme case is hypothesized: a state government, citing a housing emergency within its borders, bans all condominium conversion or authorizes municipalities to do so.\textsuperscript{122} A landlord brings an action claiming that he has been de-

\textsuperscript{117} Block v. Hirsh, 256 U.S. 135, 156-58 (1921) (wartime regulation), Bowles v. Willingham, 321 U.S. 503, 516-519 (1944) (same), Teeval Co. v. Stern, 301 N.Y. 346, 362, 93 N.E.2d 884, 890, cert. denied, 340 U.S. 876 (1950) (state rent control is not an arbitrary use of the police power, even though occasionally it may compel an owner to operate at a loss).


\textsuperscript{119} Id. at 2273-74, 399 N.E.2d at 1046. See text at notes 68-69 supra.

\textsuperscript{120} See text at notes 106-08 supra.

\textsuperscript{121} The Supreme Judicial Court treated plaintiffs' equal protection argument summarily. While classification by form of ownership is not rationally related to regulation of use, as was discussed at note 93, supra, with respect to zoning, the court agreed with the town that the amendments advanced the purposes of rent and eviction control. Presumably, these purposes are to remedy the conditions of the housing emergency stated in the special rent control statute—"a substantial and increasing shortage of rental housing accommodations and . . . abnormally high rents." Act of Aug. 31, 1970, ch. 843 § 1, 1970 Mass. Acts 740, 740. The "rational relationship" standard was accepted as the appropriate level of scrutiny, and the court found that Brookline could rationally find that condominium conversion posed a singular threat to rent and eviction control. Grace v. Town of Brookline, 79 Mass. Adv. Sh. 2257, 2275, 399 N.E.2d 1038, 1047 (1979).

\textsuperscript{122} The ban would prohibit conversion of rental apartments to condominiums, not simply regulate eviction for condominium conversions.

The case is not so hypothetical. The state legislature granted Newton, Massachusetts, the
prived of the full use of his apartment buildings without any compensation.

According to Penn Central, the first factor to be considered is the economic impact of the ban on the claimant. A court would probably find the loss caused by the ban insufficient to hold that a "taking" had been effected. The landlord continued to receive rent, which even under rent control is set at an administratively-determined fair return on the investment in the building. Sale of the building as a rental property is not restricted. The fact that condominium conversion would return a larger and more immediate profit would not in itself cause a finding of a "taking." Penn Central reaffirmed an earlier holding that deprivation of the most beneficial use of a particular property does not take a regulation out of the realm of the non-compensatory police power.

An alternative inquiry might be whether the denial to the landlord of the power to convert the rental apartments to condominiums constituted an unreasonable interference with "distinct, investment-backed expectations." An argument based on an expectancy of the right to convert apartments into condominiums would be hard to maintain because, like any other form of ownership, the legal characteristics of condominiums are subject to prospective modification by the state legislature. A repeal of the condominium statute, for example, would effectively operate as a ban on condominiums, and the legislature could abolish common law condominiums just as some states have modified other forms of co-ownership of land. These considerations make a denial of expectation argument unlikely to prevail.

The second factor discussed in Penn Central for determining whether a governmental action constitutes a "taking" of property power to prohibit conversions unless a special permit had been obtained from the board of aldermen. Act of Aug. 14, 1974, ch. 847, 1974 Mass. Acts 961. The city did not accept the law within the specified time.

But see Niles v. Boston Rent Control Adm'r, 78 Mass. App. Adv. Sh. 240, 374 N.E.2d 296 (1978) (holding that the requirement of the general rent control statute that rent be set to yield landlords a "fair net operating income" does not require a fair return on the current market value of the property).


For a discussion of the difficulties in establishing condominiums at common law, see text at notes 30-31 supra.

For example, joint tenancies have been abolished or modified in some states. C. Moy-}

is the nature of the action. The ban on condominium conversion is a matter of regulation; it involves no physical invasion of the property. Rather, it is a social program to promote the common good. Court decisions concerning rent control have long recognized a legitimate governmental interest in the maintainence of a rental housing market and have approved the power of the government to intervene in legislatively declared emergencies to control that market.128

On the basis of these considerations, it is extremely unlikely that a complete ban on condominium conversion would be judged to be a "taking" of property under the Fifth Amendment. With this result, regulation of condominium conversion short of a ban, such as Brookline's waiting period before involuntary eviction is allowed, appears to be well within the limits of the police power.

