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## Condominium Conversions: *They're Back*

A Brief Primer on Condominiums Conversions and Conversion  
Ordinances and Some Thoughts from One Suburban Battleground

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This paper is intended to be a brief and thorough primer on condominium conversions and the permissible restrictions that can be placed on conversions. The primary audience is intended to be city attorneys of communities in which conversion are occasional and sporadic. In such communities, conversion proposals only arise when—as perhaps now—conditions in the real estate market suddenly make the renting or leasing units significantly less profitable than selling them individually. In the suburban East Bay, a number of communities—including Concord, Dublin, San Ramon, and Walnut Creek—are dealing with condominium conversion proposals. Whether the trend continues will depend on market conditions. Given the experience we recently had in Dublin, I can now state the obvious: it is preferable to have a well thought out condominium conversion ordinance in place before an application is received.

In addition, the paper looks at several other legal issues that arise in the condominium conversion context, including whether a city can apply a condominium conversion ordinance to a project that had previously recorded a subdivision map for condominium purposes but that is presently operated as an apartment building or complex.

### 1) **The Basics**

Before getting into condominium conversion specific issues, it is important to first understand what a condominium is and how it is created. Under California law, a “condominium” is “an estate in real property that consists of an undivided interest in common in a portion of real property coupled *with a separate interest* in a space called a unit.” (Civ. Code, § 1351, subd. (f).) This concept is very flexible, and the “space” can be filled with air, earth, or water. Hence, since the unit need not be within a building the unit can be a parking space, a space in a marina, or a mobile home park space.

One creates a condominium by following the process required by Civil Code section 1352. It states that a condominium is created when:

- i. A declaration of conditions, covenants and restrictions is recorded
- ii. A subdivision or parcel map for condominium purposes is recorded
- iii. A condominium plan is recorded; and
- iv. A unit is conveyed.

In addition, the approval of the Department of Real Estate is required to market residential units to the general public.

It is important to understand the difference between a condominium map and a condominium plan. Under the Subdivision Map Act, the condominium map is not required to describe the location of the individual condominium units. (See Gov. Code, § 66427.) Rather, that formal legal description is set forth in the condominium plan, which is not regulated by local government. In fact, local governments are now precluded from requiring the recordation of a condominium plan as a condition of a subdivision map. (See Gov. Code, § 66427.)

*Condominium plans* must contain the following:

- i. A description or survey map of a condominium project, which refers to monumentation on the ground
- ii. A three-dimensional description of a condominium project, one or more dimensions of which may extended for an indefinite distance upwards or downwards, in sufficient detail to identify the common areas and each separate interest
- iii. Certificate from the record owner consenting to recordation.

There is no standard definition of a conversion. The Subdivision Map Act uses the term “condominium conversion,” but it does not define the term. However, a conversion is typically taken to mean the process of converting multiple-unit rental property held in a single ownership to a form in which the units may be individually sold. (See 1 Forming Common Interest Developments (CEB), § 4.1.) Most conversion ordinances define a conversion to require that the project be occupied. As we will see in more detail below, a project proposed for conversion may have completed any number of the elements required to create a condominium.

## **2) Subdivision Map Act Provisions Dealing with the Conversion of Existing Structures to Condominiums**

All condominium conversions are subject to the Subdivision Map Act. (See Gov. Code, § 66424.) They are processed like any other subdivision. There are no special rules beyond those discussed above and the tenant protections that are discussed in detail below. The conversion of an existing structures to condominiums is exempt from CEQA. See CEQA Guidelines § 15301, subd. (k).

### **a) The Subdivision Map Act’s Protections for Residential Tenants**

The Subdivision Map Act contains certain tenant protections, which *apply only to* conversions of residential real property.

For conversions that involve tentative maps, *the converter* is required to give certain notices to tenants. These requirements are enforced by requiring the approving agency to find at approval of the final map that each of the following notices has or *will be* given to each of the tenants:

- i. A notice of intent to convert sixty days prior to filing tentative map. (Gov. Code, § 66427.1, subd. (a).) (The form of this notice set out at Government Code section 66452.9.)
  - (1) Following the issuance of this notice, the converter is required to provide the notice to each *prospective* tenant. (Gov. Code, § 66452.8.)

