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The Validity of Ordinances Limiting Condominium Conversion

In 1974, the New York Times ran a front-page story about the dilemma of an elderly woman who lived in a Washington, D.C., apartment building that was being converted into a condominium. On a limited budget, she faced the choice of either finding a new place to live in the tight Washington housing market or paying $2000 down and $422.50 in monthly installments for the same one-bedroom apartment she had been renting for $155.00 per month. The woman's situation is not unusual: a federal study estimates that owners have recently converted 60,000 rental apartment units to condominiums, and real estate experts expect many more conversions in the future. Landlords and speculators find conversion profitable, but tenants and housing officials blame it for exacerbating shortages of rental housing, for displacing tenants from long-established homes, and for adding to the cost of housing. These complaints

2. 1 U.S. DEPT. OF HOUSING AND URBAN DEVELOPMENT, HUD CONDOMINIUM/COOPERATIVE STUDY III-10, -11 (1975) [hereinafter cited as HUD REPORT]. The report estimated that an additional 25,000 units were converted to condominiums during the five-year period ending in 1974. Id. at III-30.
3. In the interest of brevity, this Note will use condominium to refer to both condominiums and cooperatives. Basically, the owner of a condominium owns in fee a single dwelling unit in a multiple dwelling and also has some joint interest in the land and other common facilities in the complex. The owner of a cooperative is a shareholder of a corporate entity that owns the entire multiple dwelling complex; the shareholder is entitled to occupy one of the dwelling units, to share common facilities, and to participate in the management of the complex. For a brief discussion of the differences between the forms of ownership, see 1 HUD REPORT, supra note 2, at IV-7, -8.
4. The data to date do not seem to justify the conclusion that conversions have caused a significant decline in the rental housing stock. As of 1975, only 125,000 rental units had been converted out of a total rental housing stock of 25 million units. During the peak year for conversions, they reduced the rental housing vacancy rate only 0.1%. See 1 HUD REPORT, supra note 2, at V-30. While the impact in New York City exceeded that for the entire country, local figures are still not alarming. By 1975, 52,000 units in New York had been converted out of a total rental housing stock of 2.2 million units. See 2 HUD REPORT, supra note 2, at C-2. Thus, the percentage of rental units converted in New York by 1975 amounted to just 2.4% of the rental stock; the corresponding national statistic was only 0.5%. Of course, conversions may affect particular segments of some housing markets more strongly. In the Borough of Manhattan, for example, cooperatives represent nearly 7% of the rental housing stock, the "highest concentration of cooperative conversions in the country." Id. at C-9, -13. Most conversions have been of the highest rent buildings, undeniably reducing the number of luxury apartments available. This experience supports concern that conversions might reduce the vacancy rate in other markets in the future. See Note, Tenant Protection in Condominium Conversions: The New York Experience, 48 St. John's L. Rev. 978, 981 (1974).
5. The somewhat sketchy data on involuntary tenant displacement seem to bear out these concerns. The HUD Report includes three case studies of actual conversions. In the first,
have prompted several state and local legislatures to regulate the conversion of apartment buildings into condominiums.\(^7\) Conversion laws fall into two categories: consumer protection laws that merely require an owner to disclose fully his plans to convert, but actually protect the condominium purchaser more than the tenant;\(^8\) and stricter laws that prohibit conversions unless the owner or the housing market satisfies certain conditions. The first group is almost certainly constitutional,\(^9\) but the second group's legitimacy is less clear.

The more limiting regulations are stern indeed. A few jurisdictions have explicitly prohibited conversions,\(^10\) and many have im-

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\(^7\) By 1975, all states had passed laws recognizing the condominium form of ownership and in some way regulating condominiums. Six states had adopted provisions particularly relating to conversions. See 1 HUD REPORT, supra note 2, at VI-27 to -117. Municipal ordinances regulating conversion are quite common. Among the cities with such ordinances are New York, Chicago, Washington, D.C., Palo Alto, and San Jose.

\(^8\) One building owner reported that while resale of rental buildings to new landlords might typically bring a price six times the annual rental income, conversion to condominiums would yield a total sales price of about ten times the rental income. Rugaber, supra note 1, at 14, col. 1. The three apartment complexes examined in the HUD Report were sold just before the conversion for $3.6 million, $13.6 million, and $4.0 million. 2 HUD REPORT, supra note 2, at B-26, -34, -35, -47, -68. While these figures certainly do not represent profits, and at least one of the converted buildings appeared likely to fail short of selling all its units, the figures indicate at least a potential for large profits, especially where the owner converts directly, rather than selling to a developer. For another financial analysis of an actual conversion, see 1 P. ROHAN & M. RESKIN, CONDOMINIUM LAW AND PRACTICE § 3A.04 (1965 & Supp. 1978).


\(^10\) Some communities enacted temporary moratoria while studying the conversion problem. See, e.g., D.C. Reg. 74-26 (1974). These temporary measures have typically been followed by permanent restrictions that do not ban conversions outright, but permit them only
posed restrictions so severe as to amount to a prohibition. Marin County, California, for example, prohibits conversion if the rate of rental vacancies in the county dips below five percent or if multifamily accommodations form less than one fourth of the total housing stock.\textsuperscript{11} When the rental vacancy rate in Washington, D.C., drops below three percent, only high rent apartments may be freely converted; other conversions require the written consent of "a majority of the heads of household actually residing in such housing accommodation."\textsuperscript{12} New York enacted a comprehensive and widely discussed conversion law in 1974.\textsuperscript{13} Unlike many statutes requiring only that tenants consent to a conversion, the New York law required that 35% of the tenants agree to purchase their units within one year of the start of the conversion effort.\textsuperscript{14} If too few agreed, the owner could not reinstitute the plan for eighteen months.\textsuperscript{15} The owner could not evict any nonpurchasing tenant for two years from the date of the first offering,\textsuperscript{16} and could not subject the tenants to "unconscionable increases beyond ordinary rentals for comparable apartments" during that two-year period.\textsuperscript{17}

