COMMENT

HOUSING MAINTENANCE AND REHABILITATION: LEGISLATIVE AND JUDICIAL RESPONSES

AN OVERVIEW OF THE HOUSING PROBLEM

The current housing crisis in this country is characterized by an insufficient number of quality housing units.[1] Public sentiment for units of such quality as would afford their occupants decent housing has frequently been expressed through legislative acts and judicial decisions at all levels—national, state, and local—since the turn of the century.[2] In New Jersey, the right to be decently

[1] *See* PRESIDENT'S COMM. ON URBAN HOUSING, REPORT: A DECENT HOME 7-8 (1968) [hereinafter cited as A DECENT HOME]. The President's Committee noted a study by TEMPO, General Electric's Center for Advanced Studies, which found that even though in 1968, 66 million housing units existed for 60 million households, an estimated 6.7 million of the units occupied were in substandard condition (four million lacked indoor plumbing and 2.7 million were in a dilapidated condition). In addition, of the six million vacant units, only about two million were of standard quality and available for occupancy. Furthermore, 6.1 million units (both standard and substandard) were overcrowded, having more than 1.0 occupants per room. The TEMPO study, entitled "United States Housing Needs; 1968-1978," was prepared for the President's Committee on Urban Housing. A DECENT HOME, *supra* at 7 n.1 & 8.

[2] *See, e.g.*, Housing Act of 1949, ch. 338, 63 Stat. 413, *as amended*, 42 U.S.C. § 1441 *et seq.* (1970); Hotel and Multiple Dwelling Law, N.J. STAT. ANN. § 55:13A-1 *et seq.* (Supp. 1974-75); NEWARK, N.J., REV. ORDINANCES § 15:1-1 *et seq.* (1966).

Legislative findings expressed in N.J. STAT. ANN. § 2A:42-85 (Supp. 1974-75) are indicative of the basis of the above statutes and ordinances. Section 2A:42-85 provides in part:

> The Legislature finds:
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> a. Many citizens of the State of New Jersey are required to reside in dwelling units which fail to meet minimum standards of safety and sanitation;
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> b. It is essential to the health, safety and general welfare of the people of the State that owners of substandard dwelling units be encouraged to provide safe and sanitary housing accommodations for the public to whom such accommodations are offered . . . .

The public's concern for decent and habitable housing was judicially recognized over a half-century ago when Justice Holmes stated that "[h]ousing is a necessary of life. All the elements of a public interest justifying some degree of public control are present." Block v. Hirsh, 256 U.S. 135, 156 (1921). The Court has reiterated that sentiment since then. *See* Frank v. Maryland, 359 U.S. 360, 371-72 (1959); Berman v. Parker, 348 U.S. 26, 32-33 (1954).

New Jersey courts have also recognized that human values are served by the furtherance of property interests. As Chief Justice Weintraub stated in State v. Shack, 58 N.J. 297, 303, 277 A.2d 369, 372 (1971): "Property rights serve human values. They are recognized to that end, and are limited by it." *See* Marini v. Ireland, 56 N.J. 130, 142, 265 A.2d 526, 532 (1970).

Other jurisdictions have espoused similar views. *See, e.g.*, Buckner v. Azulai, 251 Cal.

housed has not been overlooked by the courts.[3]

One of the first major reform bills in housing to embrace this sentiment as a national policy was the Housing Act of 1949.[4] In that Act, Congress committed itself to "the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family."[5] In attempting to resolve the housing problem and in taking into account that the economically disadvantaged were often the occupants of substandard[6] or

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App. 2d 1013, 1015, 59 Cal. Rptr. 806, 808 (1967); Pines v. Perssion, 14 Wis. 2d 590, 596, 111 N.W.2d 409, 413 (1961).

[3] Inganamort v. Borough of Fort Lee, 120 N.J. Super. 286, 327, 293 A.2d 720, 742 (L. Div. 1972), *aff'd in part & rev'd in part*, 62 N.J. 521, 303 A.2d 298 (1973), wherein the court stated:

> One can detect a movement—perhaps erratic, but progressive—towards the constitutional right to be housed. . . . It is an affront to the dignity of tenants to provide indecent housing.

