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### Conversion Condominium Development: An Issue of Tenants' Rights

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# NOTES

## CONVERSION CONDOMINIUM DEVELOPMENT: AN ISSUE OF TENANTS' RIGHTS

### I. INTRODUCTION

THE RAPID INCREASE IN THE NUMBER of condominium units in the United States has been identified as the "housing phenomenon of the seventies."<sup>1</sup> Today there are an estimated two million residential condominium units across the country and over ninety percent of these units have either been newly constructed or converted from private rental units during the last ten years.<sup>2</sup> The total number of apartments which were converted to condominium ownership in 1979 alone was greater than the total number of all such conversions done during the first half of the decade.<sup>3</sup> Conversion condominium developments were responsible for removing 100,000 rental units from the nation's housing market in 1978 and an estimated 130,000 additional units in 1979.<sup>4</sup> Pro-

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<sup>1</sup> *Condominium Housing Issues: Hearing on Condominium Conversions and S.612 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs*, 96th Cong., 1st Sess. 2 (1979) (opening statement of Harrison A. Williams, Chairman) [hereinafter cited as *Hearing on Condominium Conversions*].

Condominium property ownership is thought to date back to biblical times. It was not until 1958, however, that condominium enabling legislation was enacted in the United States. The Horizontal Property Act, developed in Puerto Rico, is credited with being the first formal recognition of condominium ownership by statute in a United States jurisdiction. P.R. LAWS ANN. tit. 31, §§ 1291-1293(k) (1971). During the 1960's all of the fifty states introduced their own condominium enabling statutes in response to § 234 of the National Housing Act of 1961; § 234 authorizes the Federal Housing Authority to insure condominium mortgages. 12 U.S.C. § 171(y) (1976). For a discussion of the historical background of condominium development in the United States, see D. CLURMAN & E. HEBARD, *CONDOMINIUMS AND COOPERATIVES* 2-10 (1970). See also Schrieber, *The Lateral Housing Development: Condominium or Home Owners Association?*, 117 U. PA. L. REV. 1104 (1969).

<sup>2</sup> *Hearing on Condominium Conversions*, *supra* note 1, at 2. The purchaser of a residential condominium buys fee simple title to an individual dwelling unit along with a percentage interest in the common areas of the whole development. 1 P. ROHAN & M. RESKIN, *CONDOMINIUM LAW & PRACTICE* § 1.01 at n.1 (1979). See also Rohan, *The "Model Condominium Code"—A Blueprint for Modernizing Condominium Legislation*, 78 COLUM. L. REV. 587, 587 n.3 (1978).

<sup>3</sup> *Hearing on Condominium Conversions*, *supra* note 1, at 2.

<sup>4</sup> *Id.* at 1. Statistical data on recent conversion activity is difficult to obtain. In 1979 the most complete study on condominium and cooperative housing activity was published by HUD. This study only compiled statistics for the years 1970-1974. U.S. DEPT OF HOUSING & URBAN DEVELOPMENT, 1 HUD CONDOMINIUM COOPERATIVE STUDY (1975) [hereinafter cited as 1975 HUD STUDY]. The problem of obtaining data on conversions was recognized in the HUD STUDY. *Id.* at 101-10.

jections for 1980 indicated that the number of condominium conversions would continue to rise despite a diminishing rental housing stock; by the end of 1980 there had been 135,000 new conversions.<sup>6</sup> The most recent national condominium conversion study estimated that between 1980 and 1985, an additional 1,457,000 rental units would be converted to either condominiums or cooperative ownership.<sup>7</sup> This figure represents an annual increase in condominium conversions of 45,000 units per year.<sup>8</sup>

The fact that conversion activity has predominated in those areas where rental housing shortages are most severe indicates that the demand for rental units has begun to exceed its supply. Rental vacancy rates<sup>9</sup> in major urban and suburban communities have been on the decline while condominium conversions have proliferated.<sup>10</sup> The current

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Information on the prevalence of conversion activity since 1975 continues to be unavailable in individual states, and the Census Bureau does not yet track condominium conversions. This is also true for city-wide statistics on conversions. One commentator has noted that "[m]ost major cities do not collate records on conversions, making credible statistics harder to come by than apartment leases." Franklin, *Tenants Voice Anger Over Growing Trend to Condominium Use*, N.Y. Times, Oct. 21, 1979, § 1, at 18, col. 1. In 1980 HUD published the findings of a national study concerning the scope, causes and impacts of the conversion of rental housing to condominiums and cooperatives. This report contains the most comprehensive research on the conversion trend to date. U.S. DEPT OF HOUSING & URBAN DEVELOPMENT, *THE CONVERSION OF RENTAL HOUSING TO CONDOMINIUMS AND COOPERATIVES* (1980) [hereinafter cited as 1980 HUD STUDY]. This study recognized the difficulty inherent in compiling national condominium conversion statistics. *Id.* at IV-1 to IV-4.

<sup>5</sup> See *G.A.O. Seeks Action on Rental Housing*, N.Y. Times, Dec. 27, 1979, § 1, at 19, col. 1. But see Citicorp Real Estate, Inc., U.S. HOUSING MARKETS, Sept. 1979, at 10 (concluding that the rental market is currently tight because of insufficient demand).

<sup>6</sup> 1980 HUD STUDY, *supra* note 4, at VII-16.

<sup>7</sup> *Id.* at VII-17.

<sup>8</sup> *Id.* at VII-16.

<sup>9</sup> Rental vacancy rate is defined as the percentage of vacant rental units to the total rental inventory. The figure is computed by dividing the number of vacant units by the total rental units. U.S. DEPT OF COMMERCE, BUREAU OF THE CENSUS, *VACANCY RATES AND CHARACTERISTICS OF HOUSING IN THE UNITED STATES: ANNUAL STATISTICS 1977*, at 6 (1978). According to the 1980 HUD STUDY, the turnover rate provides a useful indicator of the balance between supply and demand. Turnover rates are measured by the rate at which rental units are occupied by new households. 1980 HUD STUDY, *supra* note 4, at V-9 n.13. Rental vacancy rates may sometimes be unreliable when used alone as a measure of the supply/demand balance. *Id.*

<sup>10</sup> Those states which are presently experiencing the most severe housing shortages in their prime metropolitan communities include New York, California, Washington, D.C., Illinois, Massachusetts, Washington and Colorado. See Nat'l Council of Senior Citizens, *Condominium Conversions: Options for Tenant and Rental Market Protection*, in *Hearing on Condominium Conversions*, *supra* note 1, at 65, 86-96. In 1975, a ranking of the top 10 states by recent condominium and cooperative activity (including new construction) listed the following states in

rental vacancy statistics represent an increase in the number of American households, the removal of substandard rental units from the housing market, an overall decrease in the construction of new rental properties and the conversion of prime residential rental units to condominiums.<sup>11</sup>

The reported national rental vacancy rate for the first quarter of 1979 was 4.8%, the lowest figure ever released by the Census Bureau since these statistics were first collected more than two decades ago.<sup>12</sup> The vacancy rates in those cities where condominium conversion has been most rampant have been significantly lower than the national figure.<sup>13</sup> "[T]he galloping pace of conversion activity has led to forecasts that private market rental housing, already an endangered species, may soon be driven to extinction."<sup>14</sup> The current demand for condominium conversions may not reflect a true preference for this form of property ownership, but instead may be generated by a perception that housing prices will continue to rise and that rental housing availability will continue to diminish.

order: Florida, California, Ohio, Texas, Illinois, Michigan, Arizona, New York, Pennsylvania and Maryland. 1975 HUD STUDY, *supra* note 4, at 111-17.

The 1980 HUD STUDY found that Boston, Chicago, Denver-Boulder, Houston, Los Angeles-Long Beach, Miami, Minneapolis-St. Paul, New York City, San Francisco-Oakland, Seattle-Everett, Tampa-St. Petersburg and Washington, D.C. comprised the twelve highest conversion activity areas of the thirty-seven largest Standard Metropolitan Statistical Areas used by the Census Bureau. 1980 HUD STUDY, *supra* note 4, at IV-7. Cleveland was noted as one of the metropolitan areas in which suburban conversions are much higher than those of the central city itself. *Id.* at IV-8.

<sup>11</sup> See *Hearing on Condominium Conversions*, *supra* note 1, at 462-63 (statement of G.V. Brenneman, Jr., Chairman, Condominium Committee, Nat'l Ass'n of Realtors, D.C.). See also 7 HOUS. & DEV. REP (BNA) 341 (Sept. 17, 1979).

<sup>12</sup> *Hearing on Condominium Conversions*, *supra* note 1, at 2 (statement by Senator Williams). See also *G.A.O. Seeks Action on Rental Housing*, *supra* note 5, at 19.

[W]hen a rental vacancy rate falls below 6 percent, market parity is destroyed and tenants are forced to pay higher rents than they can afford, accept housing below previous standards, or uproot their family and move to a different jurisdiction with a high vacancy rate. Other housing experts agree that when the rental vacancy rate falls below 5 percent, it is difficult for low- or moderate-income persons to find replacement housing in the same community at the comparable cost or quality. When the rate falls below 3 percent, this difficulty extends to the middle income household as well.

*Hearing on Condominium Conversions*, *supra* note 1, at 45-46 (statement by Daniel Lauber, Principal Consultant, Planning/Communications Associates of Evanston, Ill.).

<sup>13</sup> For an overview of rental vacancy rates and conversion condominium development since the 1975 HUD STUDY was published, see 1980 HUD STUDY, *supra* note 4.

<sup>14</sup> *Hearing on Condominium Conversions*, *supra* note 1, at 2.

The growth of condominium conversion during the 1970's has prompted legislative response at the state and local level in an attempt to secure the continued existence of a private rental housing market and to minimize the hardship of dislocation imposed upon rental tenants of apartment buildings in the conversion process. Those states experiencing the most serious rental housing shortages have generally tended to adopt the most stringent regulations on conversion activity.<sup>15</sup> Local governments have often gone further to adopt additional tenant protection ordinances,<sup>16</sup> and complete moratoriums on all conversion development pending further local legislation in the area have not been uncommon.<sup>17</sup> The interests which must be reconciled in the regulation of conversions are those of nonpurchasing tenants, rental property owners, developers and the community.

It is against this backdrop of burgeoning conversion activity, rental housing shortages and diverse legislative controls that this Note will examine the issue of tenant protection as it has developed in Ohio. The consideration given to conversion condominium development in the 1978 amendments to the Ohio Condominium Property Act<sup>18</sup> creates minimal, if any, protection for either tenants or the rental housing market. This

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<sup>15</sup> For example, Washington, D.C. has devised a comprehensive statutory scheme whereby defined high rent housing may be converted without limitation, but all other conversion condominium development is permitted only if the rental vacancy rate is higher than 3%, or if a majority of tenants agree to the conversion of their particular apartment building. D.C. CODE ENCYCL. § 1-1281 (West Supp. 1978). For a review of recent legislative and substantive developments in condominium law on a state-by-state basis, see generally 1 P. ROHAN & M. RESKIN, CONDOMINIUM LAW & PRACTICE 27-103 (Supp. 1979).

For a discussion of the constitutionality of condominium conversion legislation, see Note, *Condominium Conversion Legislation: Limitation on Use of Deprivation of Rights?—A Re-examination*, 15 N. ENG. L. REV. 815, 825-35 (1980). An in-depth analysis of all state conversion condominium tenant protection legislation is beyond the scope of this Note.

<sup>16</sup> E.g., LAKEWOOD, OHIO, BUILDING CODE § 1327.06 (1979) (protection of tenants and purchasers); Skokie, Ill., Ordinance 78-6-B-1088 (June 12, 1978). See notes 82-89 *infra* and accompanying text.

<sup>17</sup> E.g., Lakewood, Ohio, Ordinance 22-79 (Feb. 20, 1979) (90 day moratorium on all condominium conversion development); San Francisco, Cal., Ordinance 160-79 (April 9, 1979) (prohibiting conversions for 45 days); San Francisco, Cal., Ordinance 229-79 (May 29, 1979) (extending conversion moratorium); Skokie, Ill., Ordinance 77-11-B-1058 (Nov. 28, 1977). "A moratorium is not a solution to the condominium conversion dilemma. A moratorium is by definition only a temporary expedient in times of emergency. If extended indefinitely, a conversion moratorium would represent an unconstitutional restraint on the alienation of private property." Nat'l Council of Senior Citizens, *Condominium Conversions: Options for Tenants and Rental Market Protection*, in *Hearing on Condominium Conversions*, *supra* note 1, at 65, 154.