\textsuperscript{11} Marin County, Cal., Ordinance No. 2122 (Sept. 24, 1974).  
\textsuperscript{13} Act of June 15, ch. 1021, § 2-a, 1974 N.Y. Laws 1629 (1974) (expired July 1, 1977). A conflict between the houses of the state legislature over statutory terms prevented reenactment after the statute expired. \textit{See N.Y. Times, May 15, 1977, § 1, at 42, col. 3; N.Y. Times, June 24, 1977, § A, at 28, col. 2; N.Y. Times, June 30, 1977, § D, at 16, col. 1.} A portion of the New York City Rent Stabilization Act, however, reiterated several of the provisions of the state law, including the requirement of filing a plan with the state attorney general, and the requirement that 35% of the tenants agree to purchase if the plan provides for evictions. \textit{New York, N.Y. ADMIN. CODE § YY5 l-6.0(c) (1975).} A new state law, similar to the expired one, was passed in July, 1978, for the major New York City suburban counties. \textit{N.Y. GEN. BUS. LAW § 352-33 (McKinney Supp. 1978).}  
\textsuperscript{15} Act of June 15, 1974, ch. 1021, § 1, 2-a, 1, (ii), 1974 N.Y. Laws 1629 (expired July 1, 1977).  
\textsuperscript{17} Act of June 15, 1974, ch. 1021, § 2, 2-a, (iii), 1974 N.Y. Laws 1629 (expired July 1, 1977). Although tenant groups pressured the state legislature to increase the purchase requirement to 51%, the 35% requirement effectively prevented most conversions. The real estate industry, on the other hand, sought to relax the regulations, claiming that conversions contribute to a stable urban middle class, foster building upkeep through pride in ownership, and increase the municipal tax base. \textit{N.Y. Times, March 13, 1977, at 30, col. 1; N.Y. Times, April 8, 1977, § A, at 15, col. 1.} See also \textit{Proposed Act to Protect Purchasers of Condominium Housing Units: Hearings on S. 3658 and S. 4047 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing and Urban Affairs, 93d Cong., 2d Sess. 115 (1974)} (statement of David Clurman) [hereinafter cited as \textit{Condominium Hearings}].
Regulations as extensive as the Marin County, District of Columbia, and New York laws may force a land owner to forego a highly profitable use of his land. Therefore, such laws will assuredly face courtroom attacks\(^{18}\) under a variety of constitutional theories. In particular, land owners who thumb through the Constitution's portfolio of limitations on government activity may be tempted by any of three plausible assertions:

1. The regulations exceed the state's police power, denying due process guaranteed by the fourteenth amendment.
2. The regulations take private property without just compensation, contrary to the fifth and fourteenth amendments.
3. The regulations that require tenant consent to conversions improperly delegate state power, denying due process guaranteed by the fourteenth amendment.\(^{19}\)

This Note evaluates those assertions, concluding that the first two do not square with modern Supreme Court precedent, but that the third

\(^{18}\) At least one court has overturned a conversion ordinance as “an abridgement of the plaintiff's rights in violation of both the Federal and State Constitution.” Rothman v. Borough of Fort Lee, No. 1-21679-73 P.W. (Bergen County Ct., N.J., June 17, 1974).

In Bridge Park Co. v. Borough of Highland Park, 113 N.J. Super. 291, 273 A.2d 397 (1971), the Superior Court, Appellate Division, held that the municipality's zoning law could not prohibit the conversion of a garden apartment complex into a condominium. The court reasoned that the state legislative grant of zoning power gave the borough no right to regulate forms of ownership of real property.

A third case, City of Miami Beach v. Arlen King Cole Condominium Assn., 302 So. 2d 777 (Fla. Dist. Ct. App. 1974), held that the change from rental apartments to the condominium form of ownership, absent other significant changes, was not a change in use sufficient under the municipal zoning ordinance to trigger the termination of the building's nonconforming use permit. See also Zussman v. Rent Control Bd., 367 Mass. 561, 326 N.E.2d 876 (1975).

\(^{19}\) These, of course, are not the only grounds for a challenge. Rhyne, \textit{supra} note 9, at 69-71, discusses the possibility that conversion limitations may be challenged on equal protection grounds. As Rhyne points out, an equal protection challenge is not likely to succeed. It would be difficult indeed to prove the lack of a rational basis for distinguishing between the owners of new condominiums and the owners of apartment buildings undergoing conversion when displacement of existing tenants is one of the major problems being addressed.

Building owners might also contend that conversion laws impair their freedom of contract. This somewhat archaic constitutional doctrine, which enjoyed some success during the era of Lochner v. New York, 198 U.S. 45 (1905), should not be terribly troublesome now, notwithstanding the suggestion of the court in Rothman v. Borough of Fort Lee, No. 1-21679-73 P.W. (Bergen County Ct., N.J., June 17, 1974) discussed in note 18 \textit{supra}. The Supreme Court recently discussed the contract clause in Allied Structural Steel v. Spannaus, 438 U.S. 234, 240 (1978):

The Language of the Contract Clause appears unambiguously absolute . . . . The Clause is not, however, the Draconian provision that its words might seem to imply. As the Court has recognized, “literalism in the construction of the contract clause . . . would make it destructive of the public interest by depriving the State of its prerogative and self-protection.”

Since at least 1921, the Court has not seen any merit in discussing the contract clause as an issue distinct from due process in cases involving interference with private contractual obligation. See Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 198 (1921).