However, the Supreme Court has refused to include housing among the rights it deems "fundamental." Lindsey v. Normet, 405 U.S. 56, 74 (1972).

[4] Ch. 338, 63 Stat. 413, *as amended*, 42 U.S.C. § 1441 *et seq.* (1970).

Except for a report on city slums in 1892, the production of 30,000 housing units mainly for civilian workers in World War I shipyards and munitions plants, and the development of a model set of building and zoning codes, congressional involvement in housing did not commence until the 1930's. During that decade, the mortgage system was enhanced through the creation of Federal Home Loan Banks, the Home Owners Loan Corporation, the Federal Deposit Insurance Corporation, and the Federal Housing Administration. In 1934, the Public Works Administration began construction of federal low-rent housing projects. J. FRIED, HOUSING CRISIS U.S.A. 64-71 (1971) [hereinafter cited as FRIED]. Three years later, the National Housing Act of 1937, ch. 896, 50 Stat. 888, *as amended*, 42 U.S.C. § 1401 *et seq.* (1970), was passed, creating the United States Housing Authority, the forerunner of the presently existing Department of Housing and Urban Development. *Id.* § 1402. A primary purpose of the National Housing Act of 1937 was

> to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income . . . .

42 U.S.C. § 1401 (1970). In effect, the Act subsidized low-rent public housing operations with federal monies. *Id.* § 1410(a).

[5] Ch. 338, 63 Stat. 413, *as amended*, 42 U.S.C. § 1441 *et seq.* (1970). Section 1441a provides:

> The Congress finds that the supply of the Nation's housing is not increasing rapidly enough to meet the national housing goal, established in the Housing Act of 1949, of the "realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family". The Congress reaffirms this national housing goal and determines that it can be substantially achieved within the next decade by the construction or rehabilitation of twenty-six million housing units, six million of these for low and moderate income families.

[6] For the purposes of this Comment, "substandard" housing is defined as non-dilapidated housing which lacks one or more basic facilities needed to render it habitable. It is economically feasible to rehabilitate or renovate such housing so that it will comply with housing and related health and safety codes. Generally, when this Comment refers to housing located within a conservational area, it will be addressing itself to substandard housing.

For a discussion of criteria utilized in determining whether an area is worth saving see Slayton, *Conservation of Existing Housing*, 20 LAW & CONTEMP. PROB. 436, 439-40 (1955).

dilapidated[7] housing, Congress authorized the yearly construction of 135,000 units of low-rent public housing over a period of six years.[8] Notwithstanding this laudable goal, that objective had not been realized twenty years later.[9]

Until the late 1960's, Congress attempted to meet the goals of the 1949 Act through supplementary legislation.[10] With the passage of the Housing and Urban Development Act of 1968,[11] Congress finally saw fit to overhaul its legislative program to deal with the nationwide housing problem. It established as its goal for the next decade "the construction or rehabilitation of twenty-six million housing units, six million of these for low and moderate income families."[12] Although the 1949 Act had provided grants for

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[7] For the purposes of this Comment, "dilapidated" housing is defined as housing whose condition is worse than that of substandard housing and whose rehabilitation is not economically feasible. Such housing should be demolished within a reasonable time period. Generally, when this Comment refers to housing located in a slum area, it will be addressing itself to dilapidated housing.

[8] Housing Act of 1949, ch. 338, 63 Stat. 428, *as amended,* 42 U.S.C. § 1441 *et seq.* (1970).

[9] FRIED, *supra* note 4, at 84.

[10] Housing and Urban Development Act of 1965, Pub. L. No. 89-117, § 311, 79 Stat. 477, *as amended,* 42 U.S.C. § 1450 *et seq.* (1970) (made federal aid available to assist in local code enforcement); Housing Act of 1964, Pub. L. No. 88-560, § 301, 78 Stat. 785, *as amended,* 42 U.S.C. § 1450 *et seq.* (1970) (aimed primarily at encouraging local code enforcement activities within urban renewal project areas); Housing Act of 1954, ch. 649, 68 Stat. 590, *as amended,* 42 U.S.C. § 1450 *et seq.* (1970) (enacted to broaden the attack on blight by adding the concept of urban renewal to that of redevelopment).