<sup>18</sup> OHIO REV. CODE ANN. §§ 5311.01-5311.09, 5311.11, 5311.13, 5311.18 and 5311.21-5311.27 (Page 1981).

Note will critically examine the pertinent provision of the Ohio Act,<sup>19</sup> outline the municipal tenant protection laws which have subsequently been enacted in metropolitan Cleveland communities and consider the issue of whether these local conversion regulations are a valid exercise of Home Rule power. Finally, the relative merits of state versus local legislation will be discussed.

## II. THE CONDOMINIUM CONVERSION TREND

The proliferation of condominium conversions during the 1970's has not been an unexplained phenomenon. The profits to be derived from rental properties have diminished as the costs of real estate taxes, utilities and building maintenance have escalated.<sup>20</sup> Moreover, apartment rents have not kept pace with inflation and, in some states, rent control legislation has been enacted which prevents landlords from arbitrarily increasing rents.<sup>21</sup> The fear of forthcoming rent control legislation has similarly prompted landlords to avail themselves of the conversion alternative. Some commentators have even proposed that the expansion of tenants' rights has further burdened the private landlord and has ultimately discouraged continued involvement in the private rental housing market.<sup>22</sup> Condominium conversion creates an opportunity for property owners to rid themselves of unprofitable rental property at a substantial short-term profit. The sale of individual apartment units often creates more gain for the landlord than would be realized upon the sale of the same property as a whole.<sup>23</sup>

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<sup>19</sup> *Id.* § 5311.25(G). See notes 33-81 *infra* and accompanying text.

<sup>20</sup> See Note, *Tenant Protection in Condominium Conversions: The New York Experience*, 48 ST. JOHN'S L. REV. 978, 982 (1974). See also Comment, *The Condominium Conversion Problem: Causes and Solutions*, 1980 DUKE L.J. 306, 311-14.

<sup>21</sup> *Id.*

<sup>22</sup> *E.g.*, *Hearing on Condominium Conversions*, *supra* note 1, at 28 (testimony of the Nat'l Council of Senior Citizens).

Tenants have begun to organize and protest in opposition to conversion condominium development. On October 21, 1979, a group of tenants, organized by the Emergency Committee to Save Rental Housing, staged a demonstration and marched from the White House to the Capitol in support of the "right to rent" movement. Franklin, *Tenants Voice Anger Over Growing Trend to Condominium Use*, N.Y. Times, Oct. 21, 1979, § 1, at 1.

<sup>23</sup> Suttler, *Getting Rich Quick in the Condo Market*, VENTURE, Aug., 1979, at 50. "The condominium market can offer financial rewards that border on the outrageous." *Id.* A conversion cost analysis done in 1975 on a 342 unit apartment building in New York is illustrative of this statement. The yearly rental income received from the property was approximately \$500,000, the sale price of the building to a condominium developer was \$8,450,000, but the total estimated sale price for 342 units individually was \$13,615,000. 1 P. ROHAN & M. RESKIN, CONDOMINIUM LAW & PRACTICE § 3A.04 (1979).

The tax consequence of creating a condominium conversion development may

The interests of landlords in the conversion of their rental properties has been further stimulated by the current demand for condominiums. "The desirability of converting rental projects into condominiums is based upon the proposition that although the market for rentals is unprofitable, a market for buyers exists that will justify the conversion."<sup>24</sup> Condominium ownership offers the purchaser the tax benefits and appreciation potential of single-family housing coupled with the relative ease of condominium property maintenance. Converted units may offer the additional benefit of a prime metropolitan location previously unavailable to purchasers. Furthermore, as the cost of single family homes has increased, condominiums have provided the opportunity of property ownership at a lower purchase price. According to the 1975 HUD study on condominiums and cooperatives, the number of households has continued to grow, but the average household size has become smaller<sup>25</sup> with the result that "the demand for housing has increased while preference for space has declined, thus increasing the attractiveness of condominiums."<sup>26</sup>

Advocates of condominium conversion growth have emphasized the benefits to individual communities generated by the current conversion trend; property tax revenues are increased by the growth in numbers of separately taxable property units. Some older buildings may be rehabilitated and kept on the market because of conversion activity. Also, transient renter neighborhoods are "stabilized" when apartments are owned by their occupants.<sup>27</sup> Condominium owners, unlike renters, will arguably take better care of their property investment. It has therefore been advanced that the community interest in the maintenance of its housing stock is best met by encouraging condominium conversion development.<sup>28</sup> Condominium conversion development in a healthy housing market is a positive trend, offering economic and non-economic benefits to landlords, purchasers and communities.

On the other hand, the recent rapid pace of condominium conversion

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be that any gain will be treated as ordinary income under § 1231(b)(1)(B) of the Internal Revenue Code. This would be the case if the owner of the property was deemed a "dealer" holding the property for sale to customers in the ordinary course of business. It is, however, possible for a condominium conversion to qualify for capital gains treatment on the building's appreciation. See Stewart & Klein, *How to Convert An Apartment Complex Into Condominium Units at Capital Gains Rates*, 8 TAX. FOR LAW. 342 (1980).

<sup>24</sup> P. ROHAN & M. RESKIN, *CONDOMINIUM LAW & PRACTICE* § 3A.04 (1979).

<sup>25</sup> 1975 HUD STUDY, *supra* note 4, at 1-9. See generally 1980 HUD STUDY, *supra* note 4, at V-1 - V-32.

<sup>26</sup> 1975 HUD STUDY, *supra* note 4, at 1-9.

<sup>27</sup> Nat'l Council of Senior Citizens, *Condominium Conversions: Options for Tenant and Rental Market Protection*, in *Hearing on Condominium Conversions*, *supra* note 1, at 65, 101.

<sup>28</sup> *Id.*

development during a time of an inflated economy and already existing rental housing shortages poses a significant threat to the portion of the population who are (and who would prefer to remain) renters. "Changing rental units into home-ownership stock increases the cost of housing without increasing the ability of city residents to pay."<sup>29</sup> As the pace of new apartment and single family home construction has not kept up with the demand for housing during the 1970's, the impact of conversion activity has exacerbated an already existing housing shortage.<sup>30</sup> Consequently, it is important to recognize that condominiums and conversions in and of themselves have not created the current problems.

Theoretically, condominium conversion development only involves a change in the ownership status of the occupants in a particular building. If all renters purchased their apartments as they were converted into condominiums, the pattern of housing would simply shift away from renting towards ownership. This has not been the situation with the advent of condominium conversions, and although conversion activity typically occurs in higher priced rental units, the net effect has been to decrease the availability of low and moderate income housing:<sup>31</sup>

Under traditional housing theory, every time a new house was built and somebody moved in, they would leave behind them a unit that would be less costly. . . . It could be seen as a ladder which is wide at the base and narrows at the top. . . . In the ladder analogy, condominium conversions force tenants to move down the ladder. . . . [C]ondominiums have the effect of raising the cost of housing, displacing [sic] tenants, removing housing choices and decreasing the amount of housing available for low-income tenants.\*\*\* [W]ith no new housing being built because of the cost, opportunities do not open up on the housing ladder. Condominiums remove the dollars that would go to new housing

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<sup>29</sup> Nat'l Council of Senior Citizens, *Condominium Conversions: Options for Tenant and Rental Market Protection*, in *Hearing on Condominium Conversions*, *supra* note 1, at 71.

The psychological impact of dislocation upon tenants has been identified as further consequence of conversion condominium development. "Some therapists have already coined the term 'condo stress' to describe the fears of tenants who have been displaced one, two, or even three times, and anxiously await their next eviction notice." Jones, *Urban Gentrification: Where There's No Place Like Home*, 25 NAT'L A. SOC. WORKERS NEWS 2, 5 (1980). As a result of this impact upon tenants, a new role for social workers as therapists, relocation assistance brokers, and social planners is expected to develop. *Id.*

<sup>30</sup> *Hearing on Condominium Conversions*, *supra* note 1, at 45 (statement by Daniel Lauber, Principal Consultant, Planning/Communications Associates of Evanston, Ill.).

<sup>31</sup> Testimony by Philip D. Star, Executive Director of the Cleveland Tenants Organization (March 16, 1979) (presented before the City of Cleveland, Office of Consumer Affairs public hearing on condominium conversions).



and present costs do not provide for new low-income housing to replace substandard units. Instead of moving up the housing ladder and providing units below, the tenant is forced down. At each step, higher income tenants are competing for lower cost housing forcing the lower-income tenant out or forced to pay higher rents for no change in the quality of the housing.<sup>32</sup>

The housing ladder analogy helps to explain the total impact of condominium conversion activity in metropolitan communities. It illustrates that the displacement of nonpurchasing tenants in a conversion project ultimately poses a most critical housing dilemma. Tenant protection provisions, as a by-product of legislation enabling condominium conversion, are an attempt to mitigate both the immediate and future impact of such rental tenant dislocation.

### III. TENANT PROTECTION AND THE OHIO CONDOMINIUM PROPERTY ACT

The Ohio Condominium Property Act, as originally enacted in 1963,<sup>33</sup> contained no reference to condominiums created by the conversion of apartment rental units. When the Act was amended in 1978, condominium conversion developments were given statutory recognition,<sup>34</sup> but reference to their creation, however, was limited. In the interest of prospective condominium purchasers, the amendments require developers of conversion condominium properties to disclose structural information about the buildings to be converted and to provide repair cost estimates.<sup>35</sup> These amendments also provide prospective purchasers with essential facts about the conversion project and place the

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<sup>32</sup> *Id.* at 1, 3, 5.

<sup>33</sup> OHIO REV. CODE ANN. §§ 5311.01-22 (Page 1981).

<sup>34</sup> Conversion condominium development is defined under the 1978 amendments as "a condominium development that was originally operated as a rental property occupied by tenants *prior* to the time that the condominium property is submitted to the provisions of [the Ohio Condominium Property Act] and the units are offered for sale." OHIO REV. CODE ANN. § 5311.01(X) (Page 1981) (emphasis added). This definition specifically requires the property to have been occupied prior to the submission of the property to the Condominium Act. Since tenants need not have been living in the apartment units immediately prior to the filing of the condominium declaration, the possibility exists that even a vacant apartment building that once was inhabited by either residential or commercial tenants would fall under this conversion condominium development definition.

<sup>35</sup> OHIO REV. CODE ANN. § 5311.26(G) (Page 1981). The disclosure required by the developer must contain the "age, the condition, and the developer's opinion of the remaining useful life of structural elements and mechanical and supporting systems, together with the developer's estimate of repair and replacement costs projected for five years" from the time the property becomes subject to the requirements of the Condominium Act. *Id.*

burden on the developer to obtain the necessary information.<sup>36</sup> The only other substantive provision of the amendments pertaining to condominium conversion requires that each condominium instrument<sup>37</sup> contain language to the effect that all tenants were given a purchase option and a 120 day written notice before being required to move from their apartments.<sup>38</sup> The option-notice provision of section 5311.25(G) reads:

In the case of conversion condominium development, all tenants were offered an option, exercisable within not less than ninety days after notice, to purchase a condominium ownership interest in the development, and such tenants were given notice of not less than one hundred twenty days prior to being required to vacate the premises to facilitate the conversion.<sup>39</sup>

Section 5311.25(G) is basically a procedural requirement for developers to follow in the process of converting apartment buildings into condominiums,<sup>40</sup> but it lacks clarity regarding the nature and timing of the option and notice actually required. Compliance with the provision is not insured to produce uniform results. For example, the option to purchase is "exercisable within not less than ninety days after notice."<sup>41</sup> This can be interpreted to mean that the option is exercisable by the tenant either upon notice of the option or notice of the conversion.<sup>42</sup>

Also, as written notice is not required, constructive notice of the conversion could begin the running of the ninety day period.<sup>43</sup> Even if a ten-

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<sup>36</sup> See generally Blackburn and Melia, *Ohio Condominium Law Reform: A Comparative Critique*, 29 CASE W. RES. L. REV. 145 (1978) [hereinafter cited as Blackburn & Melia].

<sup>37</sup> The term "condominium instruments" includes "the declaration and accompanying drawings and plans, the bylaws of the unit owner's association, any contracts pertaining to the management of the condominium property, and all other documents, contracts, or instruments establishing ownership of or exerting control over a condominium property unit." OHIO REV. CODE ANN. § 5311.01(P) (Page 1981). Section 5311.25 does not indicate which of these documents must contain the notice and option information required by that section. *Id.* § 5311.25.

