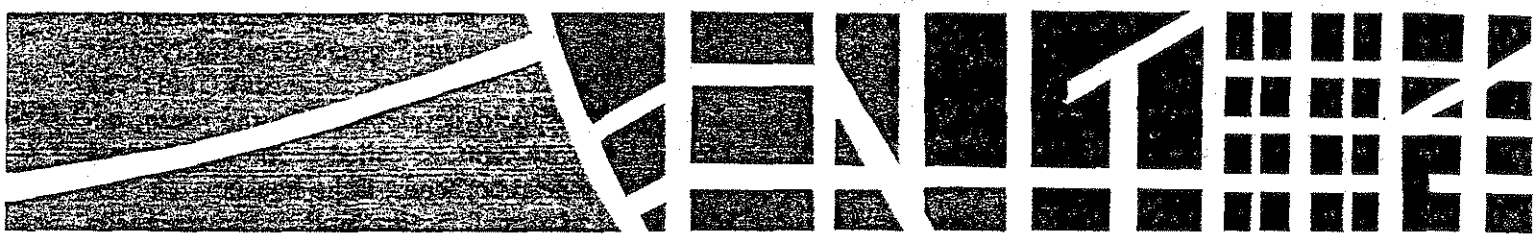
ZONING AND PLANNING LAW REPORT



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SINGLE FAMILY ZONING AND THE NEW NEIGHBORHOODS: EMERGING DUE PROCESS AND EQUAL PROTECTION ISSUES

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- **Erosion of Single Family Zoning's Integrity**
- **Revision of Local Zoning Codes**
- **Due Process and Equal Protection Challenges to Restrictions on Use and Occupancy**

Recent socioeconomic and demographic changes and related legal developments are now significantly undermining the integrity and validity of single family zoning in both urban and suburban neighborhoods. Local communities are responding to these changes, sometimes as the result of legislative or judicial mandate, by allowing, but regulating, alternative residential uses and living arrangements which traditionally have been excluded from areas zoned for single family use. These new uses include shared housing, accessory apartments, manufactured housing and group houses. The following article examines the due process and equal protection issues that may arise as a result both of these changes in residential use and of the local revision of zoning codes to accommodate these changes.

Introduction

The integrity and validity of restrictive single family zoning are being challenged at an accelerating rate. A 1983 report of the American Bar Association's Committee of Land Use, Planning and Zoning has described the increasing pressure for revision of residential zoning policies as "an unprecedented assault" on the practice of single family zoning. Such developments as the increased cost of new housing and the changing nature of American households have contributed to the emergence of alternative residential uses and living arrangements in many neighborhoods throughout the country.

A decreasing number of neighborhoods today can

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be said to epitomize the traditional neighborhood vision of on-site-built detached single-unit homes occupied primarily by nuclear families with children. Alternative residential uses and living arrangements such as group homes, shared housing, attached and detached accessory apartments, and manufactured housing are increasingly found in neighborhoods zoned for single family use. These changes, along with the decline in the importance of the nuclear family household, may prove to have a significant impact on the legal validity of single family zoning restrictions, particularly with respect to zoning restrictions on age or family relationship that are often imposed by communities permitting these alternative residential uses and living arrangements.

The New Neighborhoods

A number of recent reports have focused on the changing nature of American households. See, *e.g.*, Sternlieb & Hughes, *Demographic Trends and Economic Reality,* 25 (1982). Single-unit homes in both urban and suburban areas are now unlikely to be occupied primarily by nuclear families with children. Married couples with children now comprise only 29 percent of households—less than one-half of all owner–occupied housing units. The high cost of new homes, the high rate of divorce and the increasing number of non-married young and elderly persons are all contributing to the steady erosion of the nuclear family with children household. According to recent census data, non-family households are increasing more than ten times as fast as married couple households and more than five times as fast as all types of family households. Between 1970 and 1980, shared households (two or more unrelated persons) increased by 162 percent and, according to census bureau projections, shared households and non-nuclear family households (only one spouse present) will comprise 43 percent of all households by 1990. While 70 percent of households in past decades consisted of married couples, a recent estimate is that only about 25 percent of the estimated 17 million new households that are expected to be formed during the 1980s will consist of married couples. See *Housing: Supply and Affordability,* 3 (Urban Land Institute 1983).

