A MODEL LEASE: ONE PROPOSAL FOR NEW JERSEY

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INTRODUCTION

The recent history of landlord-tenant relations in multiple dwellings[1] in New Jersey has been marked by the absence of equality of bargaining strength between landlord and tenant.[2] This situation has been caused in large measure by an extremely low vacancy rate[3] that presents a tenant with little choice but to accept the premises on the landlord's terms. The result is either no lease at all, or unconscionable lease provisions drafted by landlord lawyers and universally utilized in renting most middle and low-income housing.[4] In addition, archaic common law rules developed for a different age[5] and an inequitable

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1 "Multiple Dwelling" as used here is defined in the Hotel and Multiple Dwelling Health and Safety Law of 1967, N.J. STAT. ANN. § 55:13A-3(k) (Supp. 1969) [hereinafter cited as 1967 Multiple Dwelling Law].

2 The appellate division took judicial notice of the decidedly unequal bargaining positions of landlords and residential tenants in 1955. Kuzmiak v. Brookchester, Inc., 33 N.J. Super. 575, 586-87, 111 A.2d 425, 431 (App. Div. 1955). Since then the housing shortage has not improved.

3 The vacancy rate of dwelling units in New Jersey has been placed at 0.75%. Unpublished study by the Department of Community Affairs made in 1969, based on information from federal postal authorities. The low vacancy rate is the consequence of a low level of new housing construction. High interest rates, confiscatory property taxes, inappropriate federal tax laws, rising land and construction costs, restrictive zoning, antiquated building codes, racial and economic discrimination, and an extremely high population density are all contributing factors.

4 *See* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 389-91, 161 A.2d 69, 86-87 (1960), discussing the use of standardized contract provisions. *See also* Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943). Generally, the guidelines employed to construe contracts have been recently applied to the construction of leases. Marini v. Ireland, 56 N.J. 130, 141, 265 A.2d 526, 532 (1970). Thus the principles employed in *Henningsen* ought to be available in construction of standard form lease provisions. *See, e.g.*, Kuzmiak v. Brookchester, Inc., 33 N.J. Super. 575, 587-88, 111 A.2d 425, 432 (App. Div. 1955), holding an exculpatory clause to be invalid on the alternate ground "that it is contrary to public policy because of the unequal bargaining positions of the parties . . . ."

5 Stewart v. Childs Co., 86 N.J.L. 648, 92 A. 392 (Ct. Err. & App. 1914) (landlord's covenant to repair is independent and breach thereof does not amount to constructive eviction, now largely overruled by Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970)); Duncan Development Co. v. Duncan Hardware, 34 N.J. Super. 293, 112 A.2d 274 (App. Div. 1955) (abandonment necessary to effect a constructive eviction, also overruled in

statutory dispossess procedure[6] provided the landlord with the means to exploit fully his superior position. Under these conditions, traditional notions of freedom of contract become but a lame excuse for maintaining the landlords' dominance.

However, developments on several fronts indicate that landlord-tenant law is undergoing radical changes aimed at restricting the power of landlords and restoring a measure of bargaining strength to tenants. Recent cases have found an implied covenant of habitability in commercial[7] and residential[8] leases, and have given the tenant a practical self-help remedy when that covenant is breached.[9] The Multiple Dwelling Law of 1967 gives the Commissioner of the Department of Community Affairs broad powers to issue and enforce regulations to assure that multiple dwellings are built and maintained in such a manner as is consistent with the health, safety and welfare of the occupants thereof and the general public.[10] A variety of proposals were introduced in the legislature, and a legislative study commission was formed with an eye toward reforms.[11]

There are, however, inherent limitations in these legislative and judicial developments. The regulatory approach adopted in the Multiple Dwelling Law suffers from lack of enforcement resources. Landlords throughout the state openly violate health and building code regulations. In addition, case law is slow and difficult to develop. Few tenants have either the resources or the fortitude to litigate a great many of the abuses they suffer.[12]

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residential cases by *Marini*, *supra*); Muller v. Beck, 94 N.J.L. 311, 110 A. 831 (Sup. Ct. 1920) (landlord under no duty to mitigate damages); and cases cited note 44 *infra*.

6 N.J. STAT. ANN. §§ 2A:18-53 *et seq.* (1952, Supp. 1969). To discover that this procedure was inequitable one need only read Peters v. Kelley, 98 N.J. Super. 441, 237 A.2d 635 (App. Div. 1968), also overruled in *Marini*; N.J. STAT. ANN. § 2A:18-59 (1952) provides that the landlord "shall remain liable in a civil action for unlawful proceedings under this article"—hardly a practical remedy for a wrongly evicted tenant with nowhere to live and no resources to employ an attorney; *see also* notes 9, 13, and 56 *infra*.

7 Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969).

8 Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 268 A.2d 556 (Essex Cty. Dist. Ct. 1970).