This Note does not discuss questions of state law because of the narrow value of such a discussion. State law, for example, might preempt local conversion ordinances, see Rhyne, \textit{supra} note 9, at 71-72, and state constitutional provisions about taking, impairment of contracts, delegation of power, or due process differ from their federal counterparts, see, e.g., state constitutional provisions cited in note 41 \textit{infra}. 

\textit{Note} — Condominium Conversion
assertion — of an improper delegation — may accurately characterize some conversion regulations.

I. CONVERSION REGULATIONS AND THE POLICE POWER

The Supreme Court has recognized, under the rubric of police power, that states have authority to protect the health, safety, morals, and general welfare of the public.\(^{20}\) Police power extends, however, only to laws rationally related to a legitimate government objective; beyond such objectives, due process requirements restrict state regulation.\(^{21}\) Landlords, faced with restrictive conversion laws, may contend that such laws exceed the perimeters of police power. No court has ruled on this question, but decisions upholding laws that limit the rent a landlord may charge offer a persuasive analogy.\(^{22}\)

The Supreme Court first upheld rent control laws in 1919.\(^{23}\) In response to the widespread rent gouging, overcrowding, and harsh evictions after World War I, Washington, D.C., had passed a rent control law.\(^{24}\) Although the Court at that time generally opposed any government regulation of private property rights,\(^{25}\) it deemed the rental housing market "clothed . . . with a public interest so great as to justify regulation by law."\(^{26}\) Yet that clothing was not especially ample. Justice Holmes writing for the majority, stressed the emergency conditions that prompted the law:

The provisions [were] made necessary by emergencies growing out of the war resulting in rental conditions in the District dangerous to the public officers, employees and accessories, and thereby embarrassing the federal government in the transaction of the public business. As


\(^{21}\) Substantive due process requires even a higher standard of justification when a law deprives persons of a "fundamental right." Such a right is one explicitly or implicitly guaranteed by the Constitution. In light of the Supreme Court's decisions on fundamental rights, it clearly would not consider the right to convert an apartment building to a condominium to be fundamental. See Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973); Lindsay v. Normet, 405 U.S. 56 (1972).

\(^{22}\) This analogy was first discussed in Rhyne, supra note 9.

\(^{23}\) Block v. Hirsch, 256 U.S. 135 (1921). Block, a tenant in a building owned by Hirsch, held over after the expiration of his lease despite Hirsch's request that he vacate. Block claimed that Hirsch had not complied with the rent control law enacted less than three months before the lease expired. Hirsch declined to follow the recent law's eviction procedures, claiming instead that the law was invalid. 256 U.S. at 136. The Court reconsidered the determination of the court of appeals that the District of Columbia rent law "attempted to authorize the taking of private property not for public use and without due process." 256 U.S. at 153.


\(^{25}\) A brief history of conditions in the rental housing market during and immediately after World War I, and a discussion of the legislative responses to those conditions appears in E. Drellich & A. Emery, Rent Control in War and Peace (1939).


\(^{26}\) 256 U.S. at 155.
emergency legislation, [it] is to end in two years unless sooner re­
pealed.27

The Court plainly suggested that the law would not have been justi­fied in the absence of an emergency.28 In Chastleton Corp. v. Sin­clair,29 the Court reaffirmed the need for emergency conditions to justify rent control.30

The emergency requirement, however, has outlived its usefulness.31 It made sense in 1919 as an expression of a constitutional

27. 256 U.S. at 154. Although the Court declared that it need not accept a legislative determination as true, it found that a declaration of emergency conditions familiar to the legislature "is entitled at least to the greatest respect." 256 U.S. at 154.

28. 256 U.S. at 157. In Marcus Brown Holding Co., v. Feldman, 256 U.S. 170 (1921), a companion case with similar facts, the Court upheld the New York rent law. The Supreme Court next dealt with rent control in Edgar A. Levy Leasing Co. v. Siegal, 258 U.S. 242 (1922), which concerned a tenant's refusal to pay the higher rent stipulated in a lease renewal executed before, but effective after, the imposition of rent controls. The Court held that Block and Marcus Brown Holding Co. controlled the case. 258 U.S. at 248. It reasoned that:

The warrant for this legislative resort to the police power was the conviction on the part of the state legislators that there existed in the larger cities of the State a social emergency, caused by an insufficient supply of dwelling houses and apartments, so grave that it constituted a serious menace to the health, morality, comfort, and even to the peace of a large part of the people of the state. That such an emergency, if it really existed, would sustain a resort, otherwise valid, to the police power for the purpose of dealing with it cannot be doubted, for, unless relieved, the public welfare would suffer in respects which constitute the primary and undisputed, as well as the most usual, basis and justification for exercise of that power.

258 U.S. at 245. In plainer terms than the previous cases, this decision indicated that the required emergency is a social one, a housing shortage gravely threatening the general public welfare, rather than a war or other catastrophe.

29. 264 U.S. 543 (1924).

30. The plaintiff, a landlord, sought to prevent the enforcement of an order of the District of Columbia rent commission reducing rents in his building. In particular, he contended that the emergency conditions used to justify the rent control law had disappeared by 1922. Justice Holmes wrote the opinion reversing the judgment of the lower court, holding that without a housing emergency the law could not stand, and remanding the case to the lower court for determination of whether the emergency still existed on the date of the Commission order. 264 U.S. at 549. The Court noted that "[i]f about all that remains of war conditions is the in­creased cost of living, that is not in itself a justification of the act." 264 U.S. at 548. Shortly, thereafter, the court of appeals considered the conditions in light of Chastleton and held that "the emergency had ended, and that therefore there was no constitutional basis for the legisla­tion . . . ." Peck v. Fink, 2 F.2d 912, 913 (D.C. Cir. 1924).