The economic necessity for, and desirability of, the shared household living arrangement is likely to affect both urban and outlying suburban areas, where there has been a dramatic increase in the number of elderly "empty-nest" households and where large homes are increasingly occupied by fewer and fewer people. The build-up of surplus space in single-unit homes and the housing affordability problem have also contributed to the tremendous increase in the number of houses that are being converted to two-unit dwellings. Recent reports indicate that accessory apartments are being added to existing single family homes at a rate unprecedented since the post-World War II period. The National Association of Homebuilders has estimated that such conversions are occurring at a rate of 300,000 a year—nearly one-half of the estimated number of new houses sold in 1983. According to one report, the creation of accessory apartments in single family homes is "a sweeping new phenomena" that "touches all types of localities—large and small; suburban and exurban; old and young, wealthy and not-so-wealthy." *New Haven Register,* Jan. 18, 1981, at F6.

A less widespread development is the use of detached accessory units, so-called "echo housing," in single family neighborhoods. Echo housing—the residential use of a small factory-built or conventionally constructed dwelling unit located on the same lot with an existing single-family home—is reported to be increasing as new households and elderly persons choose this form of living arrangement as a less expensive alternative housing option. See Hare & Hollis, *Echo Housing: A Review of Zoning Issues and Other Considerations* (American Association of Retired Persons 1983).

The integrity of single family zoning has also been undermined by the location of group homes in many neighborhoods. This is the result of the widespread movement to either deinstitutionalize or rehabilitate disabled or dependent persons through the normalization process of a group home living environment in residential neighborhoods. See generally Gailey, "Group Homes and Single Family Zoning," 5 ZONING AND PLANNING LAW REPORT 97 (1981).

Another development is the increasing use of manufactured housing, which presents an attractive option for new households and others seeking smaller, less expensive housing. The percentage of new single-unit dwellings consisting of manufactured housing and mobile homes has increased substantially in recent years, comprising 32 percent of the single-unit market and 15 percent of all housing starts in 1983. In addition, federal government mortgage financing is now available for manufactured housing. The trend is expected to continue with sales doubling during the 1980s.

Revision of Local Zoning Codes

Many local communities are responding to these changes, particularly the housing affordability problem and the changing nature of households, by revision of their zoning codes to allow for the location of one or more of these alternative residential uses in areas that formerly were zoned exclusively for single family use. In many cases, local communities have

voluntarily revised their zoning codes to allow one or more of these alternative uses in residential areas, subject to zoning restrictions and standards which attempt to protect against the alleged adverse impact of such uses on neighborhoods.

Often, however, local revision of zoning codes to accommodate one or more of these alternative uses has been the result of judicial or legislative mandate which overrides or preempts local discretion to prohibit an alternative use in the community or a particular residential area. See, *e.g., Saunders v. Clark County Zoning Dep't,* 66 Ohio St. 2d 259, 421 N.E.2d 152 (1981) (group home); *City of Santa Barbara v. Adamson,* 27 Cal. 3d 123, 610 P.2d 539, 164 Cal. Rptr. 539 (1980) (shared housing). At least 12 states have enacted legislation which generally prohibits local communities from entirely excluding manufactured housing and which may require that local zoning allow such housing to be sited on individual lots. See, *e.g.,* Fla. Stat. Ann. § 553.38 (2) (Supp. 1983). Similarly, at least 20 states have enacted statutes which override local zoning codes by requiring that certain types of group homes be allowed in residential areas. See, *e.g.,* Wis. Stat. Ann. § 59.97 (15) (Supp. 1983). At least one state, California, has enacted similar legislation with respect to accessory apartments and echo housing. Cal. Gov't Code § 65862.1 (Supp. 1983). In New York, shared housing cannot be prohibited in single family zoning districts solely because of marital status. See N.Y. Exec. Law § 296 Sec. 5(a)(1) (McKinney 1983).