- ii. Notice that the final map has been approved within 10 days of its approval. (Gov. Code, § 66427.1, subd. (b).)
- iii. Ten days' notice that an application for public report has been or will be filed with the Department of Real Estate. (Gov. Code, § 66427.1, subd. (a).)
  - (1) Although this provision requires 10 days' notice, it also permits the notice to be given after the application is filed. Presumably, then, the notice must be given within 10 days of the application being filed.
- iv. Notice of intent to convert (i.e. to actually terminate tenancy) 180 days prior to termination of tenancy. (Gov. Code, § 66427.1, subd. (c).)
  - (1) Note that unlike the other notices this notice can be given at any time, provided that it is 180 days prior to the termination of the tenancy. Thus, it could be coupled with the initial notice of intent, which must be provided 60 days before filing a tentative map.
- v. Notice of the tenant's exclusive right to purchase the unit upon the same terms and conditions that the unit will be offered to the general public. The right runs for 90 days following issuance of the public report. (Gov. Code, § 66427.1, subd. (d).)
  - (1) Map Act sets no time frame for when the notice must be given.

Several of these notices cannot be provided until after the final map is approved, and others are more likely to be provided after final map approval. Without some form of security, it is awkward to find that the notices "*will be*" provided in the future. To deal with this problem, most cities require converter to agree to make the required notifications, which the city could enforce, presumably satisfying the statutory finding.

The *local agency* is required to make certain notifications to tenants of public hearings on the proposed map. These provisions require that the local agency provide:

- i. Mailed notice of public hearings on tentative and final maps must be provided to all tenants. (Gov. Code, § 66451.3, subd. (b).)
- ii. Serve the staff report or recommendation on a tentative map to tenants three days prior to any action on the map. (Gov. Code, § 66452.3.)

### 3) **Local Condominium Conversion Ordinances**

These state law provisions impose no substantive restrictions on the ability to convert, and conversion can have a number of impacts on the tenants of the structure or structures proposed for conversion and the community's housing market as a whole. In addition, there are a number of ambiguities in these state law provisions. Therefore, many cities have enacted condominium conversion ordinances that impose substantive restrictions on

the ability to convert and also deal with some of the ambiguities contained in the state law provisions.

#### a) **Authority to Enact Condominium Conversion Ordinances**

Cities have broad police power authority to enact restrictions on condominium conversions. The often expressed public purpose is the continued maintenance of a supply of rental housing. (See, e.g., *Leavenworth Properties v. City and County of San Francisco* (1987) 189 Cal.App.3d 986 [234 Cal.Rptr. 598]; *Santa Monica Pines, Ltd.* (1984) 35 Cal.3d 858, 869.) Such ordinances are also consistent with cities' duty under the state housing laws to maintain housing for all economic segments of the community. (Gov. Code, §§ 65880, subd. (d), 65883.)

The Subdivision Map Act does not broadly preempt the field of condominium conversion ordinances. In *Griffin Development Co. v. City of Oxnard* (1985) 39 Cal.3d 256 [217 Cal.Rptr. 1], the California Supreme Court held that Oxnard's condominium conversion ordinance did not conflict with the Subdivision Map Act and was not therefore preempted by it. Indeed, the Map Act itself, at section 66427.2, states that it does not "diminish, limit, or expand . . . the authority of any city to approve or disapprove condominium projects."

Although it is not always made clear, most condominium conversion ordinances are structured as zoning ordinances or otherwise as restrictions on the ability to remove units from the rental market as opposed to restrictions on the ability to subdivide. Structuring an ordinance in this manner can avoid preemption issues under the Subdivision Map Act. Although it provides that no public entity shall compel the owner of any residential real property to offer, or to continue to offer, accommodations in the property for rent or lease, the Ellis Act specifically exempts condominium conversion ordinances from its purview. (See Gov. Code, § 7060.7, subd. (a).)