The constitutionality of rent control legislation seems not to have been directly passed upon by the Supreme Court since the cases arising during World War II and the housing shortage consequent thereon . . . . While in those cases the Court naturally stressed the war and post-war emergencies, we have no doubt that it would sustain the validity of rent control today. The New York City Rent Control Law contains an impressive recital of the conditions deemed to call for its enactment . . . . The time when extraordinarily exi­gent circumstances were required to justify price control outside the traditional public utility areas passed on the day that Nebbia v. New York . . . . was decided.
philosophy that generally opposed government regulation, but the Court has since abandoned that philosophy in favor of a broader view of the power to regulate. Government, in the exercise of police powers, can now place many restrictions on property owners. Justice Roberts expressed the modern view in \textit{Nebbia v. New York}:

The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by method consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have the real and substantial relation to the object sought to be attained.

With particular relevance for rent control laws, the \textit{Nebbia} Court then noted:

The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived years ago.

emergency situation. For this reason, most rent control ordinances are prefaced by a declaration stating the existence of an emergency caused by a severe housing shortage necessitating the enactment of the ordinance." \textit{Ryane}, supra note 9, at 78 (footnotes omitted).


34. 291 U.S. 502 (1934).

35. 291 U.S. at 525 (footnotes omitted).

36. 291 U.S. at 532. Justice Roberts later stated that "there can be no doubt that . . . the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells." 291 U.S. at 537.

\textit{Nebbia} also greatly reduced the severity of the requirement that only property "clothed with a personal interest" warranted regulation: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large." [quoting \textit{Munn v. Illinois}, 94 U.S. 113, 126 (1877)] Thus understood, "affected with a public interest" is the equivalent of "subject to the exercise of the police power"; and it is plain that nothing more was intended by the expression . . . .

The statement that one has dedicated his property to a public use is, therefore, merely
As the Court became more tolerant of regulation generally, the emergency requirement became less useful. At least two state courts have read *Nebbia* to hold that rent control laws are valid even without an emergency. In *Westchester West No. 2 Ltd. Partnership v. Montgomery County*, 37 the Court of Appeals of Maryland faced a challenge to a county's rent control law by several landlords who contended that the law relied on a “non-existent public emergency and therefore ‘constitute[d] a deprivation of private property without due process of law.’” 38 The Court found that the prevailing housing shortage provided a rational basis for the law, 39 stating that “the constitutionality of the Montgomery County rent control law does not depend upon the existence of an emergency shortage in rental housing.” 40 The Supreme Court of California, in a lengthy opinion by Chief Justice Wright, reached a similar conclusion in *Birkenfeld v. City of Berkeley*. 41 Although the court ultimately invalidated Berkeley's rent control law for not providing a reasonable means to accomplish its objectives, 42 the opinion analyzed the emergency requirement in depth and branded it “obsolete.” 43 *Birkenfeld* and *Montgomery County* each treated the emergency requirement as primarily a theoretical vehicle the Court had used to uphold vital statutes, 44 despite a general hostility to regulatory legislation. In their view, the passing of that hostility rendered the emergency requirement a mere troublesome vestige. That assessment is persuasive and finds growing favor among scholarly commentators. 45

Thus, rental control laws do not appear to overstep the bounds of another way of saying that if one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue.

291 U.S. at 533-34.

37. 276 Md. 448, 348 A.2d 856 (1975).
38. 276 Md. at 451, 348 A.2d at 858.
39. 276 Md. at 454, 348 A.2d at 860.
40. 276 Md. at 463, 348 A.2d at 865.
42. 17 Cal. 3d at 173, 550 P.2d at 1033, 130 Cal. Rptr. at 497.
43. 17 Cal. 3d at 157, 550 P.2d at 1021, 130 Cal. Rptr. at 485.
44. Their view finds support in the opinion of Justice Douglas, for a unanimous Court, in *Olsen v. Nebraska*, 313 U.S. 236 (1941):

The standard [employed in earlier price control cases] was that the constitutional validity of price-fixing legislation, at least in the absence of a so-called emergency, was dependent on whether or not the business in question was “affected with a public interest.” . . . It was said to be so affected if it had been “devoted to the public use” and if “an interest in effect” had been granted “to the public in that use.” . . . That test, labelled by Mr. Justice Holmes . . . as “little more than a fiction,” was discarded in *Nebbia v. New York* . . . . 313 U.S. at 245. *Olsen* overruled *Ribnik v. McBride*, 277 U.S. 350 (1928), which had held that states could not regulate the fees of employment agencies.

45. *See, e.g., Baar & Keating, The Last Stand of Economic Substantive Due Process — The Housing Emergency Requirement for Rent Control*, 7 URBAN LAW. 477 (1975); 1977 ANN. SURVEY AM. L. 431. Another way of approaching the problem is to define “housing emergency” less stringently. Courts have considered a low vacancy rate in rental housing to be such an emergency. *See, e.g., Inghanamort v. Borough of Fort Lee*, 120 N.J. Super. 286, 328, 298 A.2d
a state's authority to regulate for the welfare of its citizens. The state has a legitimate interest in assuring adequate housing, and restricting the rent a landlord can charge is a reasonable way to promote that interest. The same reasoning should vindicate most condominium conversion laws as legitimate exercises of the police power. They, too, limit a landlord's return on his investment to control the cost of rental housing. In the words of a recent commentator, conversion regulations resemble rent control laws "not only in the controlling aspects, but [also] in their underlying objectives."\(^{46}\) That similarity should preclude successful police-power attacks on conversion statutes.