Whether zoning codes are revised voluntarily or as the result of judicial or legislative mandate, local communities generally have the discretion to impose reasonable restrictions and standards on these alternative uses as a condition to their location in single family or other residential areas. Zoning restrictions on alternative uses often regulate parking, exterior appearance, owner occupancy, and lot and dwelling size. In some instances, zoning restrictions are imposed on alternative uses that are not imposed on other residential uses in the neighborhood. Similarly, some communities permit alternative uses, such as shared housing, accessory apartments and echo housing, but subject them to age or family-based restrictions on occupancy.

Due Process Issues

As state courts become more sensitive to the social and economic issues relating to housing needs, it is likely that they will become more receptive to due process challenges to the facial validity of single family zoning restrictions which entirely prohibit or substantially restrict less expensive or alternative residential uses in a community. See, *e.g., Southern Burlington County NAACP v. Township of Mt. Laurel,* 92 N.J. 158, 456 A.2d 390 (1983) (low- and moderate-income or least-cost housing required); *Robinson Township v. Knoll,* 410 Mich. 293, 302 N.W.2d 146 (1981) (manufactured housing generally required); *State v. Baker,* 81 N.J. 99, 405 A.2d 368 (1979) (shared housing permitted); *Children's Home of Easton v. City of Easton,* 53 Pa. Commw. 216, 417 A.2d 830 (1980) (group home permitted). State courts may be more inclined, for example, to rule that large minimum house or lot size requirements or family-based occupancy restrictions are unreasonably burdensome or that they bear no real and substantial relationship to the general welfare. See *Builder's League of South Jersey v. Westhampton Township,* 188 N.J. Super. 559, 457 A.2d 1252 (L. Div. 1983) (minimum house size invalidated); *Negin v. Board of Bldg. & Zoning Appeals,* 69 Ohio St. 2d 492, 433 N.E.2d 165 (1982) (minimum lot size invalidated); *State v. Baker, supra,* (family occupancy restriction invalidated).

The steady erosion of the "family" character of many neighborhoods is itself likely to increase the chances of a favorable ruling on a due process claim. In many neighborhoods, illegal shared housing and accessory apartments are already so widespread that they are simply overlooked by zoning officials in the absence of complaints from neighbors. Local communities may voluntarily move to "lifestyle neutral" zoning controls or may be forced to do so as a result of state court decisions. An emerging judicial attitude may be reflected in the recent case of *In re Adult Anonymous II,* 51 U.S.L.W. 2070 (N.Y. App. Div. 1982), where a New York court allowed one male adult to adopt another in order to comply with a family-based restriction on occupancy. The court stated: "The nuclear family arrangement is no longer the only model of family life in America. The realities of present day urban life allow many different types of non-traditional families." In at least six states—California, Colorado, New Jersey, New York, Ohio and Pennsylvania—court decisions have held family-based zoning restrictions on occupancy to be invalid when applied in certain cases to so-called "functional families" living together as a bona fide single-housekeeping unit. See, *e.g., Hessling v. City of Bloomfield,* 193 Colo. 124, 563 P.2d 12 (1977).

The due process validity of family-based occupancy restrictions may also emerge as an issue related to local revision of zoning codes which allow one or more alternative residential uses in single-family neighborhoods. Reports indicate that some local communities that are revising their zoning codes to allow accessory apartments and echo housing in certain neighborhoods are imposing family-based occupancy restrictions on such uses. See Hare, Accessory Apart-

ments, 13 (1981) and Echo Housing, 14 (1983). But where occupancy of accessory apartments or echo housing is in any case limited, as it often is, to one or two persons, an additional family-based restriction on occupancy clearly cannot be justified as a control on density, which is the justification most commonly accepted by state courts. Courts may well be skeptical of the connection between such a restriction and any legitimate public purpose. Where a local community can proffer no reason for such a restriction other than the subjective preference of community residents, state courts are likely to rule that a family-based occupancy restriction in this context violates due process as an unreasonably burdensome restriction on both owner-occupants and prospective tenants and that the restriction has no real and substantial relationship to the general welfare. *Cf. State v. Baker, supra.*

Equal Protection Issues

Equal protection issues also are likely to arise as a result of the declining importance of the nuclear family with children household and the erosion of the integrity of single family areas. In the context of zoning, equal protection generally is held to require that the different treatment accorded various land uses be reasonably justified in view of the public purposes for regulation. In this regard, a court may rule that a particular zoning restriction on residential use in an area is unreasonable and invalid in view of the purpose for the restriction when considered in light of other residential uses that exist or are allowed in the same neighborhood.