<sup>38</sup> OHIO REV. CODE ANN. § 5311.25(G) (Page 1981).

<sup>39</sup> *Id.*

<sup>40</sup> But see Blackburn & Melia, *supra* note 36, at 164.

<sup>41</sup> OHIO REV. CODE ANN. § 5311.25(G) (Page 1981) (emphasis added).

<sup>42</sup> Blackburn & Melia, *supra* note 36, at 165.

<sup>43</sup> *Id.* The proper interpretation of the statute, according to a Senate Judiciary Committee report, is that the purchase option is to be exercised within 90 days of the notice of the conversion. SENATE JUDICIARY COMM. REPORT ON AM. SUB. H. R. 404, 112th Gen. Assem., Reg. Sess. 3 (1977-78). Blackburn and Melia postulate that a developer would be able to provide tenants with the purchase option at any time during the 90 day period. Blackburn and Melia, *supra* note 36, at 165-66. Although this reading of the statute is supported by the committee report, the statute is clear that the purchase option is to be exercisable for a total of 90 days. OHIO REV. CODE ANN. § 5311.25(G) (Page 1981).

ant receives a ninety day purchase option under section 5311.25(G), the statute does not require that the option be for the particular apartment unit rented by the tenant. The statute only requires that the tenant's option be "to purchase a condominium ownership interest *in the development*."<sup>44</sup> Finally, section 5311.25(G) fails to explain whether the ninety day option period and the one hundred twenty day period are to run consecutively or concurrently.

The notice required in the case of nonpurchasing tenants can be understood under section 5311.25(G) to mean notice of the conversion or a notice requiring tenants to vacate the premises after one hundred twenty days.<sup>45</sup> Under either construction, the section appears to contemplate by its terms that eviction proceedings could be brought by the developer, regardless of existing lease provisions to the contrary, after the one hundred twenty day period had elapsed.<sup>46</sup> At a time when rental

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<sup>44</sup> OHIO REV. CODE ANN. § 5311.25(G) (Page 1981) (emphasis added). See notes 123-25 *infra* and accompanying text.

<sup>45</sup> See Blackburn & Melia, *supra* note 36, at 166. Although the Senate Judiciary Committee Report supports the conclusion that the notice intended is notice to vacate the premises, the statute remains unclear. In recognition of the possible conflicting interpretations of the purchase option and the 120 day notice, it would be prudent of the state legislature to redraft section 5311.25(G) to clearly reflect what was intended.

<sup>46</sup> Since the [Michigan Condominium] Act does not explicitly indicate that a tenant may not be evicted before his lease has expired, unscrupulous converters may interpret the statute as preempting the lease, thereby enabling them to evict all tenants at the expiration of the 120 day period. Although it is unlikely this interpretation would withstand judicial challenge, many tenants that are untutored in the law could be subject to abuse and premature eviction.

Note, *Condominium Conversions—Balancing Tenants' Rights and Property Owner's Interests*, 27 WAYNE L. REV. 349, 359 (1980).

For example, the current shortage of rental housing in metropolitan Cleveland would exacerbate a tenant's dilemma. "[T]he most recent survey by the local Apartment and Homeowners Association, completed in July 1977, [found that] the average vacancy rate in the market area was 3.5%" (testimony by William Resseger, Cleveland Office of Consumer Affairs at public hearing on condominium conversion). It is troublesome to realize that the 3.5% statistic from 1977 was considered to be "the most recent survey." *Id.* Perhaps the most disconcerting fact is that more timely statistical information on the impact of condominium conversions on the rental market in metropolitan Cleveland does not exist. The County Recorder's Office records the declaration of all condominiums, but no distinction is made between conversion condominium developments and newly constructed condominiums. Interview with Sandra Prebil, Staff Attorney of the Cleveland Office of Consumer Affairs, in Cleveland (Nov. 5, 1979).

The declarations of condominiums in metropolitan Cleveland were traced from 1964 (when recording of condominiums was first required) through June 1981. During the years 1964-1970, the statistics revealed that there were less than ten condominiums recorded each year. In 1971, 21 condominium developments were listed and in 1972 this number rose to 50. Between 1973 and 1977 there were an average of 32 developments recorded each year. The 1978 listings

vacancies are diminishing,<sup>47</sup> new rental construction is decreasing<sup>48</sup> and the financial incentive to convert apartment buildings is strong,<sup>49</sup> section 5311.25(G) encourages condominium conversions. The interest of the developer in converting the property should not, however, be placed above those rights of the tenant traditionally inherent in a leasehold.

Historically, a leasehold interest in real property has been regarded as the conveyance of a valuable interest in a part or all of what is owned by the lessor.<sup>50</sup> More recently leases have been regarded as an admixture of the law of property and contracts.<sup>51</sup> Under the property theory of a lease as a conveyance of land, the tenant received a carved-out interest from the estate of the lessor and may, unless expressed to the contrary, assign or sublet that interest. The lessee also has the exclusive right to possession of the premises for the duration of his leasehold interest.<sup>52</sup> The application of contract principles to leases

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showed that 72 condominiums had been recorded, a doubling of the yearly statistics between 1973 and 1977. The 1979 recordings showed that 46 condominiums had been recorded; in 1980 there were 73 additional recordings. In 1981 there has been 27 condominium recordings between January 2, 1981 and July 2, 1981. CONDOMINIUM INDEX (Cuyahoga County Records Office, 1219 Ontario, Cleveland, Ohio 44113). The number of declarations in the Condominium Index is, however, misleading. The recordings not only represent initial declarations, but also include later changes in these declarations and structural alternations in the building itself which will affect the common areas. Interview with Mr. Stanley Samek, Deputy Recorder of the Cuyahoga County Records Office, in Cleveland (July 9, 1981).

<sup>47</sup> See notes 4-14 *supra* and accompanying text.

<sup>48</sup> See note 5 *supra*.

<sup>49</sup> See notes 20-24 *supra* and accompanying text.

<sup>50</sup> See generally C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 63-69 (1962).

The tenant's interest may be categorized as an estate for years, a periodic tenancy, or a tenancy at will. An estate for years commences and terminates on specified dates, with no notice of termination required from either landlord or tenant. Periodic tenancies run for successive periods of weeks, months, or years until notice is given by either party. See generally 1 H. TIFFANY, THE LAW OF REAL PROPERTY § 76, at 112 (1939). "While the estate from period to period lasts, the lessor and lessee have a relationship substantially identical with that . . . [of an] estate for years." 2 R. POWELL, THE LAW OF REAL PROPERTY § 255, at 387 (1977). "When no statute provides otherwise, the common law requires six months' notice to end an estate from year to year. . . ." *Id.* at 389-90. Under the Ohio Landlord and Tenant Act there is no statutory provision for the termination of periodic tenancies from year to year. OHIO REV. CODE ANN. § 5321.17 (Page 1981).

<sup>51</sup> See generally 6 S. WILLISTON, CONTRACTS § 890, at 580 (1962). *But cf.* 1 H. TIFFANY, THE LAW OF REAL PROPERTY, § 74, 111 (1939) (statement of traditional view that a lease is primarily a conveyance). "[U]nder Ohio law a lease is a contract and should be interpreted and construed like any other contract." *Glyco v. Schultz*, 35 Ohio Misc. 25, 28, 289 N.E.2d 919, 923 (Sylvania Mun. Ct. 1972).

<sup>52</sup> See generally 2 R. POWELL, THE LAW OF REAL PROPERTY § 225 (1977). The tenant's right to exclusive possession may, however, be limited by restrictions in the lease. *Id.* § 225[4].

recognizes that a lease is also a legally enforceable contract between landlord and tenant. The terms of a lease are binding upon both parties and a breach by one party generally entitles the other to seek contractual remedies.<sup>53</sup>

The application of section 5311.25(G) to leases would run counter to these property and contract principles if it permitted the owner of a conversion condominium development to disregard the leases held by current tenants.<sup>54</sup> Under common law the developer would be bound by whatever terms existed in the outstanding leases of the property purchased.<sup>55</sup> The lease, as the conveyance of a property interest to the lessee, would prevent the lessor from being able to sell the lessee's interest to a third party because he is bound by a contract. The lessor could sell only whatever specific interest he had retained in the property, and nothing more.<sup>56</sup> The statutory ramifications of these common law principles will be explained fully below.

#### A. *The Ohio Condominium Property Act and the Landlord and Tenant Act*

The Ohio Landlord and Tenant Act<sup>57</sup> is silent on the subject of conversion condominium development, although rental tenants of buildings in the conversion process would remain subject to this statute as long as they did not become the owners of their converted apartments.<sup>58</sup> Owned condominiums are expressly removed from the definition of "residential premises" and are thereby not within the scope of the Landlord and Tenant Act.<sup>59</sup> Alternatively, if a condominium developer assumed the management of residential rental property or became authorized to receive rental payments, this Act would bring the developer within the statutory definition of "landlord."<sup>60</sup> Since there is no reference in the Condominium Act to the pertinent provisions of the Landlord and Ten-

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<sup>53</sup> See note 67 *infra*.

<sup>54</sup> Blackburn & Melia, *supra* note 36, at 166. "Absent § 5311.25(G), a tenant cannot be evicted upon conversion before the expiration of the lease period since at common law a transfer of the lessor's interest does not terminate the tenancy nor deprive the lessee of any rights." *Id.* at 167 n.121.

<sup>55</sup> *Id.*

<sup>56</sup> See note 7 *infra*.

<sup>57</sup> OHIO REV. CODE ANN. § 5321 (Page 1981).

<sup>58</sup> *Id.* § 5321.01(C)(8).

<sup>59</sup> The term "landlord" is defined as "the owner, lessor or sublessor of residential premises, his agent, or any person authorized by him to manage the premises or to receive rent from a tenant under a rental agreement." *Id.* § 5321.01(B). The Landlord and Tenant Act is not applicable to the developer or tenants of a commercial conversion condominium conversion development.

<sup>60</sup> *Id.*

ant Act, a developer or tenant could easily be misled to believe that upon the declaration of the conversion project the Landlord and Tenant Act was no longer applicable to either party.

The issue of the proper notice required to terminate a tenancy under the Condominium Act is further confused when read in conjunction with the Landlord and Tenant Act. Section 5321.17 of the Landlord and Tenant Act specifies notice requirements for the termination of periodic tenancies.<sup>61</sup> Under this section, a week-to-week tenancy may be terminated upon thirty days notice.<sup>62</sup> Whether the notice and option provision of the Condominium Act,<sup>63</sup> requiring a minimum notice of one hundred twenty days, would confer additional rights to tenants otherwise subject to section 5321.17 of the Landlord and Tenant Act is unclear. The conversion condominium statute makes no differentiation as to the various types of leasehold interests a tenant might have in property to be converted.<sup>64</sup> The provision does not concern itself with whether the tenant has a lease, whether the lease is for a specific duration, or whether the tenant is living on the premises without any lease at all. The requirement of the condominium statute is simply that *all tenants* be given an option to purchase and a minimum of one hundred twenty days notice before being required to vacate the premises.<sup>65</sup>

Section 5311.25(G) would actually *increase* the duration of tenant's leasehold where the terms of the lease (or the absence of a lease altogether) would require less than the one hundred twenty days notice. A policy rationale for reading the statute in this way is that since condominium conversion contributes to rental housing scarcity, all tenants need additional time to locate new housing.<sup>66</sup> The ultimate paradox of this interpretation is that while some tenants might receive an extension of their leasehold interest, other tenants with more protective provisions directly in their leases might be coerced to vacate their apartments at the end of the one hundred twenty day period. Accordingly, this inflexible notice period may not be appropriate under all circumstances.

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<sup>61</sup> OHIO REV. CODE ANN. § 5321.17 (Page 1981).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* § 5311.25(G).

<sup>64</sup> See note 50 *supra*.

<sup>65</sup> See notes 100, 101 *infra* and accompanying text.

There are three reasons why a tenant may not be able to convert: (1) he cannot meet the down payment requirements to purchase or he cannot obtain a mortgage; (2) his income will not support the higher (usually 30-35%) monthly cash outlay; and (3) his job or life status . . . does not permit a long-term commitment to ownership.