II. CONVERSION REGULATIONS AND THE TAKINGS CLAUSE

Limitations on the state's police power are not the only source of possible objection to statutes regulating condominium conversion. Landlords may seek to escape the analogy to rent control statutes by referring to the fifth amendment requirement that land not be "taken" without compensation.\(^{47}\) They may argue that rent control laws do not keep a landlord from renting: they merely limit the price a landlord may charge for rental. Conversion regulations, on the other hand, prevent landlords from selling individual apartments at any price. One must confess that the regulations restrict land use more significantly than do the rent control statutes; nonetheless, analysis of the jumble of cases construing the takings clause reveals that conversion laws do not interfere with property rights sufficiently to require compensation.\(^{48}\)

Courts and commentators lack a settled interpretation of the takings clause; the Supreme Court has acknowledged that no "set formula" will explain all cases.\(^{49}\) Historically, the courts have most

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\(^{46}\) Rhine, supra note 9, at 6-7.

\(^{47}\) U.S. Const. amend. V. Several state constitutions prohibit the taking or damaging of property without just compensation. This might be a harder test for the state to meet. See, e.g., Cal. Const. art. I, § 19; Tex. Const. art. I, § 17; Va. Const. art. I, § 11.

\(^{48}\) Before any discussion of the taking issue is warranted, it should be clear that the "right" to convert is a property right. The condominium form of ownership is a recent statutory innovation. The current debate on what constitutes property centers on such nontraditional forms of "property" as government employment and welfare benefits. To maintain that the statutory right to sell property in a certain form is not a property right would, by implication, cut much more deeply into traditional concepts of property, and wrongly equate the concept of real property with the statutory rights under conveyancing and recording laws. It also incorrectly assumes that condominiums could not be created without the enabling acts. See 4B R. Powell, Real Property § 633.8 (rev. ed. 1979 & Supp. 1979.)

\(^{49}\) Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962). Some cases look at taking and police-power regulation as mutually exclusive concepts. A determination that a regulatory act is within the police power, they reason, is sufficient to counter any claim of a taking. See, e.g., Miller v. Schoene, 276 U.S. 272, 279-80 (1928). This is a misleading way of thinking about the relationship between the police power and the taking problem. Even when the gov-
often professed allegiance to two divergent standards.\textsuperscript{50} The narrower interpretation held that a taking occurs only when a state takes title to the property — actually or constructively — by a physical encroachment. Courts used this test to require compensation for such complete expropriations of property as when the government flooded private land\textsuperscript{51} or turned it into a swamp.\textsuperscript{52} Early Supreme Court cases explicitly limited takings to regulations depriving the owner of all use of the property.\textsuperscript{53} Obviously, condominium laws do not meet this strict test. While such regulations do limit an owner’s use of property, the government does not take title to it, physically encroach upon it, or use it for government purposes.

A second, broader interpretation held that when a regulation impairs the value of property beyond a permissible degree or unreasonably limits the owner’s control of its use, the regulators must compensate the owner. This test achieved its most prominent early expression in \textit{Pennsylvania Coal Co. v. Mahon}.\textsuperscript{54} The Supreme Court found a fifth amendment taking in a regulation that prevented the company from exercising its mineral rights because the required excavation might cause the surface of the land, and the Mahon house, to collapse. Justice Holmes wrote:

\begin{quote}
The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . [A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree — and therefore cannot be disposed of by general propositions.\textsuperscript{55}
\end{quote}

\textit{The Mahon} test looks at how much the regulation diminishes the

\begin{footnotes}
\textsuperscript{51} See Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871).
\textsuperscript{52} See United States v. Lynah, 188 U.S. 445 (1903).
\textsuperscript{54} 260 U.S. 393 (1922).
\textsuperscript{55} 260 U.S. at 415-16.
\end{footnotes}
value of property, but it does not indicate the degree of diminution required to constitute a taking.

It is highly unlikely that a prohibition on condominium conversions constitutes a taking under the Mahon test. Conversion regulation resembles many other restrictions on land use that have been upheld: zoning laws furnish the clearest examples. The Supreme Court has long held that ordinances prohibiting certain uses in certain areas are valid if enacted as part of a common plan. Thus, the standard zoning enabling act explicitly provides for land use restrictions. Of course, a zoning ordinance that unduly affects a particular plot of land may be struck down if it serves no legitimate interest, but condominium conversion laws serve important public interests. And the economic burden upon a landlord who is not allowed to convert is relatively small compared to other burdens that the Supreme Court has held valid. In Goldblatt v. Hempstead, for example, the Court upheld an ordinance that forced a landowner to abandon the use it had made of its property for many years.

The most recent judicial light on this area was shed in a case of historic landmark regulation. In Penn Central Transportation Co. v. City of New York, the Supreme Court recognized that a city may restrict the use of a certain property even if that restriction “destroy[s] or adversely affect[s] recognized real property interests.”

56. Justice Holmes stated at one point: “One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act.” 260 U.S. at 413.

57. Holmes noted that rent control laws, such as those examined in Block v. Hirsch, 256 U.S. 133 (1921), and Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921), “went to the verge of the law,” but fell short of being a taking. 260 U.S. at 416.


60. See Nectow v. City of Cambridge, 277 U.S. 183 (1928).

61. See text at note 46 supra.


64. 438 U.S. at 125. The Court explicitly rejected the pure physical encroachment test, stating that “we do not embrace the proposition that a ‘taking’ can never occur unless government has transferred physical control over a portion of a parcel.” 438 U.S. at 123 n.25. The Court then identified the determinative factors for deciding whether a law results in a taking: The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are of course relevant considerations. . . . So too is the character of the government action. A “taking” may more readily be found when the interference with property can be charac-
New York City had sought to prohibit Penn Central from constructing an office tower above Grand Central Station, which had been designated a historical landmark. The Court denied Penn Central's assertion that the prohibition amounted to an unconstitutional taking, noting that the landmark law was not an "acquisition[ ] of resources to permit or facilitate uniquely public functions" and did not interfere with the existing use of the property. In particular, the Court noted, the landmark law allowed Penn Central to continue using the property as it had expected to use it and to receive a reasonable return upon the land. Can any less be said of the average landlord?