An equal protection ruling based on the underinclusiveness of an ordinance could result where the "synergistic" effect of existing or allowed uses in a neighborhood is found to negate the alleged purpose for excluding a particular use from the same area. Consider, for example, the reasonableness of excluding shared housing from a neighborhood that allows group homes and accessory apartments or the reasonableness of excluding accessory apartments from a neighborhood where echo housing and shared housing are allowed. Even very early state court decisions indicate that the different treatment in this context should be found unreasonable and invalid. See, *e.g., Harmon v. City of Peoria,* 373 Ill. 594, 27 N.E.2d 525 (1940) (unreasonable to exclude two-unit dwellings in a neighborhood where up to four boarders are allowed); *Women's K.C. St. Andrews Society v. Kansas City,* 58 F.2d 593 (8th Cir. 1932) (unreasonable to permit apartment hotels but exclude a charitable home for the elderly).

This type of analysis was applied by a Pennsylvania court to require the issuance of a permit for a foster home for six children in a single family area. *Children's Aid Society v. Zoning Bd. of Adjustment,* 44 Pa. Commw. 123, 402 A.2d 1162 (1976). More recently, the Supreme Court of Georgia found that there was no reasonable basis for discriminating against a group home for retarded adults by prohibiting such a use in a neighborhood where group homes for foster children were allowed. *Douglas County Resources, Inc. v. Daniel,* 247 Ga. 785, 280 S.E.2d 734 (1983). This reasoning was followed by the Supreme Court of Ohio in holding that a group home for retarded adults was a permitted "accessory use" in an area permitting group homes for foster children, *White v. Board of Zoning Appeals,* 6 Ohio St. 3d 68, 451 N.E.2d 756 (1983).

But recent court decisions have not always favored proposed alternative uses. For example, the Supreme Court of Pennsylvania recently upheld, over a strong dissent, a zoning restriction excluding "boarding houses" from an area allowing "rooming houses," on the ground that the serving of meals in boarding houses presented unique health problems. *Layne v. Zoning Bd. of Adjustment,* 501 Pa. 224, 460 A.2d 1088 (1983).

Challenges to Zoning Amendments Permitting Some Alternative Residences

One of the ironies of land use administration is that local revision of zoning codes to allow for one or more alternative uses in a single family area could prove to have a greater impact on judicial decisions than continued attempts to prohibit such uses. This is due to potential judicial invalidation of the differing treatment accorded allowed and still-prohibited alternative uses. Local communities will likely be required—and must be prepared—to proffer some reasonable public purpose to support the decision to allow some but not other alternative residential uses in the same area.

A similar equal protection problem may arise where an alternative residential use is allowed in a neighborhood but is subject to zoning restrictions that are not applicable to other apparently similar residential uses in the area. If this action is a result of judicial or legislative mandate to allow the alternative residential use in the community, that requirement may be further interpreted to prohibit unreasonably discriminatory zoning restrictions imposed on the alternative use. In California, for example, where shared housing is a constitutionally protected alternative use, a state court has held that zoning provisions imposing conditional use and other restrictions on shared housing but not on family-related occupancy were unreasonably discriminatory and invalid. *City of Chula Vista v. Pagard,* 115 Cal. App. 3d 785, 171 Cal. Rptr. 738 (1981). Similarly, in Florida, where a state statute generally requires that local communities allow for

the use of manufactured housing, a court recently held that zoning provisions imposing architectural controls on manufactured housing but not on site-built homes were invalid. *Campbell v. Monroe County,* 426 So. 2d 1158 (Fla. App. 1983). Courts are likely to require that any special or unique zoning restrictions that are imposed on an allowed alternative residential use be reasonably related to some special or unique problem posed by the alternative use in question.