9 Previously the residential tenant could only treat a breach affecting habitability as a constructive eviction; he would have to move from the premises in order to avoid paying rent. Duncan Development Co. v. Duncan Hardware, 34 N.J. Super. 293, 297-98, 112 A.2d 274, 276-77 (App. Div. 1955). This obviously was an impractical remedy under existing housing market conditions. *Marini* held that a tenant may, on reasonable notice to the landlord, make the necessary repairs and deduct this cost from his rent. *See also* note 26 *infra*.

10 N.J. STAT. ANN. § 55:13A-7 (1964).

11 N.J. LANDLORD TENANT RELATIONSHIP STUDY COMMISSION, INTERIM REPORT TO THE GOVERNOR AND LEGISLATURE (April, 1970) [hereinafter cited as STUDY COMMISSION REPORT].

12 *E.g.*, the minimum fee schedules in various New Jersey counties indicate that it

The rapid growth of tenants' unions, however, promises to restore a measure of equality to the relative bargaining strength between landlord and tenant. Although New Jersey has no rent strike law,[13] there are a variety of other forms of collective pressure which can be brought to bear on a recalcitrant landlord. Strong tenant organizations in this state have already negotiated collective agreements with landlords limiting rent increases, directing that specific repairs be made, establishing a grievance procedure, and reforming the individual lease to make it a more equitable document.

Although tenants' unions may help restore the balance between landlord and tenant, here too there are inherent limitations. Organizational difficulties are numerous. Living conditions must be sufficiently egregious to mobilize tenants into action. The tenants must possess sufficient financial resources to permit recourse to the courts (unless Legal Aid Service is available).[14] High turnover rates in some buildings make stability of membership and leadership a problem. Fear of retaliatory eviction or discriminatory rent increases must be overcome.[15] Furthermore, without the cooperation of already overburdened enforcement officials it is extremely difficult to force landlords to comply even with existing health and building codes. Finally, tenants lack any legally sanctioned remedy for forcing a landlord to recognize and bargain with their union.[16] Because of these shortcomings, it seems clear that the proliferation of tenants' unions does not obviate the need for new legislation in this area.

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would cost a tenant from $125.00 to $175.00 to recover a security deposit. This cost equals the average security deposit, making recovery hardly worth the effort.

13 Four jurisdictions presently have statutes permitting tenants to withhold rent where there has been serious noncompliance with housing code standards, but only the New York statute is expressly geared to give protection to the "rent strike". BALTIMORE, MD., CODE PUB. LOC. LAWS § 459A (1968), MD. LAWS 832 ch. 459, § 1 (1968); MASS. ANN. LAWS ch. 239, § 8A; ch. 111, § 127F (Supp. 1967); MICH. COMP. LAWS § 125.530(3) (Supp. 1969); N.Y. REAL PROP. ACTIONS LAW § 769 (McKinney 1969-1970 Supp.); PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1969).

14 *See* note 12 *supra*. Most middle-income tenants are not eligible for OEO legal aid services but find it uneconomical to retain counsel individually to fight many abuses. Although small claims court would entertain jurisdiction at a minimum cost there are practical difficulties, *i.e.*, an unsophisticated tenant versus a battle-hardened landlord or his attorney, a lost day of work, and the possibility that the tenant will have moved to a distant place. Group legal services may provide one solution, *see* notes 17, 18 and accompanying text *infra*.

15 *See* N.J. STAT. ANN. § 2A:170-92.1 (Supp. 1969).

16 Tenants seeking union recognition may be confronted with a series of legal obstacles not unlike those encountered by labor unions prior to adoption of the Wagner Act. 77 YALE L.J. 1368, 1389-95 (1968). *Quaere*: Whether a tenant union "bill of rights" guaranteeing the right to organize and to be recognized as the bargaining agent for all tenants, once certain representational requirements have been met, is feasible and desirable?

Tenants' unions will increasingly turn to private attorneys for legal counsel. There will be negotiations to conduct, agreements and leases to be drafted, and occasional litigation. It is quite possible that a tenants' union may wish to retain an attorney to handle disputes between the landlord and individual tenants. In such a situation the attorney must be careful to avoid ethical pitfalls; his employment must comply with the criteria established by the *ABA Code of Professional Responsibility*, Disciplinary Rule 2-103(D)(5).[17] As long as the tenants' union is nonprofit and not organized primarily for the rendition of legal services to individual members, and the individual and not the union is recognized as the client in the matter, there should be no ethical difficulties. However, the attorney confronted with such an arrangement would be well-advised to seek an ethics opinion.[18]

The authors hope through this article to outline provisions for a balanced and equitable lease. The clauses suggested herein are by no means exhaustive of all that a residential lease should contain, but represent those areas which are of greatest concern. It is also suggested that the legislature give serious consideration to a statute requiring inclusion of these or similar provisions in every multiple dwelling lease.[19]