1975 HUD STUDY, *supra* note 4, at V-34-35.

<sup>66</sup> *Id.*

The Landlord and Tenant Act expressly provides that actions brought by a "landlord"<sup>67</sup> for possession of a rental unit must be brought pursuant to the forcible entry and detainer statute of the Ohio Revised Code.<sup>68</sup> Presumably, upon the expiration of the one hundred twenty day notice period provided under section 5311.25 of the Condominium Property Act,<sup>69</sup> a developer would then resort to Chapter 1923, the forcible entry and detainer statute,<sup>70</sup> to begin eviction proceedings against those tenants remaining in possession of apartments planned for conversion. It remains uncertain whether tenants in possession of their apartments subject to a lease which would expire after the notice period of section 5311.25 of the Condominium Property Act<sup>71</sup> would be subject to forcible entry and detainer action.

Use of the forcible entry and detainer statute to regain the possession of leased premises presupposes that the individual bringing the action has a lawful right to the possession sought.<sup>72</sup> The existence of a lease agreement creating the right of possession in the tenant would be a

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<sup>67</sup> OHIO REV. CODE ANN. § 5321.03 (Page 1981). This section of the Landlord and Tenant Act stipulates that even if a landlord brings an action in forcible entry and detainer, the tenant may still "[recover] damages for any violation by the landlord of the rental agreement. . . ." *Id.* The damages could include the costs of relocation; however it would be unlikely that this money would be available to the tenant at the time that moving expenses were incurred and new rental deposits were required.

In recognition of the financial burden imposed upon tenants who are dislocated, some state and local governments require developers to pay housing assistance or relocation costs. *See e.g.*, D.C. CODE ENCYCL. § 5-1291 (West Supp. 1978) (developer must pay housing assistance and relocation compensation to displaced tenants who have lived in the building to be converted for at least one year and who relocate within the District of Columbia); Evanston, Ill., Ordinance 12-0-79, § 4-103 (March 6, 1979) (upon receipt of a bill for relocation costs the developer must pay actual moving expenses of tenant not to exceed the greater of \$300 or one month's rent); Skokie, Ill. Ordinance 78-6-B-1088, § 11(C) (July 16, 1979) (requiring developer to pay all reasonable costs of tenants living in buildings with Section 8 subsidies). There are no similar provisions under the Ohio Condominium Property Act. Lakewood, Ohio was the first community in metropolitan Cleveland to adopt a schedule for the payment of relocation assistance. *See* notes 142-146 *infra* and accompanying text.

<sup>68</sup> OHIO REV. CODE ANN. § 1923 (Page Supp. 1980).

<sup>69</sup> *Id.* § 5311.25(G).

<sup>70</sup> Section 1923.02 of the forcible entry and detainer statute enumerates the situations which would entitle the landlord to bring an action for possession. The statute authorizes eviction proceedings against tenants who are in default of their rent, holdovers, and other cases where the landlord has the right to the possession of the apartment premises. OHIO REV. ANN. § 1923.02 (Page Supp. 1980). There is no provision under § 1923.02 which would support a cause of action by a landlord if the tenant was not in default and had possession under a valid lease. *But see* Blackburn & Melia, *supra* note 36, at 166 n.119.

<sup>71</sup> OHIO REV. CODE ANN. § 5311.25(G) (Page 1981).

<sup>72</sup> *See* note 70 *supra*.

defense to such an action.<sup>73</sup> The application of Chapter 1923 in the case of a condominium conversion would appear to be proper only against those tenants actually holding over<sup>74</sup> after the expiration of the one hundred twenty day notice period provided in the Condominium Property Act.<sup>75</sup> A tenant with a lease agreement creating the right of possession beyond the notice period of the Condominium Property Act would not be within the ambit of the Act. The application of Chapter 1923 in the case of condominium conversion would thus appear to be available against only those tenants who, by virtue of the notice provision of the Condominium Property Act, actually had received an extension of their leasehold. These tenants would include those living in apartments without a lease, those with periodic tenancies and those individuals who had one hundred twenty days or less remaining to their leasehold interests when the property originally became subject to the Condominium Property Act.<sup>76</sup>

The ambiguity of the notice and option provision of the Condominium Property Act<sup>77</sup> creates difficulty in evaluating whether there has been proper compliance with the statute. Developers may be able to demonstrate that all condominium instruments contain the requisite information; it is the actual application of providing the proper notice and option to tenants that is problematic. To date there has not been any litigation on the question of notice under section 5311.25(G); a tenant who does not want to vacate the premises, however, could avail himself of the range of interpretations apparent in the language of the statute.<sup>78</sup> In the absence of judicial construction of section 5311.25(G), neither developers nor tenants will be able to determine the exact nature of their obligations and rights in the case of condominium conversion.<sup>79</sup>

<sup>73</sup> *But see* note 67 *supra*.

<sup>74</sup> OHIO REV. CODE ANN. § 1923.02(A) (Page Supp. 1980).

<sup>75</sup> *Id.* § 5311.25(G).

<sup>76</sup> *Id.* § 5311.02. "Chapter 5311 of the Revised Code applies *only* to property that is specifically submitted to its provisions by the execution and filing for record of a declaration by the owner. . . ." *Id.* (emphasis added). Since the filing of the declaration is a prerequisite to the applicability of the Condominium Property Act, any conversion notice to a rental tenant must not be given prior to the date of filing. The running of these notice periods pursuant to the Act could not commence before that time.

<sup>77</sup> *See* notes 40-45 *supra* and accompanying text.

<sup>78</sup> *Id.*

<sup>79</sup> In contrast, the Landlord and Tenant Act clearly delineates the obligations of landlord and tenant by the use of separate subdivision headings. The headings employed, "Obligations of Landlord" and "Obligations of Tenant," are self-explanatory. OHIO REV. CODE ANN §§ 5321.04-.05 (Page 1981). At the very least, the Condominium Property Act should have a separate subheading for conversion condominium development requirements. *See generally, e.g.,* N.Y. GEN. BUS. LAW § 352-eee (McKinney Supp. 1980). Presently it is necessary to read the entire Act to determine what special provisions are applicable to conversion developments.



Moreover, the Landlord and Tenant Act<sup>80</sup> does not resolve these problems, but instead raises additional questions as to the proper application of section 5311.25(G).<sup>81</sup> The notice and option provision of the Condominium Property Act should be redrafted to reflect precisely the procedure intended by the legislature in the case of a condominium conversion development.

#### IV. TENANT PROTECTION IN MUNICIPAL CONDOMINIUM LEGISLATION

The municipal condominium ordinances which have been enacted in metropolitan Cleveland communities since the 1978 amendments to the Ohio Condominium Property Act reflect an overall dissatisfaction with the degree of tenant protection provided under the state statute.<sup>82</sup>

<sup>80</sup> OHIO REV. CODE ANN. § 5321 (Page 1981).

<sup>81</sup> Ignorance of the applicability of the Landlord and Tenant Act to condominium conversion situations might present a developer with unexpected difficulty under another set of circumstances. Under the Landlord and Tenant Act, a landlord must provide a tenant with "reasonable notice" of his intent to enter the tenant's apartment, except in the case of an emergency. OHIO REV. CODE ANN. § 5321.04(B) (Page 1981). "Reasonable notice" is deemed to be 24 hours "in the absence of evidence to the contrary." *Id.* Section 5321.04(B) of the Act provides remedies for the tenant if the landlord fails to abide by the entry notice requirement. This provision reads:

If the landlord makes an entry in violation of . . . this section, or makes a lawful entry in an unreasonable manner, or makes repeated demands for entry otherwise lawful which have the effect of harassing the tenant, the tenant may recover actual damages resulting therefrom and obtain injunctive relief to prevent the recurrence of the conduct, and if he obtains a judgment reasonable attorneys fees, or terminate the rental agreement.

OHIO REV. CODE ANN. § 5321.04(B) (Page 1981). In the case of a conversion condominium development, it is common practice for the developer to show the premises to prospective purchasers and also to make efforts to sell units to present tenants. Developers want to complete the conversion as quickly as possible to reduce their costs and, for this reason, selling to present tenants is preferred. *See generally* Kuznik, *Condomillionaires*, CLEV. MAGAZINE, June, 1979, at 86-87. Although the Condominium Property Act does not regulate these practices, the application of section 5321.04(B) could curtail sales activity in the building. Although tenants are expressly obliged to "not unreasonably withhold [their] consent" from the landlord, the tenants' interest in the peaceable enjoyment of their apartments is accorded a high priority under the Landlord and Tenant Act. OHIO REV. CODE ANN. § 5321.05(B) (Page 1981). *See also* notes 135-140 *infra* and accompanying text.

<sup>82</sup> *See* LAKEWOOD, OHIO, BUILDING CODE § 1327 (1979); Mayfield Heights, Ohio Ordinance 1979-28 (Nov. 12, 1979); Beachwood, Ohio, Ordinance 1979-36 (Nov. 5, 1979); Mayfield Village, Ohio, Ordinance 79-77 (Oct. 15, 1979); Lyndhurst, Ohio, Ordinance 79-78 (Oct. 1, 1979); Richmond Heights, Ohio, Ordinance 80-79 (Aug. 28, 1979).

The Cleveland Residential Condominium Ordinance was proposed on June 4, 1979 but has not yet been enacted. The tenant protection provisions of that ordinance differ considerably from those of the Lakewood Residential Con-

These local ordinances create stricter controls on conversion activity and clarify the developer's responsibility to the tenants of those apartment buildings intended for conversion.<sup>83</sup> While notice requirements are generally set forth with greater specificity than the state Act, the length of the notice period to be provided is not uniform under all circumstances. Specifically, the notice period is increased for those elderly and handicapped tenants who must find suitable alternative housing in the event of dislocation.<sup>84</sup> Moreover, the majority of the ordinances expressly require that existing leases be honored.<sup>85</sup>

Unlike the Ohio Condominium Property Act, the trend of the local condominium ordinances has been to provide directly for the protection of tenants living in buildings in the conversion process.<sup>86</sup> The intention to provide such tenant protection under the state statute is less clear.<sup>87</sup> The failure of the Ohio Condominium Property Act in this respect reflects inadequate attention to the problems faced by tenants. As illustrated above, the state statute makes no effort to explain how the notice and option periods are to work or how these provisions are to be incorporated with the current body of landlord and tenant law.

The tenant protection provisions of the local condominium ordinances in metropolitan Cleveland have a number of common features. The first, and perhaps most typical, of these provisions was enacted in May of 1979 in the Cleveland suburban community of Lakewood.<sup>88</sup> The Lake-

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dominium Ordinance. The provisions of the Cleveland ordinance would include the creation of a Condominium Conversion Board to oversee application and approval of the conversion developments, a 35% tenant approval of the conversion plan as a prerequisite for the Board's approval, tenant relocation compensation of up to \$1,000, assistance to nonpurchasing tenants by the developer or his agent to find comparable housing, and a one year notice period during which time no tenant may be required to vacate the premises other than for good cause. See 66 The City Record 953, 967 (June 6, 1979).

<sup>83</sup> See notes 90-146 *infra* and accompanying text. But see Shaker Heights, Ohio, Ordinance 78-134 (Oct. 24, 1978). The Shaker Heights ordinance only clarifies the state Condominium Act to the extent that it requires option and notice periods to run consecutively, rather than concurrently. *Id.* § 529.01(A).

<sup>84</sup> See notes 98-103 *infra* and accompanying text.

<sup>85</sup> See note 113 *infra*.

<sup>86</sup> See notes 88-137 *infra* and accompanying text.

<sup>87</sup> But see Blackburn & Melia, *supra* note 36, at 164.

<sup>88</sup> In 1971, a 90 unit apartment building located in the community of Lakewood became the first condominium conversion development in Ohio. Kuznik, *Condomillionaires*, CLEV. MAGAZINE, June, 1979, at 84. The communities of Richmond Heights, Lyndhurst, Mayfield Heights, and Mayfield Village have adopted tenant protection provisions which follow the Lakewood ordinance verbatim. See Richmond Heights, Ohio Ordinance 80-79, § 1327.06 (Aug. 28, 1979); Lyndhurst, Ohio, Ordinance 79-78, § 1718.06 (Oct. 1, 1979); Mayfield Heights, Ohio Ordinance 1979-28, § 1315.06 (Nov. 12, 1979); Mayfield Village, Ohio, Ordinance 79-77, § 1379.06 (Oct. 15, 1979). But see note 91 *infra* and accompanying text.

wood Residential Condominium Ordinance<sup>89</sup> illustrates the disparity between the state statute and a local ordinance regulating condominium conversion.