The comparison in Grace of the effect of the Brookline by-law amendments to the effect of rent control was the correct analysis not only for a condominium conversion regulation grounded in rent control, but for any condominium conversion regulation or ban. Absent an extreme diminution of the value of the affected property due to the regulation, the regulation would be viewed as a social program benefiting society at large while not placing an undue burden on any one party. Both the purpose of the conversion regulation and the degree to which it intrudes into the sphere of private property are similar to rent control, which has been uniformly upheld by the courts.

A comprehensive state statute controlling the circumstances under which condominium conversion is permitted provides substantial security from unfair eviction for those citizens who rent apartments and allows society to realize most of the benefits of condominium conversion. This section has demonstrated that such regulation, more productive and less restrictive than a total ban, is constitutional. The New York statutes governing condominium conversion provide an excellent example of such well-drafted and beneficial legislation.

V. AN EXAMPLE OF STATE REGULATION: NEW YORK

New York has addressed the problem of condominium conversion in a more comprehensive manner than has Brookline, Massachusetts. The state condominium conversion statute is presented

128 See cases cited at note 117 supra.
to demonstrate the detailed, balanced approach available to correct the injustices caused by condominium conversion. New York controls condominium conversion through its securities regulation, or "blue sky" law. Unlike rent control statutes, this law is not nominally a stop-gap, emergency measure. The statute specifically applicable to condominium conversion in three counties outside New York City is particularly interesting.

The statute provides the developer with the option of choosing an "eviction plan" or a "non-eviction plan" of conversion. Under the non-eviction plan, apartments are occupied by the new owners as they are voluntarily vacated by the tenants in possession. The whole building is converted at once by recording the required declaration, but the developer remains as landlord of the unvacated apartments and of the unsold units until the occupants of those units choose to relinquish their apartments. For this indefinite pe-

130 N.Y. GEN. BUS. LAW § 352 (McKinney Supp. 1979), especially:
  § 352-ee, "Conversion of non-residential property to residential cooperative or condominium ownership;" § 352-eee, "Conversions to cooperative or condominium ownership" (applicable in the counties of Nassau, Westchester, and Rockland, upon acceptance by individual municipalities); and § 352-eeee, "Conversions to cooperative or condominium ownership in the City of New York."

131 Condominium sales, including conversions, are governed by the New York securities regulation law. Whalen v. Lefkowitz, 36 N.Y.2d 75, 78, 324 N.E.2d 536, 538, 365 N.Y.S.2d 150, 153 (1975). An "offering statement" must be filed by the participants in the venture with the Department of Law. The statement is open for public inspection and contains a complete disclosure of the assets of the principals and the terms of their agreements. No "offer, advertisement or sale" may be made until the Attorney General has issued a letter declaring that the statement has been filed. N.Y. GEN. BUS. LAW § 352-e(2) (McKinney Supp. 1979).

Sections of the law provide for certain statements to be made in the offering statements for condominium conversions. The statements are made for informational purposes only, and the Attorney General is not required to investigate their truthfulness, but may do so at his discretion. Whalen v. Lefkowitz, 36 N.Y.2d 75, 79, 324 N.E.2d 536, 538-39, 365 N.Y.S.2d 150, 153-54 (1975). However, the statute requires the statements to be true, N.Y. GEN. BUS. LAW § 352-e(1)(b) (McKinney 1968), so the law has the effect of compelling certain conduct in condominium conversion projects, as discussed in the text at notes 134 and 136 infra.

The securities regulation laws provide strong sanctions for their violation. The Attorney General may seek a permanent injunction to prevent the offeror from selling securities in New York, or from continuing a specific offering. N.Y. GEN. BUS. LAW § 352-i (McKinney Supp. 1979). He may also seek restitution for money obtained through a fraudulent practice violating the statute. Id., § 353(3). The Attorney General also may prosecute criminal offenses related to the fraudulent practices. Id., § 358.