I

Security Deposit: The Tenant has this day deposited with the Landlord $————, the equivalent of one month's rent, to bear interest at ———— per annum as a security for damages arising only from the Tenant's misuse, neglect, or failure to take good

17 *See* 93 N.J.L.J. 377, 391-92 (1970). *See also* N.J. Ethics Opinions No. 114, 90 N.J.L.J. 480 (1967); No. 143, 92 N.J.L.J. 53 (1969); No. 172, 93 N.J.L.J. 81-86 (1970); UMW v. Illinois State Bar Ass'n, 389 U.S. 217 (1967), which held an arrangement whereby a labor union employed an attorney on a salary basis to represent individual union members on workmen's compensation cases to be constitutionally protected. This holding would seem to govern the arrangement suggested in the text; *see also* Railroad Trainmen v. Virginia *ex rel* Virginia Bar, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963).

18 N.J.R. 1:19-3 (1969).

19 There is precedent for such a statute. *See* N.J. STAT. ANN. § 17:36-5.20 (1963), providing standard fire insurance policy provisions; *see* STUDY COMMISSION REPORT, *supra* note 11, at 13, suggesting that the state consider enacting a model lease or a housing equivalent of UNIFORM COMMERCIAL CODE § 2-302. N.J. STAT. ANN. § 55:13A-7 (Supp. 1969), gives the Commissioner of the Department of Community Affairs the power to issue such regulations as he deems necessary to assure that any multiple dwelling will be constructed and maintained in such manner as is consistent with and will protect the health, safety and welfare of the occupants. *Quaere*: Whether the Commissioner could by regulation require standard lease clauses dealing with habitability, repairs and landlord's tort liability?

care of the premises, normal wear and tear excepted. The Landlord agrees that any inspection made for the purpose of ascertaining damages to be deducted from the security deposit shall be made in the presence of the Tenant or his agent on or before the date on which the Tenant vacates the premises. The Landlord agrees that said security deposit together with interest earned thereon shall be returned to the Tenant no later than ten (10) days after the Tenant vacates the premises, together with a written accounting of interest credits and all deductions made therefrom. If the occupancy continues beyond one year, the Tenant may exercise the option to have the accrued interest applied to the month's rent following the annual anniversary date.

The purpose of a security deposit as set forth in this lease is to secure a landlord against physical damage to his apartment.[20] Retention of a sum equal to one month's rent would make the landlord reasonably secure in this respect. This clause sets a limit to the landlord's security against damage and not a limit to the tenant's liability. It also eliminates the present landlord practice of utilizing security deposits for liquidating alleged damages stemming from an early termination of a lease.

Under state law these security deposits remain the property of the tenant held in trust by the landlord.[21] These funds are not to be mingled with the personal property of the landlord and are not to become an asset of the landlord.[22] The landlord is required to put the security deposit in a New Jersey banking institution and to notify the tenant where the money is held and the amount of the deposit.[23] Thus, the tenant is the beneficiary and the landlord the trustee of a trust. Consequently the landlord should be charged with the usual fiduciary duty to produce income on trust property.[24] As the statute is not explicit, this provision requires as a contractual obligation that the landlord guarantee interest on the tenant's security deposit at or near the going interest rate for time deposits.

We would also eliminate ex parte inspections and determinations of damages by requiring the landlord to inspect the premises in the

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20 Relatedly, the mitigation of damages clause (Part VI *infra*) would eliminate the present practice wherein a landlord demands a forfeiture of one or two month's rent upon an early termination of a tenancy, without proof of damages. If a tenant wishes to obtain the benefits of these clauses he must provide the landlord with his new address.

21 N.J. STAT. ANN. § 46:8-19 (Supp. 1969).

22 *Id.*

23 *Id.*

24 II A. SCOTT, TRUSTS § 181 (3d ed. 1967) (duty to make trust property productive); N.J. Stat. Ann. § 3A:15-16 (1953). Since submitting this article the New Jersey Senate has passed N.J.S. No. 904 (1970), which provides in substance what the authors recommend.

tenant's or his agent's presence. The landlord would then be required to submit an itemization of deductions and to return any surplus money within ten days of the tenant's departure.

II

Habitability and Repair: The Landlord guarantees for the benefit of the Tenant and his family and so warrants that the premises and all common areas are habitable and fit and shall continue to be fit for their intended uses. The Landlord agrees to keep the premises in good repair during the term of the lease, and to comply with the applicable health and safety laws, regulations, and ordinances of the State of New Jersey and of the Municipality where the premises are located, except in those cases where said violations of the applicable health or safety laws or ordinances have been caused by the willful or negligent conduct of the Tenant and his family, employees or agents. The Tenant shall take good care of the demised premises and fixtures therein and shall make, as and when needed as a result of misuse or neglect by the Tenant, all repairs in and about the demised premises necessary to preserve them in good order and condition, which repairs shall be in quality and class equal to the original work. The Tenant agrees not to create or permit the existence of any nuisance or dangerous condition upon the premises, excepting those created by the Landlord or required to be corrected by the Landlord under the terms and conditions of this lease or by law. The Landlord may repair at the expense of the Tenant all damages or injury to the demised premises or to the building of which the same forms a part, or its fixtures, appurtenances or equipment caused by the negligence or improper conduct of the Tenant or his family, servants, employees or agents, but only in the event that the Tenant refuses, upon adequate notice, to make said repairs within a reasonable time.