Section 1327.06 of the Lakewood Residential Condominium Ordinance is a protection provision for the benefit of tenants and purchasers.<sup>90</sup> Twelve of the fourteen subsections in this part of the ordinance pertain to tenants faced with the conversion of their apartments. The headings of these twelve subsections reflect the scope of tenant protection considered necessary by the Lakewood City Council. They include:

- (a) Notice to Prospective Tenants.
- (b) Notice of Conversion and Public Offering Statement.
- (c) Appropriate Notices.
- (d) Expiration of Tenancy Before End of Notice Period.
- (e) Expiration of Tenancy After Ninety Days from Notice.
- (f) Contents of Notice of Conversion.
- (g) Source of Notice of Conversion and Delivery of Public Offering Statement.
- (h) Tenant's Right of First Refusal.
- (i) Co-Tenant's Rights.
- (j) Tenant's Right to Cancel Contract.
- (k) Developer's Right of Access.
- (l) Non-Waiverability of Obligations and Rights.
- ...
- (o) Relocation Assistance.<sup>91</sup>

As these headings indicate, the Lakewood ordinance has attempted to resolve the lack of clarity found in section 5311.25(G) of the Ohio Condominium Property Act and has varied notice requirements depending upon the expiration date of a tenant's lease.

#### A. *Notification of Prospective Tenants*

Section 1327.06(a)<sup>92</sup> of the Lakewood Residential Condominium Ord-

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<sup>89</sup> LAKEWOOD, OHIO, BUILDING CODE § 1327 (1979). The Lakewood ordinance was adopted on May 21, 1979.

<sup>90</sup> *Id.* § 1327.06. Fraudulent practices and false representations made by a developer are addressed under § 1327.07 of the Lakewood ordinance. This provision, in pertinent part, protects tenants from any inducement to purchase based upon false statements concerning existing backup sales contracts, potential rent increases and decreased rental availability in Lakewood due to future conversion activity. *Id.* § 1327.06(3)(B), (C), (D).

<sup>91</sup> *Id.* § 1327.06(a)-(o). The relocation assistance provision was amended to the Lakewood ordinance in November, 1980. Lakewood, Ohio, Ordinance 73-80 (November 3, 1980). See notes 142-146 *infra* and accompanying text.

<sup>92</sup> Throughout so much of the 180 day period immediately before the filing of a declaration with the Cuyahoga County Recorder during which a developer of a conversion condominium development is the owner

inance recognizes that developers may enter into lease agreements with tenants even though the developer also intends to convert the property into condominiums. The Lakewood ordinance requires developers to notify such *prospective* tenants of future plans to proceed with the conversion of a building. Written notice of the developer's intention to convert the property must be given to each prospective tenant during the 180 day period prior to the formal filing of the condominium declaration.<sup>93</sup> The developer is required to provide such notice when he is the owner of the property, but in no event is such notice required before the 180 days prior to the filing of the actual declaration.<sup>94</sup>

The developer's required notification of a plan to convert rental property appears to be aimed at the protection of those tenants who would choose to avoid the problem of dislocation. The Lakewood ordinance provides that tenants entering into a lease agreement have knowledge of intended conversion plans; however, at exactly what point in time the developer must provide tenants with this information is unclear. The notice provision becomes applicable depending upon the developer's intentions to convert property, and thus would appear to be a subjective determination.<sup>95</sup> Under the Ohio Condominium Property Act there is no similar disclosure requirement.

#### B. *Notice of Conversion and Public Offering Statement*

The notice provision of the Lakewood ordinance<sup>96</sup> adopts the 120 day period of the Ohio Condominium Property Act.<sup>97</sup> This notice period is extended to 180 days, however, in cases of tenants over sixty years of age

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thereof, he shall give written notification to each prospective tenant before entering into a lease that such rental units may be converted to condominiums within such period.

*Id.* § 1327.06(a).

<sup>93</sup> *Id.* This means that the developer would have to know the date of filing 180 days in advance of that date. The filing could presumably be advanced or postponed to avoid compliance with this section of the ordinance.

<sup>94</sup> See note 88 *supra*.

<sup>95</sup> There are no statutory criteria for determining the point at which the developer can be said to intend the conversion of rental property. Arguably, a developer intends the conversion upon the purchase of the property.

<sup>96</sup> A developer of a conversion condominium development shall deliver to each of the tenants in possession written notice of conversion and the public offering statement not less than 120 days before requiring the tenant to vacate, provided that in the case of any tenant who is over sixty years of age, or who is deaf or blind or who is unable to walk without assistance, the developer shall deliver such notice of conversion and the public offering statement not less than 180 days before requiring such tenant to vacate.

LAKEWOOD, OHIO, BUILDING CODE § 1327.06(b) (1979).

<sup>97</sup> OHIO REV. CODE ANN. § 5311.25(G) (Page 1981). See notes 38-45 *supra* and accompanying text.

and tenants who are blind, deaf or unable to walk without assistance.<sup>98</sup> Although extended notice periods do not insure the availability of alternative rental housing accommodations, this provision of the Lakewood ordinance does recognize the differentiation in the degree of hardship imposed by dislocation.<sup>99</sup>

A report prepared under the auspices of the National Council of Senior Citizens in March of 1979 concluded that the threat of condominium conversion falls disproportionately on the elderly.<sup>100</sup> The reason given for this disproportionate impact was that this segment of the rental population often lives in "old, substantial, centrally located buildings which are prime targets for conversion."<sup>101</sup> The 1975 HUD study on condominiums and cooperatives similarly concluded that tenants living on fixed incomes and the elderly are most affected by displacement.<sup>102</sup> The HUD study recognized that this tenant group would have substantial difficulty finding suitable housing under all conditions.<sup>103</sup>

The Ohio Condominium Property Act provides a 120 day notice period for all tenants<sup>104</sup> and makes no specific reference to either the elderly or the handicapped. According to the HUD study, a three month notice period was the average notice given to tenants, but the study pointed out that this length of time would only be considered sufficient under normal market conditions.<sup>105</sup> If this is the case, then the relocation time provided under the Ohio statute is insufficient in those communities

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<sup>98</sup> See note 100 *infra*.

<sup>99</sup> Under New York law, "eligible senior citizens" may continue to reside in their apartment units as rental tenants even if their building is converted to condominiums. In effect, the New York statute creates right of life tenancy for the elderly. N.Y. GEN. BUS. LAW § 352-eee (iii) (d) (i) (McKinney Supp. 1979). The term "eligible senior citizens" includes:

Non-purchasing tenants who are sixty-two years of age or older on the date the attorney general has accepted the plan for filing and the spouses of any such tenants, on such date, who have resided in the building or group of building or development as their primary residence for at least two years prior to the date that the attorney general has accepted the plan for filing, who have an annual income of less than thirty thousand dollars and who have elected, within ninety days . . . to become non-purchasing tenants. . . .

*Id.* § 352-eee(1)(e). For a discussion of tenant protection under New York law, see Note, *Tenant Protection on Condominium Conversions: The New York Experience*, 48 ST. JOHN'S L. REV. 978 (1974).

<sup>100</sup> Nat'l Council of Senior Citizens, *Condominium Conversions: Options for Tenant and Rental Market Protection*, *supra* note 10, at 72.

<sup>101</sup> *Id.*

<sup>102</sup> 1975 HUD STUDY, *supra* note 4, at V-36.

<sup>103</sup> *Id.*

<sup>104</sup> See notes 35-42 *supra* and accompanying text.

<sup>105</sup> 1975 HUD STUDY, *supra* note 4, at V-35.

where rental housing shortages exist. The notice provision, as extended by the Lakewood ordinance, does nothing to insure the relocation of displaced tenants; the increased time period, however, may provide a more realistic appraisal of the amount of time it will take tenants to secure replacement housing.

### C. *Appropriate Notices*

The Lakewood ordinance requires the developer to provide the requisite notices of conversion "based upon his best knowledge and information as to the age and/or health of each tenant."<sup>106</sup> Tenants who are entitled to 180 day conversion notices must provide the developer with a written statement that they qualify for extended notice if they improperly receive a 120 day notice. Written statements by tenants must be delivered to a developer within fifteen days after receiving the original notice. The ordinance provision includes a presumption of the truthfulness of a tenant's written statement in the absence of evidence to the contrary.

This method of assuring appropriate notice to tenants essentially allocates the responsibility to both the developer and tenant for providing the necessary information as to the tenant's age and health. If, however, the developer makes an error, the full responsibility is then shifted to the tenant. Although all tenants are to receive a copy of the complete Lakewood Residential Condominium Ordinance at the time they receive notice of conversion,<sup>107</sup> a tenant eligible for extended notice could lose the additional sixty days by mere oversight.

### D. *Expiration of Tenancy Before End of Notice Period*

The Lakewood Ordinance contemplates a situation where a tenant's lease will expire prior to the full 120 day notice period. This section of the ordinance assures that all tenants will receive the full notice period by creating the right "to an additional tenancy on the same terms and

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<sup>106</sup> LAKEWOOD, OHIO, BUILDING CODE § 1327.06(c) (1979), provides in pertinent part:

A developer of a conversion condominium development shall deliver appropriate notices of conversion based upon his best knowledge and information as to the age and/or health of each tenant. No tenant who receives other than one hundred eighty (180) day notice of conversion shall be deemed to be entitled to a one hundred eighty (180) day notice unless within fifteen (15) days of receipt of such inappropriate notice the tenant delivers a written statement to the developer declaring that the tenant is over sixty (60) years of age or is deaf or blind or unable to walk without assistance, and in such case the statement shall be presumed to be true in the absence of evidence to the contrary.

*Id.*

<sup>107</sup> *Id.* § 1327.06(f)(1). See notes 116-23 *infra* and accompanying text.

conditions and for the same rental until the expiration of such 120 day period."<sup>108</sup> Again, it is the tenant's responsibility to supply written notice of eligibility for this extended tenancy.

The creation of this statutory tenancy period, allowing tenants to holdover upon the natural expiration of their lease, can prevent the abuse of the required conversion notice by the developer. Without this provision a developer could conceivably wait until the majority of tenant leases were to expire and then file the condominium declaration. The developer would thus be able to avoid providing tenants with the requisite 120 day notice period by simply not renewing any of the outstanding leases. The only notice that would then be required would be determined by the state Landlord and Tenant Act for the termination of periodic tenancies.<sup>109</sup>

#### E. *Expiration of Tenancy After Ninety Days From Notice*

In the case of tenants who have not received notification of the developer's intent to convert an apartment prior to entering into a lease, section 1327.06(e) of the Lakewood ordinance permits tenants to terminate their existing leases if their tenancy would expire after ninety days from the date of delivery of a conversion notice.<sup>110</sup> Termination

<sup>108</sup> *Id.* § 1327.06(d).

Any tenant whose tenancy expires other than for cause before the expiration of one hundred twenty (120) days from the date of delivery of such notice of conversion shall have the right to additional tenancy on the same terms and conditions and for the same rental until the expiration of such one hundred twenty (120) day period, by the giving of written notice thereof by the tenant to the developer within thirty (30) days of the date of delivery of such notice of conversion, provided that in the case of any tenant who is over sixty (60) years of age, or who is deaf or blind or who is unable to walk without assistance, said tenant shall have the right to an additional tenancy on the same terms and conditions and for the same rental until the expiration of such one hundred eighty (180) day period, by the giving of written notice thereof by the tenant to the developer within sixty (60) days of the date of the delivery of such notice of conversion.

*Id.*

<sup>109</sup> OHIO REV. CODE ANN. § 5321.17 (Page 1981). See notes 61-65 *supra* and accompanying text. The developer would still be subject to the requirements of the Ohio Condominium Property Act, but if the filing of the declaration was delayed, Section 5311.25(G) would not be applicable. See note 76 *supra*.

<sup>110</sup> (1) Any tenant whose tenancy expires after ninety (90) days from the date of delivery of such notice of conversion shall have the right to terminate the lease upon forty-five (45) days of written notice, without penalty or other termination charge to the tenant. By delivering the notice of termination the tenant waives the right of first refusal.  
(2) [This] section . . . shall not apply to tenants who have received notification [of the developer's intent to convert] before entering into a lease.