Occupancy Restrictions

The equal protection issue is likely to arise in litigation challenging occupancy restrictions imposed on allowed alternative residential uses such as shared housing, accessory apartments or forms of echo housing. Zoning classifications based on the identity of the user of land have received mixed verdicts in the courts under an equal protection analysis. See, *e.g., Gerzeng v. Richfield Township,* 62 Ohio St. 339, 405 N.W.2d 1034 (1980); *Lighthouse Shores, Inc. v. Town of Islip,* 41 N.Y.2d 7, 359 N.E.2d 337, 390 N.Y.S.2d 827 (1976). The test of validity generally depends on whether the established classification of users can be justified as being reasonably related to a legitimate public purpose in view of alleged differences between such users. The reason for allowing an alternative residential use by one group or class of persons but not another must bear a real and substantial relationship to the general welfare—if it does not, the restriction may be held invalid on the equal protection ground of underinclusiveness. For example, in *Janas v. Town Bd.,* 51 A.D.2d 473, 382 N.Y.S.2d 394 (1976), an intermediate appellate court in New York invalidated a zoning occupancy restriction on the use of mobile homes as a form of echo housing. Mobile homes were allowed as conditional uses but "only to relatives no more distant than first cousins or employees of owners of property." The court ruled that the occupancy restriction was unreasonable and a violation of equal protection. The "personal status" of prospective occupants did not have a reasonable relationship to a legitimate zoning objective.

This same issue arises where an owner-occupancy restriction exists in regard to accessory apartments, echo housing or shared housing. An owner-occupancy restriction may arguably be justified in this context on the ground that residential properties will be better maintained and a greater degree of control over others residing on the property will be exercised when the owner also lives there. There is some case law to support the reasonableness of such an assumption. See, *e.g., Delbrook Homes v. Mayers,* 248 Md. 80, 234 A.2d 880 (1967) (attitudes of responsibility toward neighborhood held a valid basis for distinguishing between nearby residents and others in use of beach). As applied to alternative residential uses, an owner-occupancy restriction would appear to be reasonably related to special concerns relating to the manner in which the residential owner wishes to utilize his property. Such a restriction should not be unduly burdensome since it would apply not as a blanket restriction on residential use per se, but only as a means to prevent or minimize potential problems thought by the community to be associated with higher density alternative residential uses.

Age Restrictions

Age restrictions on alternative residential uses will also face court challenges. Such restrictions on shared housing or manufactured housing might in particular cases be held unconstitutional as interfering with the fundamental liberty of personal choice in family living arrangements. See *Moore v. City of East Cleveland,* 431 U.S. 494 (1977); *Adrian Mobile Home Park v. City of Adrian,* 94 Mich. App. 194, 288 N.W.2d 402 (1979).

Age restrictions might also be challenged on equal protection grounds. Several state courts have upheld age classifications in zoning where the restrictions are inclusionary and are directed at meeting the special needs of the elderly in the community for adequate housing. See, *e.g., Maldini v. Ambro,* 36 N.Y.2d 481, 330 N.E.2d 403, 369 N.Y.S.2d 385, *cert. denied,* 423 U.S. 993 (1975). However, these court decisions have expressly stated that age classifications in zoning might be held discriminatory and invalid where they are primarily exclusionary and present significant disadvantages to a class of persons with respect to their housing opportunities within a community. See *Shepard v. Woodland Township Committee & Planning Bd.,* 71 N.J. 230, 364 A.2d 1005 (1976); *Campbell v. Barraud,* 58 App. Div. 2d 570, 394 N.Y.S.2d 909 (1977).

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Where there is no demonstrated special need for adequate housing for a community's elderly, and no other legitimate public purpose is found to be served by such a zoning classification, an age restriction might be held invalid as either exclusionary in purpose or as a violation of equal protection. For example, in *McMinn v. Town of Oyster Bay,* 111 Misc. 2d 1046, 445 N.Y.S.2d 859 (1981), a New York court struck down an age restriction on shared housing. The court found that the age restriction was simply an impermissible attempt to establish "a special exception" that would exclude as residents persons under 62 years of age.

In another recent case, *Allen v. Town of North Hempstead,* 469 N.Y.S.2d 528 (Sup. Ct. 1983), a New York court found that a zoning restriction which limited occupancy within a multi-unit dwelling district for the elderly to blood-related persons who had resided within the community for a one-year period violated equal protection. The court held that the one-year residency requirement infringed upon the fundamental right to travel and was not justified by any compelling state interest. The community's purpose for the restriction, "to take care of one's own first," was not a constitutionally permissible objective and was not under the facts shown to be rationally related to the provision of housing for the elderly.