III

Rent Abatement: In the event that the Landlord fails to perform any covenant contained herein or is in violation of any state or local statute, ordinance or regulation which affects the value of the tenancy, the Tenant shall be entitled to a reasonable abatement of rent during the period of violation or breach. In the event the Landlord fails to make any repairs required to be made by the Landlord under this lease, the Tenant, after reasonable notice of his intention to do so to the Landlord, may cause the repairs to be made and deduct the reasonable cost thereof from his rent.

These two clauses go somewhat further than existing law. *Marini*

v. Ireland[25] held that: (1) there is an implied covenant of habitability in a residential lease; and (2) a tenant may, upon breach of that covenant and after reasonable notice to the landlord, make the necessary repairs and deduct the cost thereof from his rent. The clauses suggested here provide a covenant to make repairs, covenants of habitability and fitness for intended use, and a covenant to comply with all applicable laws and regulations. This last covenant is necessary because many health code violations may not come within judicial notions of defects affecting habitability;[26] yet the tenant ought to have a remedy available to correct such conditions.

If the landlord is in violation of any of these covenants, the tenant has two remedies: he may have a reasonable abatement of rent—an abatement approximately equal to the reduction in the value of the tenancy resulting from the breach;[27] or he may make the repairs himself after reasonable notice and deduct the cost from his rent.

Valuation for purposes of a rent abatement will often be difficult and disputed. This fact in itself, however, is no reason to limit the availability of rent abatement as a tenant's remedy. The collective agreement between a landlord and a tenants' union might provide for a grievance board to decide the merit and value of a tenant's claim for abatement; or a local ordinance might create a landlord-tenant arbitration board. Other solutions are undoubtedly possible.

The suggested clauses also provide a landlord with adequate recourse against destructive tenants. The tenant agrees to keep the premises in good repair, not to create or suffer the existence of a nuisance on the premises, and to make repairs caused by his own misconduct. In a mirror image of the tenant's remedies, the landlord may, upon reasonable notice, enter and make repairs at the tenant's expense to facilities damaged by the tenant's misconduct. Violation of these covenants by the tenant will provide the landlord with cause for eviction.[28]

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25 56 N.J. 130, 265 A.2d 526 (1970).

26 Breaches of the covenant of habitability will usually be found only with respect to "facilities vital to the use of the premises for residential purposes". *Id.* at 144, 265 A.2d at 535. Although Justice Haneman equated "habitability" and "fitness for purpose", the authors submit that the covenant of fitness for intended use contained herein is broader than the covenant of habitability in that it guarantees against defects in "non-vital" facilities.

27 Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 268 A.2d 556 (Essex Cty. Dist. Ct. 1970), permits a rent abatement to a tenant where the landlord failed to make repairs affecting habitability. *Marini* did not decide whether this remedy is available to a tenant. *See* Reste Realty Corp. v. Cooper, 53 N.J. 444, 462 n.1, 251 A.2d 268, 277 n.1 (1969), where Justice Francis suggests that it might be an equitable alternative to constructive eviction to allow the tenant to remain but pay only the reasonable rental value.

28 *See* notes 34-40 and accompanying text *infra*.

IV

Landlord's Liability: The Landlord shall be responsible to the Tenant and his family for any and all damages resulting from (1) any violations of state or local statutes, ordinances or regulations or covenants contained herein, (2) any condition not included in (1) above, of which the Landlord has or should have knowledge and which involves an unreasonable risk of harm to the injured party, and (3) negligent acts or omissions of the Landlord or his agents.

In any action against the Landlord by a Tenant, it shall not be a defense that the Tenant takes the premises as he finds them.

The intent of this clause is to modify existing law to provide a few simple and fair rules governing a landlord's liability. First, violation of statutes, regulations or lease covenants is made negligence per se. Presently, violation of health or building codes is only evidence of negligence.[29] This change simplifies matters of proof at trial, probably enhances the likelihood of settlement, and encourages the early correction of code violations. Second, for defects which do not constitute such violations, the landlord is liable if he knows or should have known of the condition, and it constituted an unreasonable risk of harm to the injured party.[30] Third, as always, the landlord is liable for negligent acts or omissions by himself or his agents.[31]

The covenants of habitability and repair discussed above by implication eliminate the defense that the tenant takes the premises as he finds them.[32] Here that defense is expressly abolished, although it has probably been successfully laid to rest by recent cases.[33]

V

Renewal Option: The Landlord agrees that the Tenant shall have an option to renew this lease, upon identical terms, except

29 Coleman v. Steinberg, 54 N.J. 58, 64-65, 253 A.2d 169, 170-71 (1969).

30 *Cf.* RESTATEMENT (SECOND) OF TORTS §§ 341-45 (1965).