Absent preemption, condominium conversion ordinances are subject to the rational relationship standard of judicial review to which ordinary economic regulations are subject. (See *Griffin Development Co., supra*, 39 Cal.3d at p. 264.) The *Griffin* court held that Oxnard's ordinance furthered a legitimate governmental purpose, even though it effectively precluded most apartment buildings from converting, by imposing physical development standards that were impossible to meet. (See *id.* at p. 265, fn. 7.)

#### b) **Types of Condominium Conversion Ordinances**

I reviewed a number of condominium ordinances from throughout the state. I categorize the ordinances into two main types: procedural ordinances and substantive ordinances. Like the Subdivision Map Act provisions, *procedural* ordinances do not impose direct limits on conversions. However, they do often give tenants additional rights and require additional notices. By contrast, *substantive* ordinances place direct limits on conversions. Substantive ordinances typically contain both substantive provisions and procedural provisions.

The following is a list of the most typical provisions found in *procedural* ordinances:

- i. A requirement that tenants be notified for parcel maps.
- ii. A requirement that the initial notice of intention to convert contain a statement of tenant rights.
- iii. A requirement that the notice of intent to convert is posted in a conspicuous place in the building or complex proposed for conversion.
- iv. A requirement that the notification of the right to purchase the unit is given earlier than required by the Subdivision Map Act.
  - (1) For example, Dublin's ordinance requires that the ten days notice of the submission of an application for a public report contain an indication that the tenant will be granted an exclusive right to purchase upon the issuance of the public report.
- v. A restriction on increasing rent during pendency of conversion process.
- vi. A requirement that the converter pay tenant moving expenses or some fixed amount to cover such expenses.
- vii. A requirement that the converter enter into extended leases with seniors, the disabled, and low-income tenants that will survive after conversion.
- viii. A requirement that a certain number of units must be sold to persons of very low, low and moderate incomes.
- ix. A requirement that the converter contribute funds to the association for deferred maintenance.
- x. A requirement that the converter upgrade the building to comply with current building standards and receive a building inspection prior to conversion.

*Substantive* ordinances typically limit the number of units that may be converted each year. The criteria for determining whether conversion is permitted or not is usually based one of the following or a combination:

- i. Prohibiting conversions unless the city or regional vacancy rate is above a certain fixed amount.
- ii. Prohibiting conversions unless the ratio that rental housing units bears to total housing units is equal to or above a certain fixed number following the conversion.
  - (1) For example, the City might set its rental housing ratio at 30%, and conversions could be approved unless the conversion would result in the ratio after conversion being less than 30%

- iii. Limiting annual conversions to a fixed percentage (such as 5%) of the total rental units in the community or a fixed number of units.

With respect to each of these criteria, where the demand to convert exceeds the number of units that can be converted, some mechanism needs to be built into the ordinance whereby priorities can be established. In some cases, a lottery may be necessary.

Each of the measures has its pros and cons. Using the vacancy rate appears initially attractive because it bears some relationship to the housing market and the need for rental housing. But it is labor intensive, since it requires staff to calculate the rate. In addition, it can be difficult to find an unassailable data source for determining vacancy rates in the city, and, in smaller communities, the vacancy rate is easily manipulated. Using the rental-housing ratio is consistent with attempting to provide housing for all economic segments of the community, since it assures that rental housing remains available within the community. However, finding a rationale for fixing the required ratio may be a difficult political task. And, since the ratio changes each year, it requires annual calculations of the number of housing units in the City. The negative with limiting annual conversions to a fixed number of units or a fixed percentage is that it is not directly linked to conditions in the housing market. However, by limiting number of annual conversions, the fixed limits avoid situations in which a community's rental housing stock is wiped out in a single year, and it gives the City some "breathing room" to exercise its land use powers in a manner to generate additional rental housing.

Which of the measures is chosen will depend on each community's individual circumstances. After an extended debate, Dublin chose to limit annual conversions to 7% of the total number of rental units within the city.

Some ordinances simply require a finding that the conversion would not adversely impact the community's ability to provide housing for all economic segments of the community. Although this ultimately was the policy goal of Dublin's ordinance, we recommended against such a provision in favor of a more objective standard.