LAKEWOOD, OHIO, BUILDING CODE § 1327.07(e)(1), (2) (1979).

of the lease is allowed without any penalty or termination charge. The tenant has the responsibility to provide the developer with written notice forty-five days in advance of the early lease termination.<sup>111</sup>

Allowing tenants the freedom to terminate their leases prematurely may expand the range of choice in the search for new living accommodations. A tenant who is able to quickly find another apartment would not have to pay the price of breaking an existing lease or be forced to pay the rent on both the old and new apartments. This section is limited in its application, in that this opportunity is available only to those tenants whose leases will expire during the last three months of the conversion notice period.

#### F. *Contents of Notice of Conversion*

There are no content requirements for the notice of conversion under the Ohio Condominium Property Act.<sup>112</sup> In contrast, the Lakewood Residential Condominium Ordinance specifies three elements which must appear in every conversion notice.<sup>113</sup> First, a statement must be included informing the tenant that the conversion notice "shall not be construed as abrogating any rights [tenants] may have under a valid existing written lease."<sup>114</sup> The second provision to be included is a statement instructing the tenant that the city building department may be notified of both structural or mechanical defects and unhealthy or unsafe conditions in the building.<sup>115</sup> Finally, a complete copy of the Lakewood Residential Condominium Ordinance must be attached to every conversion notice.<sup>116</sup>

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<sup>111</sup> *Id.*

<sup>112</sup> See notes 77-81 *supra* and accompanying text.

<sup>113</sup> (1) The notice of conversion shall include a copy of the Residential Condominium Ordinance as an attachment.

(2) The notice of conversion shall contain a statement indicating that such notice shall not be construed as abrogating any rights any tenant may have under a valid existing written lease.

(3) The notice of conversion shall contain a statement instructing the tenant that he may advise the Building Department of any structural or mechanical defects in the building or common areas, and of any unhealthful or unsafe conditions therein which the tenant believes should be corrected.

LAKESWOOD, OHIO, BUILDING CODE § 1327.06(f) (1), (2), (3) (1979).

<sup>114</sup> *Id.* § 1327.06(f) (2).

<sup>115</sup> *Id.* § 1327.06(f) (3). Tenants of a Chicago community were successful in delaying the planned conversion of their apartment building by presenting their city Building Department with a list of building code violations and requesting an official inspection of the premises. The measure taken by the tenants forced the developer to make repairs before the conversion could proceed. Washburn, *Condo Foes Find a New Weapon*, Chicago Tribune, April 22, 1979, § 1 at 1, col. 2.

<sup>116</sup> *Id.* § 1327.06(f) (1). "Failure of a developer to give notice of conversion as . . . required shall be a defense to an action for possession." *Id.* § 1327.06(f) (4).



The Lakewood ordinance follows the common law concept of a leasehold estate<sup>117</sup> and expressly requires developers to honor all outstanding written leases. This is an important departure from the Ohio Condominium Property Act,<sup>118</sup> although the reaction to this may be that landlords contemplating the sale and future conversion of their rental properties may become increasingly reluctant to offer tenants more than month-to-month leases. This provision recognizes that lease agreements confer property rights upon the lessee, and the developer's subsequent ownership of the rental property is limited at the outset to the terms of those leases. A contrary position, as evidenced under section 5311.25(G) of the Ohio Act,<sup>119</sup> could possibly diminish the significance of the tenant's leasehold estate.

Although developers are required under both the Ohio Condominium Act<sup>120</sup> and the Lakewood ordinance<sup>121</sup> to disclose information regarding the condition of the property to be converted, the Lakewood ordinance goes further by involving present tenants in this practice. Instructing tenants that they may contact the city building department with their opinion of the condition of the property creates a further check on this full disclosure requirement. A tenant should have first-hand knowledge of the property, and it is both appropriate and practical for the city to utilize this additional information for the benefit of prospective purchasers.

Finally, requiring that copies of the complete Lakewood Residential Condominium Ordinance be attached to all conversion notices assures that tenants will have access to information concerning their rights and obligations with respect to the conversion of the property. This is especially important since the Lakewood ordinance requires tenants to give notice to the developer under certain circumstances.<sup>122</sup> Failure by the tenant to properly notify the developer may act as a waiver of the tenant's rights. Since tenants may be unaware that the Lakewood ordinance creates special rights and responsibilities for their benefit, it would be helpful to further require that information to this effect be included in the actual conversion notice.<sup>123</sup> The conversion notice should ask tenants to read section 1327.06 carefully and to contact the city building department with questions on the applicability of any of the ordinance provisions.

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<sup>117</sup> See notes 50-56 *supra* and accompanying text.

<sup>118</sup> OHIO REV. CODE ANN. § 5311 (Page 1981). See notes 45-56 *supra* and accompanying text.

<sup>119</sup> *Id.* § 5311.25(G).

<sup>120</sup> OHIO REV. CODE ANN. § 5311.26(G) (Page 1981). See note 35 *supra*.

<sup>121</sup> LAKEWOOD, OHIO, BUILDING CODE § 1327.05(a) (1979).

<sup>122</sup> *Id.* at § 1327.06(d), (e) (1), (j) (1).

<sup>123</sup> Section 1327.07, concerning fraudulent sales practices by developers, is also pertinent. See note 90 *supra*.

*G. Service of Notice of Conversion and Delivery of  
Public Offering Statement*

Section 1327.06(g)(1) of the Lakewood Residential Condominium Ordinance stipulates the conditions for proper service to tenants of the notice of conversion.<sup>124</sup> The issue of service is not addressed by the Ohio Condominium Property Act although it would be essential for the developer to know under what circumstances the service of notice will be considered to have been adequate.

Since the date of the delivery of the conversion notice will begin the running of the notice period,<sup>125</sup> it is important for tenants (and the developer) to understand what will constitute the delivery of such notice. It is not the date of the tenant's actual receipt of the conversion notice that marks delivery; rather, delivery will be deemed to have occurred three days after proper service or upon personal delivery of notice if service cannot be made by mail. A tenant's refusal to accept delivery will also not postpone the commencement of the notice period.

Under the Lakewood ordinance, the developer has the obligation to serve the notice of the conversion and the former landlord has no responsibility to provide tenants with any notice of his intent to either sell or convert the property.<sup>126</sup> A problem may arise if the tenant is away from his apartment for any length of time and has not provided the developer or landlord with a temporary change of address. Although the developer will be unable to reach the tenant at the address of the rental property to be converted, the notice will be considered delivered three days after a second effort has been made to provide service by

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<sup>124</sup> Such notice of conversion and public offering statement shall be deemed to be delivered on the third day after they are deposited in the United States mail addressed to the tenant at his last known residence, which may be the address of the property subject to the lease, sent by certified or registered mail, return receipt requested, with sufficient prepaid postage, affixed to carry it to its destination. A tenant's refusal to accept delivery shall be deemed adequate service. If such mailing is returned to the developer undelivered to the tenant for any reason other than refusal of the tenant to accept delivery, the developer shall forthwith remail such mailing by regular United States mail, and such remailing shall be deemed to be delivered on the third day after it is deposited in the mail. Personal delivery is permissible if service cannot be made by the United States mail.

LAKEWOOD, OHIO, BUILDING CODE § 1327.06(g) (1) (1979).

<sup>125</sup> *Id.* § 1327.06(b).

<sup>126</sup> The developer's ability to know the age and health of all tenants, as required under section 1327.06(c), and proper mailing addresses, as required by this section, would be facilitated if the former landlord was responsible for providing this information. It is the landlord's sale of the property in the first instance which allows the conversion process to commence; it would therefore be appropriate to require the landlord to assume some of the responsibility to insure that his tenants received proper notice.

mail. In some situations this may mean that the actual notice period could be significantly curtailed, or even eliminated, without the tenant's knowledge.

#### H. *Tenant's Right of First Refusal*

The nature of the purchase option provided under the Ohio Condominium Property Act is redefined and clarified under section 1327.06(h) of the Lakewood Residential Condominium Ordinance.<sup>127</sup> The tenant's right of first refusal to purchase his *particular* unit in the apartment building runs concurrently with the notice of conversion period.<sup>128</sup> This additional provision assures that current tenants will, at all times, have the benefit of the first option under the most advantageous terms. Every opportunity is thereby created to prevent the tenant's dislocation from his apartment unit upon the conversion of the property, but this provision will obviously not assist tenants who remain unable to afford to purchase their apartment or who wish to remain renters. Absent this section of the Lakewood ordinance, the proper interpretation of the purchase option provided under the Ohio Act would still remain an enigma.<sup>129</sup>

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- <sup>127</sup> (1) During the period of ninety days following delivery of the notice of conversion and the public offering statement, and during the period of 120 days following delivery of the notice of conversion and the public offering statement in the case of any person who is sixty years of age, or who is deaf or blind, or who is unable to walk without assistance, any person who was both a tenant on the date of delivery of notice of conversion and the public offering statement and also a current tenant shall have the exclusive right of first refusal to purchase his unit.
- (2) During such period, the developer may offer to sell such unit to prospective purchasers other than the tenant at a price not less than offered to the tenant and/or on terms not more favorable than offered to the tenant, and each contract for sale shall conspicuously disclose the existence of, and shall be subject to, such right of first refusal.
- (3) If during such period the tenant fails to purchase the unit, the developer shall not offer to sell that unit during the following ninety days at a price or on terms more favorable to the offeree than the price or terms offered to the tenant without first making the same offer to the tenant, who shall have ten days therefrom within which to accept the offer.

LAKEWOOD, OHIO, BUILDING CODE § 1327.06(h) (1), (2), (3) (1979).

<sup>128</sup> *But cf.* Shaker Heights, Ohio, Ordinance 78-134, § 529.01(A) (option period of 90 days and notice period of 120 days to run consecutively). If option and notice periods were to run consecutively, the actual notice period would thereby be increased. The difference between the Shaker Heights and Lakewood provisions reflects the ambiguity of § 5311.25(G) of the Ohio Condominium Property Act previously discussed. OHIO REV. CODE ANN. § 5311.25(G) (Page 1981). See notes 41-45 *supra* and accompanying text.

<sup>129</sup> *Id.*

### I. Co-Tenant Rights

The rights of co-tenants are discussed separately from the rights of other tenants under the Lakewood ordinance.<sup>130</sup> Co-tenants may purchase their proportionate share of the rental property as well as the share of any nonpurchasing tenant. The right of first refusal is not expressly created for co-tenants, but since co-tenants are actual tenants, the purchase option would presumably be similarly applicable. If, however, co-tenants are to receive the same rights as all other tenants, it is unusual for there to be a separate section of the ordinance entitled "Co-Tenant's Rights."<sup>131</sup> This section could conceivably be construed as limiting the rights of co-tenants to those rights specified under this heading, but to do so would be contrary to the express intent of the City Council to liberally construe the Ordinance in an effort to "promote [its] purpose and policies."<sup>132</sup> Since the co-tenant is entitled to purchase a proportionate share of the unit, but may not purchase less than the full interest in the unit, what additional rights this section confers is not clear.

### J. Tenant's Right to Cancel Contract

All tenants who enter into purchase agreements for their apartment units may cancel any such contract within three days of signing.<sup>133</sup> The

<sup>130</sup> (1) If there is more than one tenant leasing a unit, then each such tenant shall be entitled to contract for the purchase of a proportionate share of the unit and of a proportionate share of any tenant who elects not to purchase.

(2) In no case shall this provision be deemed to authorize the purchase of less than the entire interest in the unit to be conveyed.

LAKEWOOD, OHIO, BUILDING CODE § 1327.06(i) (1), (2) (1979).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* § 1327.02(a). See note 167 *infra* and accompanying text.

<sup>133</sup> (1) A tenant may, at his election, cancel an executed contract between himself and the developer by his agent written notice of cancellation at any time before midnight local time of the third day following the date the contract is signed by the tenant, notwithstanding any other provisions of this chapter.

(2) Upon receipt of timely cancellation the developer shall immediately refund any deposit, earnest money or other funds and the parties shall have no further rights or liabilities under the contract. Each tenant's contract for sale of a unit shall conspicuously disclose the tenant's right of cancellation.

*Id.* § 1327.06(j)(1), (2).

The Ohio Consumer Sales Practices Act also contains a similar three-day right to rescind in the case of home solicitation sales and prepaid entertainment contracts. OHIO REV. CODE ANN. §§ 1345.22, .45 (Page 1981). Three days may not provide a tenant adequate time to reconsider the purchase of their apartment. *Cf.* Seattle, Wash., Ordinance 107707, § 3.7 (Oct. 2, 1978) (tenant may rescind acceptance of offer by written notice of revocation within 15 days of acceptance); Skokie, Ill., Ordinance 78-6-B-1088, § 12(d) (June 12, 1978) (purchasing tenant may rescind agreement by written notice during 15 day cooling-off period).

policy behind this right of cancellation is to help minimize the effect of any pressure to purchase for which the tenant may be unprepared. The three day option to cancel would protect those tenants who reluctantly sign purchase agreements and immediately regret have done so,<sup>134</sup> thus providing a much needed cooling-off period.