[11] 42 U.S.C. § 1441 *et seq.* (1970).

[12] *Id.* § 1441a (1970). The projection of 26 million housing units was established as follows: 13.5 million units to accommodate household growth as determined by estimates in growth of household units over the previous three years; six million units to replace units lost in the 1960's; 8.5 million units to replace losses resulting from an aging inventory during the 1960's; four million units to permit reasonable mobility and growth in the number of seasonal dwellings, second homes, or other units held off the market. SUBCOMM. ON HOUSING OF THE HOUSE COMM. ON BANKING AND CURRENCY, 92D CONG., 1ST SESS., HOUSING AND THE URBAN ENVIRONMENT 5 (Comm. Print 1971) [hereinafter cited as SUBCOMM. ON HOUSING].

The Subcommittee based its calculation of the units to be constructed for low and moderate income families on the number of substandard units then occupied (six million) and the high correlation between the inferiority of those units and the low and moderate incomes of the occupants. Nevertheless, it is difficult to determine accurately a figure for existing substandard housing units. The primary source for such information, the 1970 census, did not measure the quality of housing units, but recorded only those units which were without plumbing facilities. This recorded figure of 3.8 million units, combined with any reasonable approximation of the quantity of units that had plumbing facilities, yet were of substandard quality, would confirm the estimated need for six million subsidized standard units. *Id.*

However, should one also take into account overcrowded housing (units having more than one occupant per room) in arriving at this figure, an additional 3.9 million units would have to be included. A. DOWNS, URBAN PROBLEMS AND PROSPECTS 117 (1970) [hereinafter cited as DOWNS].

rehabilitation,[13] the 1968 Act expanded both the scope and coverage of those grants.[14]

While construction remained the primary focus of the 1968 Act, the importance of rehabilitation, as the other facet of a bipartite solution, was clearly emphasized in a 1971 report by the Subcommittee on Housing of the House Committee on Banking and Currency.[15] Addressing itself to the possibility of new dwelling construction requirements' exceeding the estimate of 26 million units in the next decade if the nation failed to preserve its housing inventory, the report stated:

> The volume and standard of housing services that is provided by more effective utilization of the existing stock will affect significantly the time in which a broader goal of "a decent home and a suitable living environment for every American family" can be achieved.[16]

The Subcommittee's concern for the preservation of the existing housing inventory through programs of rehabilitation and maintenance can be attributed to two recent developments. First, six million housing units had been removed from the housing market during the previous decade, offsetting by more than one-third the new dwelling units constructed.[17] Second, the abandonment of dwelling units, particularly in the larger metropolitan areas by financially strapped landlords, is currently removing additional units from the market at an alarming rate.[18]

Initially, the housing goal established by Congress in 1968 met

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[13] Housing Act of 1949, ch. 338, 63 Stat. 416, *as amended,* 42 U.S.C. § 1441 *et seq.* (1970).

[14] DEPARTMENT OF HUD, HOUSING AND URBAN DEVELOPMENT ACT OF 1968, at 44 (1968). The 1968 Act also expanded the scope and coverage of loans available for rehabilitation under the Housing Act of 1964, Pub. L. No. 88-560, § 301, 78 Stat. 785, *as amended,* 42 U.S.C. § 1450 *et seq.* (1970). DEPARTMENT OF HUD, HOUSING AND URBAN DEVELOPMENT ACT OF 1968, at 45 (1968).

[15] SUBCOMM. ON HOUSING, *supra* note 12, at 6.

[16] *Id.* at 5. The Subcommittee also emphasized the need to focus on an area broader than unit production due to the burdensome economic factors created by tight money conditions and sharp increases in the costs of construction and labor. As the Subcommittee stated:

> Increased efforts to utilize the existing housing supply and to reduce the rate of unit losses from the inventory must be added to our efforts to maintain a stable growth in housing production. Both facets of housing policy must be pursued in order to achieve the national housing goals.
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> . . . .
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> In short, to meet the housing needs of the nation, both production and preservation of housing must be encouraged.

Id. at 6.

[17] *Id.* at 5-6.