## **b) Special Issues in Condominium Conversion Ordinances**

### **i. Application of Condominium Conversion Ordinances to "Previously Mapped" Apartment Buildings**

Although these facts are from Dublin, you may have a situation like this in your community. In the 1980s and early 1990s, a number of developers seeking approvals to construct residential apartment buildings sought approvals for their projects as condominiums.<sup>1</sup> At the time of the initial approvals, the City approved a condominium

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<sup>1</sup> I have heard mixed information, and I am still not clear whether these projects were initially intended to be for-sale condominium projects and then market conditions changed, or whether they were always intended to be apartment buildings with the built-in flexibility to convert in the future. Another possible explanation is that developers were unable to obtain insurance to cover construction defect claims and came up with the strategy of mapping their projects as condos, then renting them out until after the expiration of the 10-year statute of limitations, at which point they could be sold without exposing the developer to construction defect claims.

map and all additional city approvals necessary to construct a condominium project. The projects typically have recorded CC&Rs and condominium plans. Notwithstanding the initial city approvals and the recorded condominium plans, the projects have been continuously operated as rental apartments, and the developers have never taken the additional steps (such as Department of Real Estate approval) necessary to sell the units as condominiums. In designing and constructing the buildings, the developers may have complied with the more stringent development and site standards for condominiums as opposed to apartments. (For simplicity, I refer to such projects as “previously mapped.”) The total number of rental units that were “previously mapped” amounts to approximately 50% of its total rental housing stock.

Fast forward to 2005, and due to market conditions the developers now are considering conversion. The property owners assert that they are not subject to further regulation by City, since the City already approved condominium maps for the project.

The City, due to red-hot for-sale housing market, is concerned about the potential for the immediate loss of all of the “previously mapped” units, and it proposes to adopt an ordinance requiring all conversions—including apartment buildings with existing condominium maps—to obtain condominium conversion permits.

The question becomes: Can the City adopt a condominium conversion ordinance that prevents the property owner of a “previously mapped” project from converting without City approval?

Based on two cases out of West Hollywood, we initially concluded that the City could apply its conversion ordinance to previously mapped projects. Those cases, collectively, hold that a converter’s right to convert—and avoid local government restrictions on conversion—is **not vested unless the converter holds a presently valid public report** issued by the Department of Real Estate. (See *City of West Hollywood v. Beverly Towers, Inc.* (1991) 52 Cal.3d 1184 [278 Cal.Rptr. 375]; *City of West Hollywood v. 1112 Investment Company* (2003) 150 Cal.App.4th 1134 [130 Cal.Rptr.2d 168].)

In *Beverly Towers*, the California Supreme Court held that cities *cannot* enforce condominium conversion regulations enacted after a developer secures final subdivision map approval, meets the requirements of the Common Interest Development Act, and receives a public report from the California Department of Real Estate (“D.R.E.”) permitting it to sell individual units as condominiums. The converter in *Beverly Towers* had obtained final subdivision map approval, met the requirements of the Common Interest Development Act, and obtained a final public report from the D.R.E. The City argued that the apartment building owner was nonetheless subject to the City’s condominium conversion ordinance because the developer had not sold any of the units at the time the ordinance was adopted. The City relied upon Civil Code section 1352, which provides that a common interest development (which includes condominiums) is not created until at least one unit has been conveyed, even if the owner has obtained all the government approvals and recorded all the necessary documents. The court disagreed



with the City.<sup>2</sup> It found that “the final map approval and issuance of the public report were the last approvals the developers needed to sell a unit as condominium; they did not require any further discretionary permits.” (*Id.* at 1192.) Because all discretionary permits were obtained, the court concluded that it was irrelevant whether or not the owner had sold a unit before the ordinance was enacted. (*Ibid.*) Thus, the City was prohibited from applying the condominium ordinance to Beverly Towers because Beverly Towers had received approvals for both a condominium map and a public report.