### K. *Developer's Right of Access*

This section of the Lakewood ordinance<sup>135</sup> restates the obligations of developer and tenant concerning rights of access to the tenant's rental unit as described under the Ohio Landlord and Tenant Act.<sup>136</sup> In the

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The Ohio Condominium Property Act provides that any contract or agreement for the sale of a condominium is voidable for a period of fifteen days under certain circumstances:

In addition to any other remedy available, a contract or agreement for the sale of a condominium ownership interest that is executed in violation of Section 5311.25 [requirements of condominium development instruments including the conversion notice requirements] or 5311.26 [disclosure statement] . . . shall be voidable by the purchaser for a period of fifteen days after the date of sale of the condominium ownership interest or fifteen days after the date upon which the purchaser executes a document evidencing receipt of the information required by Section 5311.26 . . . whichever occurs later. Upon exercise of this right to avoid the contract or agreement the developer or his agent shall refund fully and promptly to the purchaser any deposit or other prepaid fee or item and any amount paid on the purchase price, and shall pay all closing costs paid by the purchaser or for which he is liable in connection with the void sale.

OHIO REV. CODE ANN § 5341.27(A) (Page 1981).

<sup>134</sup> The problem of the "reluctant purchaser phenomenon" is discussed in *Hearing on Condominium Conversions*, *supra* note 1, at 47-48 (statement by Daniel Lauber, Principal Consultant, Planning/Communications Associates of Evanston, Illinois).

- <sup>135</sup> (1) The tenant in a conversion condominium development shall not unreasonably withhold consent to the developer to enter the unit in order to inspect the premises, make necessary or agreed repairs, supply necessary or agreed services, or show the unit to purchaser.
- (2) Except in case of emergency, or unless it is impracticable to do so, the developer shall give the tenant reasonable notice of his intent to enter and may enter only at reasonable times. Twenty-four hours is presumed to be a reasonable notice in the absence of evidence to the contrary.
- (3) The developer shall not abuse the right of access or use it to harass the tenant. Entry by the developer in excess of twice in any seven day period for the purpose of showing the unit to purchasers shall be presumed to be an abuse of the right of access in the absence of evidence to the contrary.

LAKEWOOD, OHIO, BUILDING CODE § 1327.06(k) (1), (2), (3) (1979).

<sup>136</sup> OHIO REV. CODE ANN. §§ 5321.04(A) (8), (B), .05(B) (Page 1981). *See also* note 81 *supra*, pointing out the importance of the developer's knowledge of state landlord and tenant law.

absence of this ordinance provision, the state Landlord and Tenant Act would confer almost identical rights and obligations; the developer must give reasonable notice to his intent to enter the tenant's apartment, except in cases of emergency,<sup>137</sup> and a tenant shall not unreasonably withhold consent for the developer to enter.<sup>138</sup> The purposes of this provision are to protect the tenant's right to the quiet enjoyment of the leased premises and to allow the developer to enter when necessary.

The Lakewood ordinance further limits the developer's right to enter the tenant's apartment when the building is in the process of conversion. A developer may not enter the tenant's rental unit "in excess of twice in any seven day period for the purpose of showing the unit to purchasers."<sup>139</sup> This restriction recognizes that sales promotion might otherwise subject the tenant to frequent interference and inconvenience<sup>140</sup> and regards the tenant's possessory interest in the leased premises as superior to the marketing interests of the developer.

#### L. *Non-Waiverability of Obligations and Rights*

The rights created for the protection of tenants under the Lakewood Residential Condominium Ordinance are not waivable under any circumstances.<sup>141</sup> The importance of this provision is self-explanatory; without this stipulation, all of the tenant protection provisions would be vulnerable to contractual nonapplication.

#### M. *Relocation Assistance*

Section 1327.06(o) of the Lakewood Residential Condominium Ordinance requires developers to provide relocation assistance to certain tenants who vacate their apartments after receipt of a notice of conversion.<sup>142</sup> Tenants may qualify for the benefits provided in this section depending upon the number of years they have continuously occupied their apartments, their age and/or their physical condition. The required pay-

<sup>137</sup> OHIO REV. CODE ANN. § 5321.04(A) (8) (Page 1981).

<sup>138</sup> *Id.* § 5321.05(B).

<sup>139</sup> LAKEWOOD, OHIO, BUILDING CODE § 1327.06(k) (3) (1979). *Cf.* Evanston, Ill., Ordinance 12-0-79, art. 4, § 4-104(B), (C) (occupied rental units can only be shown to prospective purchasers during the last 90 days of notice period or tenancy and no remodeling is permitted while a unit is still occupied by a tenant).

<sup>140</sup> For an account of intrusive conversion condominium sales practices, see Kuznik, *Condomillionaires*, *supra* note 88, at 84.

<sup>141</sup> LAKEWOOD, OHIO, BUILDING CODE § 1327.06(1) (1979). "Neither the obligations nor the rights under this section may be waived in a contract of lease, a contract of sale or otherwise, and any attempted waiver is void." *Id.*

<sup>142</sup> (1) A relocation assistance shall be paid by the developer to qualifying tenants and subtenants who vacate their rental units either voluntarily or involuntarily after receiving the notice of conversion pursuant to Subsection (b) hereof in accordance with the following schedule:

ment is deemed to have been waived by the tenant if there is a voluntary holdover beyond the expiration date of the lease or the applicable one hundred twenty or one hundred eighty day periods provided in section 1327.06(d).<sup>143</sup>

YEARS OF CONTINUOUS OCCUPANCY	TENANT UNDER 60 YEARS OF AGE, OR DEAF, OR BLIND, OR UNABLE TO WALK WITHOUT ASSISTANCE	TENANT OVER 60 YEARS OF AGE, OR DEAF, OR BLIND, OR UNABLE TO WALK WITHOUT ASSISTANCE
Under 5 years	No Assistance	1 month's rent
5 to 10 years	1 month's rent	2 months' rent
Over 10 years	2 months' rent	3 months' rent

- (2) The relocation allowance provided for in Paragraph (1) hereof shall be determined to have been waived by the tenant and subtenant of the unit if occupancy is voluntarily continued beyond the expiration date of the lease or the applicable 120 or 180 day periods as provided in Subsection (d) hereof whichever shall occur later.
- (3) The age of tenant, years of continuous occupancy and applicable monthly rental shall be determined as of the date Public Offering Statement is filed with the City pursuant to Section 1327.04(a) hereof.
- (4) In unfurnished sublet units the subtenant shall be entitled to the benefits of this provision. Otherwise, the tenant shall be entitled to the benefits; provided that the developer shall not be obligated to determine tenant from subtenant and shall have filled his obligation under this subsection by delivering the relocation benefit to either the tenant or the subtenant.
- (5) The relocation assistance payment required herein shall be paid within fourteen (14) days of complete vacation of the unit by the tenant or subtenant.
- (6) Where a rental unit is occupied by two or more co-tenants, any one of whom is a qualified tenant, each co-tenant of the unit shall be paid a pro-rata share of the relocation assistance payable within fourteen (14) days of the date of vacation of the unit by the last remaining co-tenant. In no event, shall the developer be liable to pay more rental assistance per unit than that payable as if the unit were occupied by one qualifying tenant.
- (7) The relocation assistance provided for herein shall be in addition to any damage, deposit or other compensation or refund to which the tenant is otherwise entitled.
- (8) Any tenant who claims relocation assistance upon the basis that he is over 60 years of age, or deaf, or blind, or unable to walk without assistance, shall, prior to vacation of the unit, deliver a written statement to the developer declaring such to be the fact, and in such case said statement shall be presumed to be true, in the absence of evidence to the contrary.

Lakewood, Ohio, Ordinance 73-80 (November 3, 1980) (supplementing Chapter 1327 of the Building Code of the Codified Ordinances of the city of Lakewood). See also note 67 *supra*.

<sup>143</sup> *Id.* § 1327.06(o) (2).

According to the payment schedule provided in section 1327.06(o), three months' rent is to be paid out to tenants who have continuously occupied their apartments for over ten years *or* who are either over sixty years of age and who are deaf, blind, or unable to walk without assistance. Tenants who are either sixty years of age or have one of the physical handicaps outlined above but who have occupied their apartments for a period of five to ten years receive two months' rent. One month's rent is to be paid to this same class of tenants who have occupied their apartments for under five years.<sup>144</sup>

No relocation assistance is required to be provided in the case of tenants under age sixty who have lived in their apartments for under five years and who are either deaf, blind or unable to walk without assistance. These tenants would, however, be entitled to receive one month's rent if they had occupied their apartments for a period of five to ten years; two months' rent would be due if they had occupied their apartments for longer than ten years.<sup>145</sup> Although the payment schedule expressly requires "continuous occupancy" as a condition for the benefit of relocation assistance, it is unclear whether this must be continuous occupancy of a particular apartment unit or whether continuous occupancy is simply required within the apartment complex to be converted. Under either reading of the section, displaced tenants would be subject to the identical hardship imposed by relocation. It would, however, be inequitable to provide relocation assistance only to those tenants who had remained in one unit over a period of years and to deny these benefits to the class of continuous building occupants similarly situated.

Pursuant to this section of the Lakewood ordinance, relocation assistance must be paid to qualifying tenants within fourteen days after they have vacated the premises; moreover, payment is to be *in addition* to any deposit, refund or other money to which the tenant is entitled.<sup>146</sup> This may mean that the relocation assistance will not be available to the tenant until after moving expenses or a new rental deposit have already been paid.

The relocation assistance provision of the Lakewood ordinance does provide some financial relief from the expense of dislocation. Unfortunately the amount of relief is limited, both as to the population intended to be served and the actual amount of available relief. All tenants who are faced with moving due to the conversion of their rental units must incur the unanticipated costs of relocation. Perhaps the better approach would be to provide remuneration to all tenants who did not enter into their leases with prior knowledge of the planned conversion.

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<sup>144</sup> *Id.* § 1327.06(o) (1).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* § 1327.06(o) (5).



An alternative method to payment based on years of occupancy would be assistance paid out on the basis of financial need.

### V. HOME RULE POWER CONSIDERATIONS

The municipal condominium conversion legislation enacted in metropolitan Cleveland, as exemplified by the Lakewood Residential Condominium Ordinance,<sup>147</sup> demonstrates an exercise of local police power as authorized by the Ohio Constitution.<sup>148</sup> Article XVIII, section 3 of the Ohio Constitution provides that "[m]unicipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, *as are not in conflict with general laws.*"<sup>149</sup> Although the state, by virtue of the Ohio Condominium Property Act, has legislated in the area of conversion condominium development,<sup>150</sup> this should not preclude a chartered municipality from adopting more stringent conversion regulations.<sup>151</sup> A determination on the state level of the constitutionality of these local ordinances must be based upon whether there is "*conflict with [the] general laws*"<sup>152</sup> and the reasonableness of such legislation.

The most widely accepted test for determining the presence of "conflict" between an Ohio statute and a municipal ordinance was enunciated in the 1923 decision of *Village of Struthers v. Sokol*.<sup>153</sup> The Supreme Court of Ohio was faced with the issue of whether certain local ordinances prohibiting the manufacture and sale of liquor were in conflict with two state statutes also regulating liquor. The court found no conflict between the state and local liquor regulations although each punished certain acts and prescribed penalties different from the other. On the subject of conflict, the court stated "[n]o real conflict can exist unless the ordinance declares something to be right which the state law declares to be wrong, or visa versa. There can be no conflict unless one authority *grants a permit or license to do an act which is forbidden or prohibited by the other.*"<sup>154</sup>

<sup>147</sup> *Id.* § 1327. See notes 82-146 *supra* and accompanying text.

<sup>148</sup> For a comprehensive study of the scope of municipal authority in Ohio, see G. VAUBEL, *MUNICIPAL HOME RULE IN OHIO* (1978) [hereinafter cited as VAUBEL].

<sup>149</sup> OHIO CONST. art. XVIII, § 3, (emphasis added).

<sup>150</sup> OHIO REV. CODE ANN. § 531.25(G) (Page 1981). See notes 33-56 *supra* and accompanying text.