31 *See* McCappin v. Park Capitol Corp., 42 N.J. Super. 169, 172, 126 A.2d 51, 52 (App. Div. 1956).

32 Coleman v. Steinberg, 54 N.J. at 62-63, 253 A.2d at 170 (1969).

33 In Coleman v. Steinberg, *id.* at 65, 253 A.2d at 171, the defense was held not applicable to an uncovered radiator pipe in the plaintiff's apartment because possession and control of the entire heating system remained with the landlord. The same reasoning applies to common areas and stairways between apartments. Now that *Marini* has found an implied covenant of habitability in residential leases, it seems likely that landlords will be subjected to tort liability for injury caused by a breach of that covenant whether or not the defect existed at the inception of the tenancy. *See* Faber v. Creswick, 31 N.J. 234, 156 A.2d 252 (1959); Michaels v. Brookchester, Inc., 26 N.J. 379, 140 A.2d 199 (1958).

that the Landlord may seek a rent increase not to exceed ————. If the Landlord intends to increase the rent, he shall so notify the Tenant in writing no later than Sixty (60) days before the expiration of this lease. If the Tenant intends to exercise his option to renew, he shall notify the Landlord in writing no later than Thirty (30) days prior to the expiration date. Not in any circumstances nor in any manner shall the Tenant be required to exercise his option sooner than the aforementioned Thirty (30) day period. The Landlord and Tenant agree that the Landlord shall have the right to terminate or refuse to renew the tenancy only for the breach by the Tenant of any material covenant contained herein upon notice to the Tenant of the reason therefore. Any such breach by the Tenant shall be deemed waived and of no effect whatsoever upon acceptance by the Landlord of the rent for the month following the month in which the breach occurred.

The above clause would prohibit the eviction of a tenant or the nonrenewal of a tenancy without just cause. It recognizes the landlord's right to evict undesirable tenants, implies an elementary requirement of due process and sets forth the general criteria—tenant-created nuisance or other breach of a material covenant—for determining whether nonrenewal is justified.

Thus, there would be a repudiation of "[o]ne of the more repugnant aspects of landlord-tenant law . . . the long established doctrine . . . of allowing the landlord to terminate a tenancy unilaterally . . . without . . . an assignment of any reason . . . ."[34] The rationale underlying this rule is that the owner of property should be free to use it as he sees fit. A balance, however, must be drawn between the landlord's property rights and the tenant's need for shelter as a basic necessity of life. State regulations similar to the contractual one suggested above would not amount to a taking of property.

Inroads have already been made on once inviolate notions of property rights. If a tenant can prove that termination of tenancy is based on racial or other discrimination, or is in retaliation for informing public officials of housing, health or other related violations, or for tenant organizing, a landlord will find he no longer has unbridled discretion.[35] Importantly, it has been held that a tenant cannot be evicted

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34 Garrity, *Redesigning Landlord-Tenant Concepts for an Urban Society*, 46 J. URBAN L. 695, 709 (1969); *see* Alexander Hamilton Sav. & Loan Ass'n v. Whaley, 107 N.J. Super. 89, 257 A.2d 7 (Hudson Cty. Ct. 1969) (landlord has to assign a reason for eviction).

35 N.J. STAT. ANN. § 2A:170-92.1 (Supp. 1969); N.J. STAT. ANN. §§ 10:5-1 *et seq.* (Supp. 1969); Gray v. Serruto Builders, Inc., 110 N.J. Super. 297, 265 A.2d 404 (Ch. 1970); Alexander Hamilton Sav. & Loan Ass'n v. Whaley, 107 N.J. Super. 89, 257 A.2d 7 (Hudson Cty. Ct. 1969). *See generally* Jones v. Mayer Co., 392 U.S. 409 (1968); Colon v. Tompkins Square Neighbors, Inc., 294 F. Supp. 134 (S.D.N.Y. 1968); N.J. Assembly Bill 831 (March 19, 1970) (now awaiting the Governor's signature).

from government operated housing without due process[36] and just cause.[37] The unavailability of suitable alternate housing requires abolition of the rule sanctioning untrammelled discretion in the landlord to terminate tenancies in the private sector as well.[38]

In the *Landlord Tenant Relationship Study Commission Interim Report* it was noted that the emergency housing crisis has produced strong sentiment for assuring tenants a degree of security, and that

> several jurisdictions have recognized that no effective allocation of duties and responsibilities between Landlord and Tenant is workable unless tenants have the security that their tenancy can be terminated only for just cause . . . .[39]

Tenant groups have considered this to be an indispensible prerequisite for improving their servile position vis-à-vis their landlord.[40]

The above clause also contains a limited attempt to deal with the problem of rent increases. Under this clause rent increases could be limited to a stated dollar amount or to a specified percentage per year (or lease term), or they could be tied to the consumer or wholesale price index. (This is not to say that either of these necessarily reflects accurately the increases in a landlord's costs, but only that they are convenient yardsticks of increased costs generally). Where there is a strong tenants' union it might even be possible through negotiation to ascertain the landlord's costs, establish a base rental, set a fair rate of return, and work out a formula to assure reasonable increases only when necessary.