Toward A Conclusion

As state courts become more sensitive to the housing affordability problem and the changing nature of households, courts will more closely scrutinize residential zoning restrictions by using the traditional zoning standards of fairness and uniformity. Due process and equal protection issues are likely to be litigated with increasing frequency as local communities come under pressure to revise their zoning codes to accommodate alternative residential uses of land, particularly on property located in single family neighborhoods.

The presumption of validity generally accorded zoning ordinances will provide some measure of protection against judicial invalidation of residential zoning restrictions, and courts are unlikely to require that every conceivable residential use be permitted in a neighborhood or within a community. But as local zoning codes are revised to allow for various types of alternative residential uses, distinctions between alternative uses and the imposition of special or unique restrictions, particularly in regard to occupancy, that are placed on some residential uses, but not others, should be carefully considered. It is equally important that the reasons be set out in the zoning ordinance. Whenever possible, a legislative record comprised of both lay and expert opinion should be compiled prior to enactment which may later serve to demonstrate that the differing treatment of residential uses accorded by a zoning code reasonably relates to legitimate zoning objectives.

Editor's Note: For further insight on the social and legal changes affecting single family zoning, see Ziegler, "The Twilight of Single-Family Zoning," 3 UCLA J. Envt'l L. & Pol'y 301 (1983), and articles by Richard F. Babcock, Clan Crawford, Jr., and Dwight H. Merriam in the recently published *1984 Zoning and Planning Law Handbook* (Clark Boardman Co.).

RECENT CASES

U.S. Supreme Court Upholds Hawaii Land Act

Hawaii's Land Reform Act of 1967, which enables the state to use its power of eminent domain to break up large estates and transfer land ownership to home-owning tenants, has been unanimously upheld by the U.S. Supreme Court. The Court held that a land redistribution program designed "to correct deficiencies in the market . . . attributable to land oligopoly is a rational exercise of the eminent domain power." The decision reverses an appeals court ruling that denounced the program as "majoritarian tyranny." Addressing the basis of the lower court's holding—*i.e.,* the Act advances its purposes without the state taking actual possession of the land—the Supreme Court said that "any literal requirement that condemned property be put into use for the general public" has long been rejected; no "purely private taking was involved" here. The Court concluded that "it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause." Finally, in a statement that may support the increasing and novel uses of the eminent domain power, the Court said that a court's role in reviewing a legislature's judgment of what constitutes a public use is extremely narrow. *Hawaii Housing Authority v. Midkiff,* 52 U.S.L.W. 4673 (5/30/84), *rev'g,* 702 F.2d 788 (9th Cir. 1983).

The Hawaii Supreme Court is now reviewing a case challenging the Act's validity under the state constitution. If that court rules in favor of the law, as is expected, tenants may take control of property after hearings to determine fair market value. The state housing authority may lend up to 90 percent of the purchase price and provide financing.

Group Home Restrictions Held to Increased Judicial Scrutiny

Two federal courts of appeal have issued far-reaching decisions on the validity of zoning ordinances that

Chapter 81

Regulation of Occupancy, Ownership, Rental Housing, and Conversions

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

I. ZONING CONTROL OF OCCUPANCY OR OWNERSHIP

§ 81:4 Occupancy or ownership—Identity of occupant or owner

n. 1.

And see McMaster v. Columbia Bd. of Zoning Appeals, 395 S.C. 499, 719 S.E.2d 660, 275 Ed. Law Rep. 434 (2011) (holding that zoning ordinance that limited to three the number of unrelated individuals who may live together as a single housekeeping unit did not violate the Due Process Clause of the State Constitution).

n. 2.

New Jersey. Repair Master, Inc. v. Borough of Paulsboro, 352 N.J. Super. 1, 799 A.2d 599 (App. Div. 2002) (holding that a borough lacked authority under the general police power or the municipal land use regulatory power to regulate the rental occupancy of single-family homes and non-owner occupied duplex units to control a community's dynamics and demographics).