Although the exact contours of a taking remain vague, the deprivations imposed by conversion restrictions seem insufficient to require compensation. Obviously the regulating authority does not physically encroach upon the landlord's apartment, and the landlord may continue to use the property as in the past. Moreover, the burden is much less than other courts have already tolerated. Property owners will have to look elsewhere for constitutional grounds to obstruct condominium conversion regulations.

III. CONSENT PROVISIONS AND PROCEDURAL DUE PROCESS

An outraged landlord who finds no solace in the police power and takings limitations on government activity may nonetheless raise a potent constitutional objection if the conversion ordinance permits conversions when tenants or neighbors consent. Such an ordinance arguably delegates government power to interested private parties, thereby denying landlords the fourteenth amendment right to due process as a physical invasion by government, . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

438 U.S. at 124 (footnotes omitted). The Court also noted that when the government does not take property for its own use or "physically invade" it, but instead enacts police power regulations, the Court will usually uphold the law: "More importantly for the present case, in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests." 438 U.S. at 125 (footnotes omitted).

65. 438 U.S. at 128.

66. The Court noted:

[Grand Central Station's] designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel.

438 U.S. at 126.

67. The New York ordinance, for example, required that 35% of the tenants agree to purchase their units. See text at notes 13-17 supra. The San Francisco law requires that the same percentage consent to the conversion. See P. Rohan & C. Berger, supra note 12.
process. This Section pursues that argument to what is, for the landlord, a happy conclusion.

Modern due process analysis has two stages. First, it assesses whether the person is being deprived of a "protected" liberty or property interest. Then, it determines the process that is due that interest. The landlord's property interest here is the free use of the land. Although not every limitation on land use would necessarily threaten a protected property interest, the common law principle that a person may use land in any way that does not create a nuisance has been deemed to create a protected interest that easily embraces the landlord's situation.

Somewhat more effort is needed to evaluate the due-ness of the process by which a landlord is deprived of his property interest in land use. It is well established that all rational "legislative acts" within the police power satisfy the procedural requirements of the fourteenth amendment. "Administrative acts," in contrast, pass constitutional muster only by offering affected persons "meaningful" safeguards, including notice, a hearing, and an impartial adjudicator who gives reasons for the decision. Much scholarly commentary has been devoted to distinguishing legislative acts from administrative acts, and several different approaches have been suggested. By almost any standard, however, the proceedings to obtain tenant consent under condominium conversion ordinances that require consent are administrative. The decision applies a general

68. An ironic juxtaposition arises: some laws absolutely prohibiting conversion do not violate the landlord's rights, but laws that may allow some conversions upon tenant consent are constitutionally unsound. This attests to the constitutional importance of fair procedure. Although the nature of the prohibition does not render it invalid, the manner in which the prohibition is imposed may do so.

69. One might find the delegation of governmental authority impermissible by another route. Federal and state constitutions grant legislative power exclusively to governmental bodies. See, e.g., U.S. CONST. art. I, § 1; MICH. CONST. art. 4, § 1; VT. CONST. ch. II, § 2. Arguably, the nondelegation principle follows directly from such provisions. This Note will not develop such an argument. Since condominium conversion laws are not delegations of United States congressional power, no federal constitutional issue is raised; the state issue would depend on the particular state constitutional provision in dispute, and would not be of general interest.

70. See Developments in the Law—Zoning, 91 HARV. L. REV. 1427, 1514 (1978) [hereinafter cited as Developments].

71. See Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928).

72. See, e.g., Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915). Cf. Developments, supra note 70, at 1509 ("due process need not attach to legislative acts"); Comment, Due Process Rights of Participation in Administrative Rulemaking, 63 CALIF. L. REV. 886, 889 (1975) ("procedural due process has been considered inapplicable to the legislative setting").


75. See, e.g., 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE ch. 12 (2d ed. 1979); Cunningham, Rezoning by Amendment as an Administrative or Quasi-Judicial Act: The "New Look" in Michigan Zoning, 73 MICH. L. REV. 1341 (1975); Developments, supra note 70, at 1508-13.
ordinance to a particular apartment. The group that decides — a cluster of tenants — is not elected. The facts supporting the decision are tenants' personal predilections, not general assumptions about societal preferences. The decision affects an identifiable individual — the landlord. Thus, the statutes delegate responsibility for an administrative act, and the landlord seems entitled to the traditional safeguards of procedural due process.

It seems difficult to rationalize the proposition that tenant consent provisions satisfy procedural due process requirements. The ultimate decision is delegated to a party who is intimately concerned with and affected by its outcome. Such a delegation appears to be a clear violation of the procedural requirement of an impartial adjudicator.