[18] *Id.* at 6.

with apparent success.[19] However, due to the present inflationary pressures on the economy, combined with unemployment and the energy crisis, the urgent housing needs expressed by Congress in 1968 have fallen victim to these new national priorities.[20] Whether the recently enacted Housing and Community Development Act of 1974[21] will serve to resuscitate the faltering housing market remains to be seen.

The housing needs of New Jersey residents reflect, if not magnify, the housing needs of the nation, for these needs are often exacerbated in densely populated areas. In 1970, during his first year in office, former Governor William T. Cahill delivered a special message on housing to the state legislature.[22] The Governor described the crisis in New Jersey as particularly affecting low and middle income housing by citing the following: New Jersey, as the fifth smallest and most densely populated state, absolutely requires 100,000 units of additional housing yearly to adequately provide habitable dwellings for its expanding population. However, the annual rate of construction had not exceeded 40,000 units over the past several years.[23] Housing shortages suffered by the cities and larger metropolitan areas were even more severe, as deterioration in these areas "is proceeding at an alarming rate."[24] Although in 1960 over 40,000 of Newark's 136,600 housing units were considered substandard or dilapidated,[25] amounting to about 30 percent of the city's dwelling units, the figure had climbed to an estimated 45 percent by 1970.[26] In stressing the seriousness of the present housing crisis, Governor Cahill said:

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[19] MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, FOURTH ANNUAL REPORT ON NATIONAL HOUSING GOALS, H.R. Doc. No. 319, 92d Cong., 2d Sess. 1-2 (1972).

[20] *See* Meyer, *Housing Market's in the Doldrums Again And Isn't Expected to Bounce Back Soon,* Wall St. Journal, June 12, 1974, at 42, col. 1.

[21] Ch. Pub. L. No. 93-383, 88 Stat. 633.

Here again, economic inflation has hindered the federal government in its efforts to improve the housing situation:

> [H]igh interest rates and the shortage of mortgage money have driven the housing industry into the kind of depression that no such act, however sweeping, is likely to reverse.

N.Y. Times, Sept. 8, 1974, § 8 (Real Estate), at 1. James T. Lynn, Secretary of Housing and Urban Development, declared, "The only way we're going to see a dramatic turnaround in housing is by winning the battle against inflation." *Id.*

[22] W. CAHILL, A SPECIAL MESSAGE TO THE LEGISLATURE—A BLUEPRINT FOR HOUSING IN NEW JERSEY (1970) [hereinafter cited as BLUEPRINT].

[23] *Id.* at 1. New Jersey has a land area of approximately 4,800,000 acres. In 1970, New Jersey's population approximated 7,200,000 people, a 20 percent increase over the population of 1960. Experts predict that the population will reach 10,000,000 by 1985. *Id.*

[24] *Id.* at 2.

[25] STATE OF NEW JERSEY, GOVERNOR'S SELECT COMM'N ON CIVIL DISORDERS, REPORT FOR ACTION 55 (1968).

[26] BLUEPRINT, *supra* note 22, at 2.

> No words of mine are necessary to indicate the catastrophic proportions which will be reached in years to come unless some solution to the housing shortage is found today![27]

In addition to emphasizing the pressing need for new dwelling units, the Governor also stressed the necessity of sustaining or rehabilitating the viable housing that was presently on the market. Deterioration of older housing had been increasing to the point of concern not only in the cities, but in growing pockets of suburbia and poor rural areas as well.[28] In effect, due to the housing shortages and skyrocketing rents, a seller's or landlord's market had been created where few single family dwellings were available, and the existing supply of habitable apartments was inadequate to meet the demand. In 1972, two years after his initial speech, Governor Cahill reported that "the same conditions that existed in 1970 are with us today."[29]

This Comment does not propose to resolve the housing problem, a task which both state and national legislatures have grappled with, apparently unsuccessfully, for years and whose answer may lie in any number of solutions now existing. However, this Comment will attempt to examine the means by which the judicial and legislative branches may effectively work together in ameliorating the housing problem by enforcing and improving upon the programs that require the maintenance and rehabilitation of existing housing units. Since the state of New Jersey has been most active in this regard, its legislative enactments and judicial decisions may provide the foundation upon which a comprehensive program may be built.