131 Id. § 352-ee (applies to Nassau, Westchester and Rockland counties).

132 A property is subject to the condominium statute when a condominium declaration is executed and recorded. N.Y. REAL PROP. LAW § 339-f (McKinney Supp. 1979). The required contents of the declaration are set out in N.Y. REAL PROP. LAW § 339-n (McKinney Supp. 1979).
period, a single building will have both condominium owners and rental tenants as residents.

When the eviction plan is chosen, the developer must declare in the offering statement\(^\text{133}\) that non-controlled rents will not be unconscionably increased.\(^\text{134}\) Nor may the developer commence eviction proceedings “for failure to purchase or any other reason applicable to expiration of tenancy,” although such an action may be brought for failure to pay rent or for some other breach of the landlord-tenant relationship.\(^\text{135}\)

If the plan is declared in the offering statement to be an “eviction plan,” more stringent regulations apply. As with a non-eviction plan, the whole building is converted at once by recording the proper documents. The eviction plan must provide that evictions for non-purchasing tenants will not commence for two years (compared to the six to twelve month delay in Brookline), and that tenants over sixty-two years of age on the date the plan is declared effective by the Attorney General shall not be evicted at all.\(^\text{136}\) The plan must also provide that there will be no unconscionable rent increases during the waiting period.\(^\text{137}\)

Another important feature of this comprehensive law prevents “warehousing” by the developer, the accumulation of vacant apartments for the purpose of conversion. The statute requires the Attorney General to find that “an excessive number of long-term vacancies did not exist” when the offering statement was first submitted.\(^\text{138}\) This provision ensures that developers will not evict tenants before filing an offering statement to avoid the restriction placed on evictions by the statute.

Lastly, the condominium conversion statute provides for the tenant harassed by the developer. If a tenant is substantially disturbed, he can request an investigation by the Attorney General. If the alleged conduct is found to exist, the Attorney General may apply for a court order restraining the sale of the unit.\(^\text{139}\)

\(^{133}\) See note 130 supra.

\(^{134}\) The sanctions for an untrue statement are described in note 130, supra.


\(^{136}\) Id. § 352-eee(2)(d)(1).

\(^{137}\) Id.

\(^{138}\) Id. § 352-eee(2)(g). “Excessive vacancies” is defined as greater than 10%, unless the average vacancy rate has been higher for more than two years. “Long-term vacancy” is defined as longer than five months. Id.

\(^{139}\) Id. § 352-eee(4).
This recent statute\textsuperscript{140} serves as an example of some of the problems related to condominium conversion that can be provided for by statute. Similar provisions could be added to a condominium statute or to a rent control law. Nor is there anything to prevent a municipality with appropriate enabling legislation from making similar detailed provisions apply within its jurisdiction.

VI. CONCLUSION

Condominium conversion offers multiple advantages to individual buyers and sellers of condominiums and to the communities in which the converted buildings are located. However, the plight of the tenants evicted from rental apartments for conversion is a major problem which government has tried to resolve equitably.

Brookline, Massachusetts, responded to this concern by seeking to restrict evictions from rent-controlled apartments for the purpose of condominium conversion. The cases arising from Brookline's attempts to regulate the landlord-tenant relationship, culminating in \textit{Grace v. Town of Brookline,}\textsuperscript{141} reveal the limits on governmental power to meet the problem. Municipalities do not, in most jurisdictions, have the power to regulate conversion or eviction, without enabling legislation from the state. States do have the power to regulate conversions and evictions and may exercise it directly, as in New York, or may authorize municipalities to address the issue as they deem proper, as is the situation in Massachusetts.

Such regulation by the state is not a "taking" of property requiring the payment of compensation under the Fifth Amendment to the United States Constitution. Application of the factors set out in \textit{Penn Central Transportation Co. v. City of New York}\textsuperscript{142} to determine when government regulation of private property constitutes a "taking" demonstrates that condominium conversion regulation, even to the extreme of a complete ban on condominium conversion, remains well within the bounds of government regulation which has already been held not to be a "taking."


\textsuperscript{142} 438 U.S. 104 (1978).