Ohio. Baughman v. Board of Zoning Appeals for Harrison Tp., 2002-Ohio-3931, 2002 WL 1773043 (Ohio Ct. App. 3d Dist. Logan County 2002) (holding invalid condition that transfer of ownership would nullify permit).

n. 3.

California. Buena Park Motel Ass'n v. City of Buena Park, 109 Cal. App. 4th 302, 134 Cal. Rptr. 2d 645 (4th Dist. 2003), review denied, (Aug. 13, 2003) (upholding zoning provision prohibiting motel rentals for 30 days or more to allow for room cleaning and preventing sanitation problems and also upholding a provision limiting return guest stays to a maximum of 60 days within any 180 consecutive day period).

§ 81:6 Occupancy or ownership—Household composition

n. 2.

Montana. State v. Stewart, 2003 MT 108, 315 Mont. 335, 68 P.3d 712 (2003) (enforcing single-family dwelling restriction as requiring single-housekeeping unit).

n. 3.

Add the following new paragraph after the third paragraph of footnote 3:

And see McMaster v. Columbia Bd. of Zoning Appeals, 395 S.C. 499, 719 S.E.2d 660, 275 Ed. Law Rep. 434 (2011) (holding that zoning ordinance that limited to three the number of unrelated individuals who may live together as a single housekeeping unit did not violate the Due Process Clause of the State Constitution).

But see United Property Owners Ass'n of Belmar v. Borough of Belmar, 343 N.J. Super. 1, 777 A.2d 950 (App. Div. 2001) (holding that ordinance making it unlawful for number of adults in summer rental unit between 1:30 and 8:30 a.m. to exceed maximum permitted occupancy was overbroad intrusion on tenants' privacy rights and violated due process).

§ 81:9 Condominium development

n. 1.

New Hampshire. Town of Rye Bd. of Selectmen v. Town of Rye Zoning Bd. of Adjustment, 155 N.H. 622, 930 A.2d 382 (2007) (holding that ordinances that prohibited conversion of tourist cabins to condominiums conflicted with Condominium Act).

n. 4.

New Hampshire. Dovaro 12 Atlantic, LLC v. Town of Hampton, 158 N.H. 222, 965 A.2d 1096 (2009) (finding that conversion of seasonal apartments to year-round condominium units was not substantial change or expansion of preexisting nonconforming use).

Virginia. Northampton County Bd. of Zoning Appeals v. Eastern Shore Development Corp., 277 Va. 198, 671 S.E.2d 160 (2009) (where the relevant zoning ordinance unconditionally prohibited new construction of apartment buildings where the developer's land was situated, the county board of supervisors' grant of a special use permit for condominium development, pursuant to which the developer proposed to erect eight condominiums having eight units each, did not supersede the zoning ordinance's prohibition against new apartment construction, although the ordinance provided that "condominium-type ownership" could be allowed by special use permit, that phrase related only to the legal form of ownership and not to the physical structure of buildings to be erected).

§ 81:11 Short term rentals

n. 1.

California. Young v. County of San Mateo, 2005 WL 3454106 (N.D. Cal. 2005) (upholding validity of ordinance regulating bed and breakfast establishments, which prohibited the hosting therein of conferences, meetings, or social events).

Indiana. Siwinski v. Town of Ogden Dunes, 949 N.E.2d 825 (Ind. 2011) (holding that homeowners' short-term rental of their home was a violation of town's ordinance prohibiting commercial use of property).

n. 2.

Add the following new paragraph after the second paragraph of footnote 2:

Alabama. Slaby v. Mountain River Estates Residential Ass'n, Inc., 2011 WL 4790638 (Ala. Civ. App. 2011) (holding that cabin owners' short-term rental of their property did not violate the terms of the restrictive covenant limiting the use of the property to single-family residential purposes because they rented their property to groups who used the cabin for residential purposes only).

Florida. Rollison v. City Of Key West, 875 So. 2d 659 (Fla. Dist. Ct. App. 3d Dist. 2004) (holding that owner's use of condominium unit for short-term rentals was a lawful nonconforming use; at time of owner's purchase, city's

administration interpreted city's zoning code to allow short-term rental of transient housing if rental occurred less than 50% of year, owner complied with 50% rule and obtained required occupational license, and owner was engaged in short-term rentals prior to changes in zoning code that prohibited such rentals).