The landlord's contentions find some support in a trilogy of aging but still important Supreme Court cases concerning the delegation of land use decisions. In Eubank v. Richmond, the Court struck down an ordinance allowing the owners of property on a street to establish the building lines on that street. Five years later, however, in Cusack v. Chicago, the Court upheld a law that forbade billboard erection without the consent of nearby property owners. The Court weakly distinguished Eubank by noting that the Richmond law allowed property owners to establish a new prohibition, while the Chicago law only allowed property owners to remove an existing prohibition. The fatuousness of this distinction became

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76. For a list of "tests" that may turn on the foregoing characteristics of the decision, see Developments, supra note 70, at 1509-12.
77. 226 U.S. 137 (1912).
78. In response to a state law, the City of Richmond delegated the power to establish building lines. If the owners of two thirds of the property abutting any street agreed on a building line, the city automatically decreed that no building should extend over that line and prescribed fines for violations. The city government had no discretion in the matter, nor was any review possible. Eubank erected a home with a bay window that extended over a building line that had been established after he received his permit but before construction began. He challenged the law, contending that it deprived him "of his property without due process of law and den[ied] him the equal protection of the laws." 226 U.S. at 140. The Court agreed. It noted that the ordinance allowed the owner of nearby property to control the property of the plaintiff, perhaps "solely for their own interests or even capriciously." 226 U.S. at 144. The Court implied that it might have held differently if the ordinance had established rigid guidelines by which the property owners had to decide the location of the line, or if it had empowered the city to review the reasonableness of the designation. The Richmond ordinance, however, "enable[d] the convenience of property owners to control the property rights of others." 226 U.S. at 144.
79. 242 U.S. 526 (1917).
80. The case upheld a Chicago ordinance that required the consent of the owners of a majority of the property fronting on a residential street before a billboard or signboard could be erected on that block. The parties, once again, framed the issue in due process terms. The Court held that since the city could (and did) prohibit the billboards absolutely, the provision that allowed the neighbors to lift that prohibition could not injure the plaintiff. The Court stated that "[h]e who is not injured by the operation of a law or ordinance cannot be said to be deprived by it of either constitutional right or of property." 242 U.S. at 530.
clear in *Washington ex rel Seattle Title Trust Co. v. Roberge,* the final case in the trilogy. *Roberge* invalidated an ordinance that had required the builders of a home for the elderly to obtain the consent of area homeowners. The Court tried to distinguish the case from *Cusack* by holding that *Cusack's* billboard regulation had concerned a use that threatened "the safety and decency" of the neighbors, while the home for the elderly in *Roberge* benefited the community.

Not surprisingly, the tension within the *Roberge* trilogy has spawned some curious results in the lower courts. In 1968, for example, the Delaware Supreme Court invalidated a section of the Newark zoning law that required the consent of neighboring property owners before a "multiple dwelling" could be built, reasoning that such consent was "repugnant to due process . . . an unlawful delegation of legislative authority." A year later, the Minnesota Supreme Court faced similar facts in *O'Brien v. City of Saint Paul* but upheld the ordinance by analogizing it to *Cusack*: the law was couched in terms of lifting a prohibition, rather than imposing one. Extraordinarily, the *O'Brien* court distinguished *Roberge* by finding the proposed apartment building — like the *Cusack* billboard — to be a use likely to cause "injury, inconvenience, or annoyance to the community.” The court thus used the *Roberge* language to uphold the very situation that *Roberge* had disallowed.

Clearly, *O'Brien* wobbles uneasily on the foundation of *Roberge* and *Eubank.* More significantly, however, it illustrates the theoretical instability of the Court's attempts to distinguish *Cusack.* By hinging the legitimacy of a delegation on whether the ordinance requires the neighbors' initiative to remove a prohibition or to impose one, the Supreme Court overlooked the central question of due pro-

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81. 278 U.S. 116 (1928).
82. The ordinance provided that "a philanthropic home for . . . old people shall be permitted in First Residence District when the written consent shall have been obtained of the owners of two-thirds of the property within four hundred (400) feet of the proposed building." 278 U.S. at 118. The plaintiff, who proposed to erect such a home without the consent of nearby property owners, challenged the validity of the delegation provision on due process grounds. The Court noted that the law provided no standards for the delegated decision and supplies no means of reviewing those decisions.
83. 278 U.S. at 122.
84. In addition to the state court cases discussed in text, see, e.g., People ex rel. Chicago Dryer Co. v. City of Chicago, 413 Ill. 314, 109 N.E.2d 201 (1952); Gannett v. Cook, 245 Iowa 759, 61 N.W.2d 708 (1953); Concordia Collegiate Inst. v. Miller, 301 N.Y. 189, 93 N.E.2d 201 (1952).
85. Marta v. Sullivan, 248 A.2d 608, 611 (Del. 1968). The ordinance required the developer to obtain "approval of 75% of the residents within a radius of one-eighth mile" before constructing a multiple dwelling when the "immediate neighborhood is more than 50% developed." 248 A.2d at 608 (quoting Newark Zoning Ordinance § 501(d)).
86. 285 Minn. 378, 173 N.W.2d 462 (1969). A city ordinance required the consent of the owners of two thirds of the property within 100 feet of a proposed apartment building in a one- or two-family residence district.
cess. Laws that accommodate that formalistic standard may still permit neighbors to prohibit unwanted uses capriciously.

Moreover, Roberge's redefinition of the Cusack exception (allowing a state to delegate authority to waive a prohibition of a use that threatens "safety and decency") does not even withstand the Court's own analysis. In Eubank, Justice McKenna condemned the delegation in question for letting property owners control their neighbors' property "solely for their own interests or even capriciously." The Roberge Court spoke similarly. That analysis should also have doomed the Cusack and O'Brien ordinances: the motivation for a legal restriction does not affect the selfishness or capriciousness with which interested parties may wield delegated authority. The neighbors in O'Brien might deny the right to build because they prefer the spacious feeling of an empty lot, because they fear a decline in property values, or simply because they don't like Mr. O'Brien.

The Cusack exception is difficult to reconcile with other constitutional settings. One cannot even justify it with a theory that the beneficiaries of a use restriction are accurate, non-capricious arbiters of when it is in their own interests to waive a prohibition.

87. 226 U.S. at 144.
88. 278 U.S. at 122.
89. As early as 1886, the Court discussed the repugnancy of arbitrary power based on personal, rather than general, interests:

When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power . . . . For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life at the mere will of another seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.