In *1112 Investment Company*, the Court of Appeals held that, if a building owner does not have a current public report, a city can impose new requirements upon a developer seeking to convert the use from apartments to condominiums. The Court of Appeal held that the failure to renew a public report eliminated any vested rights the developer had previously gained from previously mapping the building as condominiums and obtaining a public report. (*Id.* at 1152.) The city brought an action against owners for charging rents in violation of the city’s rent control ordinance. Although the main issue in the case was compliance with the rent-control ordinance, that issue turned on whether the project was a condominium project, because condominiums were exempt from rent control under the ordinance. The court held that because the owner’s public report had expired, the project became subject to the City’s condominium conversion ordinance. Therefore, because the owner had not obtained the conversion permit required by the City, the building was not a condominium project and was subject to the city’s rent control ordinance.

Read together, we concluded that *Beverly Towers* and *1112 Investment Company* hold that both a recorded condominium map and a valid public report from the Department of Real Estate are required in order to vest one’s right to be free from a later-enacted city regulation, such as rent control or a condominium conversion permit.

Perhaps needless to say, the building owners’ attorneys disputed the City’s position, notwithstanding language in all of the condominium treatises suggesting that developers get a public report at the outset.<sup>3</sup> The building owners’ attorneys argued that the *West Hollywood* cases are distinguishable because they involved “conversions after construction.” In other words, the *West Hollywood* cases involved apartment buildings that had been initially entitled and constructed as apartment buildings. By contrast, most of “previously mapped” projects were entitled as condominiums when they were initially constructed and built to the city’s condominium standards. Thus, the building owners’ attorneys argued that, unlike “conversions after construction,” there were “hard costs” in reliance upon those entitlements. By contrast, the *West Hollywood* cases involved

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<sup>2</sup> The city’s argument was consistent with previous cases, which seemed to conclude that a condominium map cannot vest under the common law until one of the units is sold. (See *Santa Monica Pines, Ltd. v. Rent Control Bd.* (1984) 35 Cal. 3d 858.) The *Santa Monica Pines* Court questioned whether the common law vested rights doctrine can ever apply to condominium conversions, since “such projects generally require no substantial new construction,” which is required in order to invoke the vested rights doctrine. (See *id.* at p. 866, fn. 6.)

<sup>3</sup> See Hanna and Atta, *Calif. Common Interest Developments* (2004 ed.), § 12.83; Continuing Education of the Bar, *Forming Common Interest Developments* (2004 ed.) § 4:4, p. 260; and *id.* at § 2:10, p. 80.

existing apartment buildings that were later mapped as condominiums, and therefore there could not be an substantial expenditures in reliance upon those condominium maps.

Therefore, the building owners' attorneys argued that common-law vested rights doctrine survived in situations where a project was "purpose-built" as condominiums, and that the property owners made substantial expenditures by constructing the buildings in reliance upon the promise by the city to allow condominiums. They also pointed out that the property owners had paid taxes based on the properties' higher value as condominiums.

We evaluated the property owners' position but again concluded that the City could apply a condominium-conversion ordinance to previously mapped projects. We relied upon various cases under the Subdivision Map Act that hold that a map approval does not vest subdivider's right to avoid subsequently enacted zoning regulations that would preclude construction of the subdivision. (See, e.g., *Santa Monica Pines, supra*; *McMullan v. Santa Monica Rent Control* (1985) 168 Cal.App. 3d 960, 963 [214 Cal.Rptr. 617].) Based on these authorities, we concluded that the City's approval of a developer's condominium map in conjunction with the approval of the developer's proposed multi-family residential structure could not reasonably be construed as a "promise"—under the common law vested rights doctrine—that implied that the City would not subsequently enact a conversion ordinance.

The building owners then attempted to rely upon the fact that the projects were built to the City's condominium development standards rather than the City's apartment development standards. We conceded that by meeting the City's condominium development standards at the time of construction the property owners obtained a vested right to be free from additional *development standards* the City might impose on condominiums in the future. Thus, the City could not adopt an ordinance like that in *Griffin, supra*, that effectively precluded conversion through development standards. Any prudent apartment developer desiring the flexibility to convert would likely build the project to the City's condominium standards to ensure that if desired in the future the owner could convert if market conditions warranted. (See *Griffin, supra*, 39 Cal.3d at p. 265 [upholding denial of condominium project on the basis that the building proposed for conversion failed to meet development standards for condominiums].) But we concluded that it is not correct to characterize the City's approval of the development of the project to condominium development standards as a promise that the City would not later adopt direct restrictions on condominium conversions.