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[27] *Id.*

[28] *Id.* When a seller's market exists, the landlord (seller) has an overabundance of power, and tenants can be easily replaced by others who will pay the same, if not higher, rents. NATIONAL HOUSING AND ECONOMIC DEVELOPMENT LAW PROJECT, TENANT UNION GUIDE 7 (1969) [hereinafter cited as NHEDLP].

[29] W. CAHILL, A SPECIAL MESSAGE TO THE LEGISLATURE—NEW HORIZONS IN HOUSING 3 (1972) [hereinafter cited as NEW HORIZONS]. The Governor, however, did indicate that he had seen some encouraging signs: (1) Municipal officials had recently appeared receptive to less restrictive zoning ordinances, particularly those permitting the construction of apartments and small houses, both of which are vital to the housing of low and moderate income families and single persons. (2) Instead of authorizing the construction of approximately 40,000 housing units each year, building permits issued by the state in 1971 authorized the construction of 48,500 housing units. Nevertheless, it was recognized that this was still judged to be short of the yearly requirement. (3) The two state financing agencies—the New Jersey Housing Finance Agency and the New Jersey Mortgage Finance Agency—have made substantial mortgage loans available for over 5,000 moderately priced apartment units and homes. (4) More federal funds have been made available to New Jersey for housing assistance programs, including funds for rehabilitation programs in both Newark and Hoboken. *Id.* at 2-3.

NEW JERSEY'S LEGISLATIVE PROVISIONS FOR HOUSING MAINTENANCE AND REHABILITATION

In 1967, the New Jersey legislature approved two acts designed, in part, to aid in the financing of housing rehabilitation programs. The first, the New Jersey Housing Finance Agency Law of 1967,[30] provides for the distribution of mortgage loans to interested and "qualified housing sponsors" to facilitate the construction and rehabilitation of housing projects for families of moderate income.[31] To date, however, most loans have provided financing primarily for the construction of new dwellings.[32]

The second act, the Department of Community Affairs Demonstration Grant Law of 1967,[33] provides grants for both housing development and the demonstration of new technology and materials for housing construction and rehabilitation.[34] It is anticipated that through such grants, improved, expedient, and more economical methods of construction and rehabilitation will be devised, thereby hastening the elimination of slums and blighted areas.[35] Approximately one-eighth of the approved grants in fiscal year 1973 have had rehabilitative components.[36]

These two acts are administered, respectively, by the New Jersey Housing Finance Agency and the Bureau of Housing Production under the Division of Housing and Urban Renewal, both of which have been created within the New Jersey Department of

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[30] N.J. STAT. ANN. § 55:14J-1 *et seq.* (Supp. 1974-75).

[31] *Id.* § 55:14J-1. A "family of moderate income" is defined as a family "whose income is too low to compete successfully in the normal rental or mutual housing market" and whose gross income does not surpass the limits specified in section 10 of the Act. *Id.* § 55:14J-3(e). Section 10 provides that no family or individual whose gross income exceeds $15,000 shall be eligible for a loan. *Id.* § 55:14J-10(a).

To finance mortgages under the Act, the New Jersey Housing Finance Agency sells "long-term revenue bonds for permanent mortgage financing for new or rehabilitated housing." Since these securities are tax-exempt, low interest rates are secured and the cost savings in interest is reflected in the favorable interest rates for mortgages made to housing sponsors. Interest rates on these mortgages generally average from 2 to 2.5 percent below the prevailing market rates. 6 N.J. DEP'T OF COMMUNITY AFFAIRS ANN. REP. 37 (1973).

[32] *See* 6 N.J. DEP'T OF COMMUNITY AFFAIRS ANN. REP. 37 (1973). During the Agency's seven-year existence, mortgage commitments have been made for 80 different housing projects, amounting to approximately $423,249,000. In addition, over $302,575,000 of the Agency's funds have been allocated to 51 developments for the construction of new housing. *Id.*

[33] N.J. STAT. ANN. § 52:27D-59 *et seq.* (Supp. 1974-75).

[34] *Id.* §§ 52:27D-60 to -61.