The regulation of rent increases is one of the most sensitive and difficult areas of landlord-tenant relations. In the absence of an adequate housing supply and in the face of an inelastic demand curve for shelter some sort of limit on the landlord's power to increase rents is desirable. However, care must be taken to strike a balance between the tenant's desire to limit increases as much as possible, the landlord's to meet increased costs and enlarge his profit margin, and the social utility inherent in maintaining a fair return on housing investment sufficient to assure upkeep and to encourage additional investment. Ultimately statutory controls may be necessary. Here too, care must be

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36 Ruffin v. Housing Auth., 301 F. Supp. 251 (E.D. La. 1969).

37 Thorpe v. Housing Auth., 393 U.S. 268 (1969).

38 Garrity, *supra* note 34, at 711; *cf.* Colon v. Tompkins Square Neighbors, Inc., 294 F. Supp. 134 (S.D.N.Y. 1968).

39 STUDY COMMISSION REPORT, *supra* note 11.

40 William Goldberg, Model Collective Bargaining Agreement (unpublished paper for the New Jersey Tenants Organization (N.J.T.O.), Fort Lee, N.J.)

taken to avoid the inflexibility that has given rise to failure elsewhere. New York City's experience with rent control is legend.[41]

VI

> *Mitigation of Damages*: Notwithstanding any other paragraph of this lease, it is hereby agreed that in the event the Tenant shall find it necessary to move from the premises prior to the expiration of this lease, the Tenant shall give the Landlord Thirty (30) days written notice; said notice shall include Tenant's forwarding address, and a statement setting forth Tenant's reasons for early termination. Upon such notice the Landlord agrees to undertake immediately all reasonable efforts to secure a new tenant to lease the vacated premises as of the Tenant's announced termination date. The Landlord agrees that the Tenant shall be answerable in damages only in the event that the Landlord's reasonable efforts to secure a new tenant are unsuccessful; and in no event shall the Tenant be liable for more than two (2) months rent or the rental to the end of this lease, whichever is less. In no event shall the Tenant be required to pay damages to the Landlord until actual damages have been ascertained.

Aside from one early case,[42] the New Jersey courts have held to the majority view[43] that a landlord is not required to mitigate damages when a tenant abandons or vacates the premises before the expiration of a lease.[44] This view is regrettable and not in accord with modern realities;[45] hence the need for the above clause.

In the majority view "the landlord need not meddle with the property, may stand by and do nothing, may even arbitrarily refuse to

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41 Two statutory solutions are suggested here for the purpose of discussion: (1) the housing industry might be deemed a public utility and subjected to traditional rate regulation; (2) the N.J.T.O. has proposed a "rent leveling" law, tying rent increases to the consumer price index. Operation of the law would be triggered by an executive declaration of a "rent emergency" once vacancies fell below a specified level.

42 Zabriskie v. Sullivan, 80 N.J.L. 673, 77 A. 1075 (Sup. Ct. 1910), *aff'd*, 82 N.J.L. 545, 81 A. 1135 (Ct. Err. & App. 1911).

43 A 1968 survey found that a landlord need not mitigate damages in fifteen jurisdictions, with another eight, New Jersey among them, probably in accord. Ten states would require mitigation with two more indicating support of this view. In another state with cases in point the law was declared "unsettled." Annot., 21 A.L.R.3d 534, 541 (1968).

44 Joyce v. Bauman, 113 N.J.L. 438, 174 A. 693 (Ct. Err. & App. 1934); Weiss v. Zapinsky, Inc., 65 N.J. Super. 351, 167 A.2d 802 (App. Div. 1961); Heyman v. Linwood Park, Inc., 41 N.J. Super. 437, 125 A.2d 345 (App. Div. 1956); Zucker v. Dehm, 128 N.J.L. 435, 26 A.2d 564 (Sup. Ct. 1942); Heckel v. Griese, 12 N.J. Misc. 211, 171 A. 148 (Sup. Ct. 1934); Muller v. Beck, 94 N.J.L. 311, 110 A. 831 (Sup. Ct. 1920).