Without the expenditures associated with construction, the property owners had no "hard costs" under the common law vested rights doctrine upon which to rely. They could point to no expenditures based solely on the map. The costs of preparation of the final map and the condominium plans are considered "soft costs" under the classical vested rights doctrine. Therefore, we concluded that it was unlikely that any of the building owners could establish that they had made substantial expenditures in reliance on the subdivision approvals sufficient to give them a common-law vested right to avoid the condominium conversion ordinance.

Finally, we argued that the vested rights doctrine is a doctrine based on fairness and that there was no unfairness associated with applying the ordinance to the developer at this point in time. Each building owner had several mechanisms by which it could have vested its right to convert. For instance, the building owners could have filed for a vesting tentative map initially, and they could have sought to obtain development agreements. Both of these *could have ensured* that the building did not become subject to a subsequently enacted condominium conversion ordinance. Secondly, when the West Hollywood cases came down, the building owners could have, without even involving the City, obtained and maintained public reports, which would have immunized them from further local regulations. Yet, in spite of their opportunity to do so, the building owners did nothing.

Just as this debate was heating up, it became academic. At the various public meetings, the property owners made both legal arguments and policy arguments. Their policy arguments were based on fairness. After considerable debate, their policy arguments won the day, and the City Council declined to apply the condominium conversion ordinance to “previously mapped” projects.

One final note: Even if substantive provisions are not imposed a City might consider applying the procedural requirements to “previously mapped” projects.

## ii. **Inclusionary Zoning Issues**

Projects proposed for conversion may contain existing affordable rental units subject to regulatory agreements. In those circumstances, the city would have several options to ensure that the units remain affordable. Relying upon the regulatory agreement, it can require that the unit continue to be rented to the occupant household for so long as the occupant remains eligible for the affordable unit and thereafter allow it to be sold as an affordable unit. Second, again relying upon the regulatory agreement, it can require the restricted units to remain as an affordable rental unit. Third, it can require the units to be sold at a price that is affordable to a person in the income category at which the unit is currently being rented. The Dublin ordinance requires that an inclusionary unit to be offered to the tenant at an “affordable price” under the City’s Inclusionary Zoning Regulations, if the tenant is eligible within a particular category.

Typically inclusionary zoning regulations only apply to the construction of new residential units, but many condominium conversion ordinances apply inclusionary zoning regulations to units that are converted. The Dublin ordinance gives building owners a credit if they had previously complied with the City’s Inclusionary Zoning Regulations. The City’s requirements had recently increased from 5% to 12.5% (with a 7.5% must-build requirement). So even if the building proposed for conversion had been subjected to inclusionary zoning regulations in the past, it may still be subject to an 7.5% inclusionary requirement and likely a 7.5% must-build requirement.

Where a condominium conversion ordinance requires a finding that the conversion will not negatively impact the provision of housing to all economic segments of the community, a condition requiring the provision of or the converter’s agreement to provide additional inclusionary units above and beyond what the inclusionary zoning

ordinance requires could be used ensure that the conversion mitigates the impact of the conversion on the availability of housing for all economic segments of the community.

**iii. Commercial and Industrial Condominiums**

Commercial and industrial condominiums are not separately treated under the Subdivision Map Act. The Map Act contains no tenant notification provisions and no tenant protections applicable to such conversions. Cities may desire to adopt regulations that apply to commercial and industrial condominium conversions to ensure that commercial and industrial tenants receive appropriate notices.

**iv. Mixed-use Condominiums**

With the increase in the number of mixed use projects, it has become more common to see developers seek to separate the residential portions of a project from the commercial portions. These conversions are typically done for financing purposes. The conversions can be complicated by issues involving sharing access, parking, and utilities between residential and commercial users.