90. In other cases of delegation to interested parties, the Supreme Court has been vehement in its condemnation. For example, in Carter v. Carter Coal Co., 298 U.S. 238, 311-12 (1936), the Court declared:

The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business . . . . The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause . . . . that it is unnecessary to do more than refer to the decisions of this court which foreclose the decision. Schechter Corp. v. United States, 295 U.S. at p. 537; Eubank v. Richmond, 226 U.S. 137, 143; Seattle Trust Co. v. Roberge, 278 U.S. 116, 121-122.

On the other hand, in Currin v. Wallace, 306 U.S. 1 (1939), the Court upheld the Federal Tobacco Inspection Act against a challenge based, in part, on the delegation of power to some of the growers and to the Secretary of Agriculture. The Act authorized the Secretary to designate those markets where tobacco moved in interstate commerce. Before he could make such a designation, however, two thirds of the growers in the area had to approve. A designated interstate market became subject to Department of Agriculture inspection. The Court, citing Cusack, Roberge, and Carter, held that there was no delegation to the growers since Congress merely withheld the operation of its own regulations until the required approval was given by the growers. "Here it is Congress that exercises its legislative authority in making the regula-
cannot localize the beneficiaries of laws as the *Roberge* treatment of *Cusack* seems to suggest. A law protecting the safety or decency of a few also affects the safety and decency of the whole society. It is foolish to expect interested parties to appreciate all the concerns of every fellow beneficiary of an ordinance. Furthermore, the *Cusack* standard allows a state to remove the safety valve of judicial review from delegated decisions. Ultimately, no procedural safeguards protect a grievant's interest in the fair administration of the laws.

*Roberge* and *Eubank* should be read to preserve the due process rights of property owners. The general standard of *Eubank, Cusack,* and *Roberge* should be understood to prohibit all delegation of power to restrict property use, with perhaps a minor exception for those presenting an immediate, localized threat to safety and decency. Obviously this standard imperils statutes that condition condominium conversion upon tenant approval. In many cases, the

tion and in prescribing the conditions of its application. The required favorable vote upon the referendum is one of these conditions.” 306 U.S. at 16. The delegation of power to the Secretary was seen as merely giving him the power to ascertain a fact, and once the fact has been ascertained, to apply the rules established by Congress. 306 U.S. at 16-17. While the Court seems to have slipped into the evasive language of *Cusack,* the case can be distinguished from the conversion problem since in *Currin* those subject to the regulations were given the right to bind themselves to adherence, rather than to force adherence on another party whose interests conflict with those of the delegates.

A more recent discussion of the delegation issue occurred in City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976). That case decided “whether a city charter provision requiring proposed land use changes to be ratified by 55% of the votes cast [in a referendum] violate[d] the due process rights of a landowner who applies for a zoning change.” 426 U.S. at 670. The Court held that the charter provision did not deny due process, distinguishing the *Eubank* and *Roberge* delegations as not analogous to a referendum requirement:

Two decisions of this Court were relied on by the Ohio Supreme Court in invalidating Eastlake's procedure. The thread common to both [*Eubank and Roberge*] is the delegation of legislative power, originally given by the people to a legislative body, and in turn delegated by the legislature to a narrow segment of the community, not the people at large. 426 U.S. at 677 (emphasis in original).

Neither *Eubank* nor *Roberge* involved a referendum procedure such as we have in this case; the standardless delegation of power to a limited group of property owners condemned by the Court in *Eubank* and *Roberge* is not to be equated with decision-making by the people through the referendum process.

426 U.S. at 678. The Court characterized *Cusack* in a footnote as a simple waiver of “an otherwise applicable legislative limitation.” 426 U.S. at 678 n.12.

One recent case which peripherally discusses the delegation issue is Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). In *Belle Terre,* the Court upheld a zoning ordinance that restricted use to “single family dwellings,” and that defined “family” to exclude any group of more than two unrelated individuals. While the case did not really present a delegation of power issue, the Court discussed *Roberge* and *Cusack* in its review of past zoning challenges. The Court noted that the Seattle ordinance in *Roberge* was invalid because property owners could be subject to the selfish, arbitrary, or capricious will of others and because it, unlike *Cusack,* did not involve an inherent threat to safety or decency. 416 U.S. at 6-7. *See also* United States v. Mazurie, 419 U.S. 544, 556-58 (1975) (delegation of authority to tribal council to control sale of liquor on Indian reservation).

interests of the tenants and the landlord will conflict, and overall public interest may or may not favor conversion. To expect tenants to determine whether the conversion meets the public interest is folly; to expect them to appreciate the valid interests of the landlord is also folly. Both sides have important interests at stake, and both sides are entitled to an impartial consideration of those interests, with corresponding procedural safeguards. Any condominium conversion statute delegating that consideration to the tenants by requiring their consent denies the due process rights of the owner and offends the fourteenth amendment.

IV. CONCLUSION

Condominium conversion laws touch the bank accounts of building owners and their tenants; those affected parties will continue to litigate the validity of such laws. But a federal constitutional challenge is unlikely to invalidate the general concept of conversion regulation. Conversion regulations serve important social goals; to attain these goals they impose relatively light burdens. Regulations that require the consent of the tenants, however, deny the due process right of building owners. They offend basic concepts of procedural and substantive fairness, and therefore should not stand.

92. See, e.g., the statement of legislative findings in the recent New York law for suburban counties, N.Y. GEN. BUS. LAW § 352-33 (McKinney Supp. 1978); the debates over the reenactment of the old New York law, see sources cited in note 13 supra; HUD REPORT, supra note 1; Condominium Hearings, supra note 17; and Rhyne, supra note 9.