45 Kuzmiak v. Brookchester, Inc., 33 N.J. Super. 575, 111 A.2d 425 (App. Div. 1955) (judicial notice of the housing shortage).

accept other suitable and responsible tenants, and may still recover from the original tenant the entire amount of the rent to end of the term."[46] This harsh rule is "usually founded on the theory that the tenant . . . has purchased a vested interest in real estate . . . and the tenant's obligation to pay rent for the estate so purchased is absolute."[47] The better reasoned view "is that a landlord is required to mitigate damages by reletting upon his tenant's abandonment . . . ."[48] Axiomatic to this view is an appreciation that under modern conditions a lease is predominately an exchange of promises to which a sale of an estate of land is only incidental.[49] Importantly, "public policy favors this view, since it is better for the parties, as well as the public, particularly when a critical housing shortage exists to have property put to some beneficial use."[50]

In light of the above we have, in effect, incorporated general principles of contract law with respect to mitigation of damages into this clause.[51] Under this clause the tenant is obliged to give the landlord thirty days notice of his intention to vacate. This clause puts the burden of proof upon the landlord to show that he has exercised due diligence in trying to relet the apartment. This was done because a landlord is more likely to be able to come forth with the necessary proofs. In no event, however, will the tenant be required to pay any damages due to the early termination of the tenancy until they have been ascertained, and in no event shall the tenant be liable for more than two months rent.

VII

> *Landlord Retaliation or Reprisal*: The Landlord agrees not to evict or refuse to renew a landlord-tenant relationship with his Tenant, or threaten to evict or take reprisals against his Tenant for initiating a building inspection by any public official, for making a complaint to any lawful body, for participating in any tenant organization or association; or for any other lawful exercises by the Tenant of his rights, guaranteed by federal, state and local law.

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46 Annot., 21 A.L.R.3d 534, 539 (1968).

47 *Id.*

48 *Id.* at 540.

49 Wright v. Bauman, 239 Ore. 410, 398 P.2d 119 (1965).

50 Annot., 21 A.L.R.3d 534, 540; Martin v. Siegley, 123 Wash. 683, 212 P. 1057 (1923).

51 *See* N.J. STAT. ANN. § 12A:2-703 (1962); N.J. STAT. ANN. § 12A:2-711 (1962); *see also* 5 A. CORBIN ON CONTRACTS § 1039 (1964) (damages are not recoverable for avoidable consequences).

The critical housing shortage[52] and the ever-increasing awareness of the societal importance of housing[53] puts this protective provision beyond debate. Indeed, even the New Jersey Legislature has recognized the necessity of prohibiting retaliatory evictions, although in a less than satisfactory manner.[54]

The state legislature has made it a disorderly persons offense to retaliate against anyone who has notified a public official of a housing complaint.[55] The penalty is up to six months in jail and/or a $250.00 fine. A recently proposed amendment to this statute would provide similarly for persons retaliating against members of a tenants' organization.

The legislative response is wholly inadequate. While a tenant's desire for revenge may be satiated by seeing his landlord charged with a disorderly persons offense, his first need is shelter. Consequently he will find little comfort in the prescribed penalties.[56] An encouraging development, however, is the holding in *Alexander Hamilton Savings & Loan Ass'n v. Whaley*,[57] where the court found that a landlord must disclose reasons for eviction. It found that the tenant was being evicted because he had requested a housing inspection and was a leader of a tenants' group. Furthermore, the court held equitable defenses sufficient to deny eviction. Implicit in the court's decision is a refusal to be an accessory to the commission of a disorderly persons offense.[58]

The seventh clause adopts the logic inherent in the *Alexander Hamilton* opinion. It directly protects a person's right of habitation

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52 *See* notes 2 and 3 *supra*.

53 Since this article was submitted Governor Cahill has signed into law Assembly Bill No. 1204 (1970). This law prohibits reprisal by a landlord against a tenant who has sought to secure or enforce any rights under the lease, the laws of New Jersey or its governmental subdivisions, or of the United States, or a tenant who has been an organizer for or who has joined or been involved in the activities of any lawful organization. It also provides for a rebuttable presumption of reprisal upon a showing of the existence of any of the preceding circumstances. This presumption may be raised as a defense to a landlord-initiated action or as the basis for an affirmative claim in a tenant's action for damages, injunctive relief, etc.

54 N.J. STAT. ANN. § 2A:170-92.1 (Supp. 1969); N.J. Assembly Bill 831, *supra* note 35; AMERICAN BAR FOUND., MODEL RESIDENTIAL LANDLORD—TENANT CODE § 2-407 (Tent. Draft 1969). This proposed section protects the tenant from retaliatory eviction for six months but does not protect tenants involved in organizing a tenants' union prior to a housing code complaint.

55 N.J. STAT. ANN. § 2A:170-92.1 (Supp. 1969). *See* N.J. Assembly Bill 831, *supra* note 35.

56 Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970) (it is the apartment that a tenant needs); the impracticability of tenant "remedies" is obvious throughout New Jersey's landlord-tenant law; *see* note 6 *supra*.