New Jersey. But see Repair Master, Inc. v. Borough of Paulsboro, 352 N.J. Super. 1, 799 A.2d 599 (App. Div. 2002), the court holding that a borough lacked authority under the general police power and under the municipal land use regulatory power to attempt to control the rental occupancy of single-family homes and non-owner occupied duplex units in an effort to manage community dynamics and demographics. The court stated:

> We conclude that the Legislature did not imply the power to municipalities to deny or regulate a property owner's right to rent non-owner occupied residential housing in an effort to alter the community's dynamics and demographics, and control the ratio of owners and tenants. This is a power we simply will not infer in light of the evidence and the history of our land use and occupancy jurisprudence. If this power is conferred on municipalities, we think it should be the result of legislative deliberation and evaluation of all the complex considerations, not from a judicially-created attempt to accommodate a single, though doubtlessly sincere, municipal effort. The problem could be compounded if other municipalities were to take this route and seek an arguably more desirable occupancy mix. Specific legislative approval should be a precondition to the exercise of a power we consider a radical regulatory development.

New York. Soule v. Scalci, 288 A.D.2d 585, 732 N.Y.S.2d 662 (3d Dep't 2001) the court holding that a zoning ordinance provision regulating a "tourist accommodation" as a private residence for "the overnight accommodation of guests" did not apply to an apartment building where separate housekeeping units were used for short-term rentals. The court found that transient rentals did not convert the apartment building into a tourist facility which required the rental of space in a private residence.

And see City of New York v. 330 Continental LLC, 60 A.D.3d 226, 873 N.Y.S.2d 9 (1st Dep't 2009) (finding that city stated claims for alleged violations of zoning regulation and apartment hotels' certificates of occupancy based upon alleged failure to use buildings "primarily" or "as a rule" for permanent occupancy).

n. 3.

But see Siwinski v. Town of Ogden Dunes, 922 N.E.2d 751 (Ind. Ct. App. 2010) (holding that homeowners' short-term rental of their house was not a "commercial use" of the property in violation of zoning ordinance).

II. REGULATION OF RENTAL HOUSING CONVERSIONS

§ 81:13 Zoning and conversion of seasonal rentals

n. 2.

And see Village Estates Condominium Ass'n v. Planning Bd. of Town of Lake George, 298 A.D.2d 665, 748 N.Y.S.2d 431 (3d Dep't 2002) (reversing denial of special permit to convert condominiums from seasonal to year-round use since evidence did not support finding that upgrades to water or septic systems were necessary).

III. RENT CONTROL, CONVERSION, AND TENANT PROTECTION PROVISIONS

§ 81:19 Substantive due process claims

n. 1.

Maryland. Tyler v. City of College Park, 415 Md. 475, 3 A.3d 421 (2010) (holding that city ordinance creating rent control program that would cap rent on detached dwellings in single-family neighborhoods except for apartment buildings, was rationally related to achievement of city's legitimate objective of strengthening neighborhoods by reducing number of rentable single-family homes, as required for ordinance to satisfy rational basis review in action by rental property owners and student renter challenging validity of ordinance under due process and equal protection clauses of State constitution; evidence indicated that renters were cited more frequently for litter and garbage violations than occupying homeowners).

§ 81:21 Regulatory taking claims—Fair return on investment

n. 6.

And see Concord Communities, L.P. v. City of Concord, 91 Cal. App. 4th 1407, 111 Cal. Rptr. 2d 511 (1st Dist. 2001), review denied, (Dec. 19, 2001) (holding with respect to rent control on mobile home park that critical question in determining whether price controls on rent are valid is whether the base rents can reasonably be deemed to reflect general market conditions and not whether the base rents establish a fair and reasonable return).

§ 81:23 Regulatory taking claims—Physical occupation analysis

n. 10.

See also Cwynar v. City and County of San Francisco, 90 Cal. App. 4th 637, 109 Cal. Rptr. 2d 233 (1st Dist. 2001), review denied, (Sept. 26, 2001) (city ordinance restricting owner's right to evict tenant from residential unit so unit could be used by owner or close family member could constitute per se physical or regulatory taking).