<sup>151</sup> See VAUBEL, *supra* note 148, at 690-96.

<sup>152</sup> OHIO CONST. art. XVIII, § 3, (emphasis added). The term "general laws" would include the provisions of the Ohio Condominium Property Act. For a discussion of the definition of "general laws," see VAUBEL, *supra* note 148, at 771-76.

<sup>153</sup> 108 Ohio St. 263, 140 N.E. at 519 (1923).

<sup>154</sup> *Id.* at 268, 140 N.E. at 521 (emphasis added).

The so-called "head-on-collision test"<sup>155</sup> of *Sokol* illustrates a reluctance of the courts to strike down municipal ordinances on the basis of a purported conflict. The terms for a finding of conflict are narrowly defined, supporting a wide degree of latitude in the adoption of police regulations. It has been the general position of the courts not to interfere with the municipal exercise of police powers unless they stand in complete contradiction of state law.

As discussed previously,<sup>156</sup> the state Condominium Act sets forth minimal notice and option requirements in the case of a conversion condominium development. The state statute neither licenses nor permits the conversion of apartment buildings, but instead simply regulates the contents of condominium documents. The local ordinances, as exemplified by section 1327.06 of the Lakewood Residential Condominium Ordinance<sup>157</sup> establish interdependent rights and obligations of both the tenant and the developer. The grounds for a finding of conflict under the *Sokol* analysis are absent; the tenant protection provision of the Lakewood Ordinance merely extends the requirements of the state Condominium Property Act. Nothing is permitted under the Lakewood ordinance which is prohibited by the state, or visa versa. The differences alone between the two laws are not fatal to the exercise of municipal police power and "the underlying policy of *Sokol* becomes one of maximizing municipal Home Rule Authority."<sup>158</sup>

In *Stary v. City of Brooklyn*<sup>159</sup> the Ohio Supreme Court was confronted with the question of whether a municipal ordinance regulating the operation of trailer camps by limiting the parking period of trailers

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<sup>155</sup> In determining the meaning of the word "conflict" the court looked to a standard dictionary definition. The term "head-on-collision" was not used by the court, but was used by commentators to describe the basis for the court's decision. See VAUBEL, *supra* note 148, at 683.

<sup>156</sup> See notes 33-49 *supra* and accompanying text.

<sup>157</sup> LAKEWOOD, OHIO, BUILDING CODE § 1327.06 (1979). See notes 82-146 *supra* and accompanying text.

<sup>158</sup> VAUBEL, *supra* note 148, at 709.

Conflict by implication between a state statute and a municipal ordinance was rejected in *Sokol*. To consider the inferences which could be drawn from either the state statute or the local ordinance under review would have severely impaired municipal autonomy. The courts have not, however, been consistent in avoiding decisions based upon a finding of conflict by implication. See, e.g., *Schneiderman v. Sesanstein*, 121 Ohio St. 80, 167 N.E. 158 (1929). See also VAUBEL, *supra* note 148, at 710-33 (discussing the finding of conflict by implication or by differing policies between the state and local legislation).

If the state policy underlying the Ohio Condominium Property Act could be said to be one of encouraging conversion condominium development, then conflict could be potentially found between the state statute and the subsequent municipal regulations. Further discussion of this issue is beyond the scope of this Note.

<sup>159</sup> 162 Ohio St. 120, 121 N.E.2d 11 (1954).

to sixty days, and prohibiting the re-entry of such trailers within the municipality for a period of ninety days after the expiration of the sixty days, was an unconstitutional exercise of legislative power. In upholding the ordinance, using the test for determining conflicts announced in *Sokol*,<sup>160</sup> the court stated that municipal regulation of trailers was supported where their increased use and popularity presented problems affecting the public health, welfare, morals, or safety of the community. The specific problems associated with trailers were their tendency to create slum districts when used as permanent residences since many were without adequate sanitation facilities or adequate living space.<sup>161</sup> The court found that the fact that the state had legislated on the operation of trailer parks did not preclude the city from enacting more restrictive regulations.<sup>162</sup>

The general problems associated with a proliferation of trailer parks in a community are analogous to those problems resulting from widespread condominium conversion. Both affect the community by their direct impact upon housing. The tenant protection provisions of the Lakewood Residential Condominium Ordinance, while not prohibiting condominium conversion, place additional restrictions upon a developer's ability to freely convert residential rental property. While the trailer park ordinance at issue in *Stary* effectively precluded residential use of trailers, the condominium conversion ordinances do not go this far. Again, the purpose of the municipal police power is to allow communities to confront local problems affecting the public health, welfare, morals and safety. Condominium tenant protection ordinances protect the public welfare by improving upon state notice requirements, expressly requiring developers to honor existing leases and adding specificity to the general rule of the state statute.

Although a municipal exercise of the police power must not be "in conflict"<sup>163</sup> with the general laws, and second requirement is that the local laws in question must be *reasonable*.<sup>164</sup> In determining the reasonableness of local legislation, the Ohio Supreme Court, in an early *Home*

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<sup>160</sup> Judge Middleton stated that "the city ordinance does not permit or provide for licensing that which the statutes forbid and prohibit, nor does it forbid or prohibit that which the statutes permit." *Id.* at 131, 121 N.E.2d at 17.

<sup>161</sup> *Id.* at 134, 121 N.E.2d at 18.

<sup>162</sup> The state regulations, promulgated by the Public Health Council, authorized licensing fees for trailer park operation and vested authority in local health boards to revoke, grant or suspend any such licenses. *Id.* at 125-27, 121 N.E.2d at 14-15. The court found such regulation on the state level to be of "general application" and not "such as to pre-empt the entire field of legislation." *Id.* The issue of preemption is discussed by Professor Vaubel; greater attention, however is paid to the *Sokol* conflict analysis for determining whether municipal governments may legislate subsequent to state action on the same subject matter.

<sup>163</sup> See notes 144-53 *supra* and accompanying text.

<sup>164</sup> The reasonableness limitation of municipal police power is discussed in

VAUBEL, *supra* note 148, at 660-70.

Rule case stated that "[t]he means adopted must be *suitable to the end in view*, must be *impartial in operation* and not *unduly oppressive* upon individuals, must *have a real and substantial relation to their purpose*, and must *not interfere with private rights beyond the necessities of the situation*."<sup>165</sup> The court recognized, however, that there may be occasions when private rights are infringed upon by policy regulations, but that this alone would not invalidate such legislation.

Municipal condominium conversion regulations affect the private rights of property owners by imposing statutory tenancy periods prior to the actual conversion of an apartment building. The property rights of the developer are restricted and, in the case of the Lakewood Ordinance, this may be for as long as six months. During this time the developer is unable to interfere with the tenant's right to possession of the premises and must continue to abide by the Ohio Landlord and Tenant Act. The developer's access to the premises is also restricted under the municipal law, and entry for the purpose of showing the property to prospective purchasers is limited to twice within a seven day period.<sup>166</sup> The express purpose of all these regulations is to "establish standards for all future conversion condominium developments within the City in order to protect the tenants of rental units designated for condominium conversion . . . and also to encourage the maintenance and improvement of the housing in the City."<sup>167</sup> The question of the reasonableness of the legislation turns upon whether the means adopted have a "real and substantial relation to their purpose."<sup>168</sup> The balancing of the community interest in safeguarding tenants' rights against the private interest of condominium developers is one aspect of this determination of reasonableness, and unless the conversion regulations clearly bear no relationship to the objectives sought by the city council, they will be upheld on review.

Although the grant of police power under Article XVIII, section 3 of the Ohio Constitution,<sup>169</sup> would support the adoption of municipal tenant protection condominium conversion regulations, there are reasons why state regulation of condominium conversion activity may be a preferred alternative. The municipal condominium regulations were, in fact, adopted only after the state Condominium Property Act had been amended and tenant protection provisions had not been specifically provided. In fact, the overall emphasis of the notice and option provision of section 5311.25(G) is "to facilitate the conversion,"<sup>170</sup> ignoring the need for tenant protection.

<sup>165</sup> *Froelich v. City of Cleveland*, 99 Ohio St. 376, 391, 124 N.E. 212, 216 (1919) (emphasis added).

<sup>166</sup> See notes 131-36 *supra* and accompanying text.

<sup>167</sup> LAKEWOOD, OHIO, BUILDING CODE § 1327.01(b) (1979).

<sup>168</sup> See note 165 *supra* and accompanying text.

<sup>169</sup> OHIO CONST. art. XVIII, § 3.

<sup>170</sup> OHIO REV. CODE ANN. § 5311.25(G) (Page 1981).

State regulation of all condominium conversion activity would insure a more uniform practice by developers throughout the state. In the absence of state-wide tenant protection regulations, tenants in many communities can only avail themselves of the limited protection of section 5311.25(G) of the Ohio Condominium Property Act.<sup>171</sup> This alone does not promise satisfactory results.<sup>172</sup> Although the municipal regulation of tenant protection offers one solution, there are policy reasons which would support more extensive tenant protection by the state. Currently, developers may avoid the strictures of local legislation by moving their operations to those communities which have not yet enacted any tenant protection mechanisms. The tenant protection provisions which have already been adopted would serve little function if condominium conversion activity was simply transferred to a different locale. In fact, stricter local municipal regulation would thereby promote more concentrated conversion activity in those areas without local regulation. This sequence of events, as a by-product of local legislation, should be discouraged.

Local regulation of tenant protection may also prove burdensome in the absence of any required uniformity. Not only must the existing state regulations be followed, but local rules must be harmonized with the state law requirements. Developers who own properties in a number of communities must follow different requirements depending upon the site of each proposed conversion condominium development. The purpose of tenant protection provisions in condominium conversion legislation is not to create such hardships on developers, but to insure that the property rights of tenants are respected and the hardships of dislocation minimized. Moreover, Ohio legislation, on the state or local level, has yet to devise any statutory method which would secure the continued existence of a private rental housing market.

## VI. CONCLUSION

The pertinent sections of the Lakewood Residential Condominium Ordinance<sup>173</sup> serve as an example of the kind of tenant protection provisions which could be made a part of the Ohio Condominium Property Act. Although the promotion of tenant rights may obstruct condominium conversions from the developer's perspective, this result should be outweighed by the need to further regulate conversion activity for the benefit of all rental tenants potentially affected by the conversion trend. Stronger state regulation should be preferred by both tenants and developers.

Determining the necessary degree of conversion regulation and ten-

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<sup>171</sup> See notes 82-146 *supra* and accompanying text.

<sup>172</sup> See note 46 *supra*.

<sup>173</sup> LAKEWOOD, OHIO, BUILDING CODE § 1327.06(a)(1) (1979).

ant protection measures remains problematic. At present there are no uniform procedures for determining the number of rental units disappearing from the housing market in metropolitan Cleveland due to conversion activity.<sup>174</sup> Although the dislocation of tenants has been identified as a paramount concern, the scope of the problem remains poorly defined. No mechanism exists to determine the number of tenants affected by conversions or the availability of alternative rental housing. The adequacy of local tenant protection regulations has not been established, and any effects on neighboring communities, without such legislation, have been ignored.

In order to insure the continued existence of private rental housing in Ohio, it is critical that future conversion condominium development be predicated upon the maintenance of sufficient rental vacancy rates. This would require that the necessary statistical data be collected on a regular basis. In the absence of this form of regulation, tenant notice requirements will become meaningless when alternative rental housing can no longer be secured. The state could go further and require developers to extend the length of notice periods, and create tax incentives to promote renewed interest in rental property investment. The various forms of municipal regulatory measures have one feature in common: They all support a policy of mitigating the hardships imposed upon tenants by the growth of conversion condominium development.

There is no evidence that condominium conversion activity is decreasing. The fact that many prime apartments have already been converted to condominium status indicates that future conversion activity will become increasingly visible in communities which have not yet experienced this trend. In Ohio this may mean that tenants living in apartments earmarked for conversion will continue to become subject to the hardships imposed by conversion practices. Local law will not protect all tenants who may become potential victims of condominium conversion. There is no limitation on the number of times a tenant may be subsequently dislocated from rental property, especially when the impetus for landlords to sell to condominium developers remains strong. The contemporaneous problem of declining rental vacancy rates exacerbates the dilemma of the rental tenant. It is therefore imperative for state legislatures to continue to re-evaluate the issues of tenant and rental market protection if there is to be any future for private rental housing. Hopefully, such will be the case in Ohio.

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<sup>174</sup> See note 46 *supra*.