57 107 N.J. Super. 89, 257 A.2d 7 (Hudson Cty. Ct. 1969).

58 *Cf.* Shelley v. Kraemer, 334 U.S. 1 (1948).

which is a necessary corrollary to the penal deterrent. Indeed, many of the procedural problems found in the criminal prosecution of housing violations[59] make such a civil remedy necessary.

VIII

> *Self Help*: The Landlord agrees not to use any self-help methods against the Tenant to effect an eviction, either partial or total, or to effect a right of re-entry.

A recent law review article on self-help evictions in New Jersey,[60] the *Model Residential Landlord-Tenant Code*,[61] and the *Landlord Tenant Relationship Study Commission Report*[62] have concluded that the common law remedy permitting a landlord to personally evict a tenant without prior resort to the judicial machinery ought to be abolished,

> on the basis that (a) the preservation of the peace; (b) the order of the community; (c) the physical well being of the tenant, his family, *AND* the landlord; (d) the potential for violence, both to person and property . . . ; (e) the hardship incurred from the denial of housing; (f) the doctrinal impalatability of unilateral declaration of guilt by the landlord; (g) the existence of an expeditious and inexpensive alternative (summary dispossession) overrides any redeeming social and economic benefits which might accrue to the landlord if this remedy is left intact.[63]

New Jersey courts have apparently reached the same conclusion. The consensus of several unpublished opinions seems to be that the statutes[64] for obtaining possession of real property are the exclusive remedy for a landlord seeking possession of his leased premises.[65] Resort to a lockout without prior court order is unconstitutional because this violates the fourteenth amendment due process clause.[66]

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59 Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1275-81 (1966).

60 Note, *Self-Help Eviction: Proposals for the Reform of Eviction Procedures in New Jersey*, 1 RUTGERS-CAMDEN L.J. 315, 341 (1969). The author recommends that the forcible entry and detainer statutes, N.J. STAT. ANN. §§ 2A:39-1 *et seq.* (1952), be amended to outlaw self-help eviction.

61 Assembly Bill 831, *supra* note 35; Gibbons, *Residential Landlord-Tenant Law: A Survey of Modern Problems with Reference to the Proposed Model Code*, 21 HASTINGS L.J. 369, 404-08 (1970).

62 STUDY COMMISSION REPORT, *supra* note 11, at 7-8.

63 *Id.*

64 N.J. STAT. ANN. §§ 2A:18-53 *et seq.* (1952, Supp. 1969) (summary dispossession).

65 Wheeler v. Williams, C-2449-69 (Ch., May 6, 1970) (Judge Lora); Pratt v. Dozier, C-2417-68 (Ch., June 26, 1969) (Judge Wick); Sage v. Stockton Station, Inc., A-1643-68 (App. Div., May 28, 1970).

66 Wheeler v. Williams, C-2449-69 (Ch., May 6, 1970).

Because the courts have chosen not to publicly express themselves and because the one appellate division case[67] known by these authors to be on point is unclear, we have suggested a clause prohibiting self-help both during and at the end of the term of tenancy. Distraint and forcible entry and detainer without resort to the legal process would be prohibited.[68]

IX

Assignments and Subleases: The Tenant shall have the right to assign or sublease the premises upon written consent of the Landlord, which consent shall not be withheld unreasonably.

The usual form lease contains a prohibition against assigning or subletting the premises without the landlord's consent. Courts have been reluctant to find an implied condition that the landlord's consent will not be unreasonably withheld.[69]

Under most residential leases the covenant against assignments and subleases is somewhat unfair because a tenant is left with no way to vacate the premises without being subject to liability for rent for the balance of the term. The suggested clause makes explicit the tenant's right to assign or sublease the premises, subject only to the landlord's right to withhold consent for good cause. Where there are provisions for early termination and mitigation of damages such as found in clause VI *supra*, the right of assignment assumes less importance.

CONCLUSION

Unless there is a drastic reversal in population concentration and/or multiple housing construction trends, New Jersey's tenants will face ever-increasing difficulty in achieving an equal bargaining position vis-à-vis their landlords. The proposed clauses and legislative enactments will not be a panacea, but will aid in the process of readjusting the respective positions in the landlord-tenant relationship.

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67 Sage v. Stockton Station, Inc., A-1643-68 (App. Div., May 28, 1970).

68 Note, *Self-Help Eviction*, *supra* note 60, at 340-45.

69 Brower v. Glen Wild Lake Co., 86 N.J. Super. 341, 346, 206 A.2d 899, 902 (App. Div. 1965); *see* Annot., 31 A.L.R.2d 831 (1953). Where such a provision is made explicit it will be given legal effect. Broad & Branford Pl. Corp. v. J.J. Hockenjos Co., 132 N.J.L. 229, 39 A.2d 80 (Ct. Err. & App. 1944).