[35] *Id.*

[36] 6 N.J. DEP'T OF COMMUNITY AFFAIRS ANN. REP. 10 (1973). These grants have provided in part for the rehabilitation and repair of housing in the counties of Middlesex and Somerset and the municipalities of Camden, Elizabeth, and Phillipsburg. *Id.*

Community Affairs.[37] Various other offices or bureaus within the Department may also be of assistance to eligible sponsors interested in housing rehabilitation programs. For example, the Office of Program Development under the Division of Human Resources has provided financial assistance for housing rehabilitation in both discretionary and special impact grantee categories.[38] The discretionary funds provide financing for programs such as the rehabilitation of low income housing where monies from other sources are unobtainable.[39] The impact grantee funds provide assistance to applicants by delivering needed services to Hispanic people in key cities.[40] Likewise, the Bureau of Housing and Renewal Services, under the Division of Housing and Urban Renewal, provides technical assistance to interested housing sponsors through which they may become eligible for various federal, state, and local housing programs.[41]

While the rehabilitative aspects of these programs contribute to the alleviation of the housing problem, they are neither comprehensive in effect nor direct in action. However, the Bureau of Housing Code Inspection,[42] also within the Division of Housing and Urban Renewal, owes its existence to the one class of legislation which is both comprehensive and direct—the housing codes.

The foundation for housing maintenance and rehabilitation is found in both state and municipal housing code enforcement

[37] N.J. STAT. ANN. § 55:14J-1 (Supp. 1974-75) (New Jersey Housing Finance Agency Law of 1967); *id.* § 52:27D-59 and 6 N.J. DEP'T OF COMMUNITY AFFAIRS ANN. REP. 9 (1973) (Department of Community Affairs Demonstration Grant Law of 1967).

The Department of Community Affairs was created in 1966 to design, implement, and coordinate comprehensive programs in response to state needs. The Department houses the Division of Housing and Urban Renewal, the Division of Local Government Services, the Division of Human Resources, the Division of State and Regional Planning, the New Jersey Housing Finance Agency, the Hackensack Meadowlands Development Commission, the New Jersey Urban Loan Authority/State Development Corporation, and the New Jersey State Commission on Women. 6 N.J. DEP'T OF COMMUNITY AFFAIRS ANN. REP. (1973).

[38] 6 N.J. DEP'T OF COMMUNITY AFFAIRS ANN. REP. 21-22 (1973). The Office of Program Development has been innovative in developing experimental programs designed to expand and improve "governmental and community services for the disadvantaged." *Id.* at 20.

[39] *Id.* at 20. In fiscal year 1973, a grant of $918,200 was awarded to the Grace Church Van Vorst Foundation in Jersey City for the rehabilitation of low income housing. (Only $25,600 of this grant came from Program Development Discretionary Funds. The remainder came from federal and other non-state sources.) *Id.* at 22.

[40] *Id.* at 20. In fiscal 1973, a state grant of $17,351 was awarded to PRAC of Vineland, a special impact grantee, for housing rehabilitation and related services for the Puerto Rican community. *Id.* at 21.

[41] *Id.* at 4. One of three bureaus that comprise the Division of Housing and Urban Renewal, the Bureau of Housing and Renewal Services, primarily assists municipalities in revitalizing neighborhoods through housing and other rehabilitative programs. *Id.*

[42] N.J. STAT. ANN. § 55:13A-4 (Supp. 1974-75).

programs. New Jersey is one of but a few states that has established statewide standards governing the construction and maintenance of hotels, motels, and other multiple dwellings.[43] The state operated and funded Bureau of Housing Inspection ensures compliance with the aforementioned standards.[44] In practice, it would seem that this measure was designed to provide a check to guarantee the compliance of dwellings within municipalities which have enacted housing codes and to provide a means by which habitable housing may be assured in communities where local housing codes do not exist.

New Jersey's course in the area of housing construction, maintenance, and enforcement was charted at the beginning of the twentieth century when, in 1904, the state assumed jurisdiction over all tenement houses containing three or more units.[45] In 1948, this jurisdiction was expanded to include all hotels with fifteen or more units or with sleeping facilities for thirty or more

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[43] N.J. ADMIN. CODE § 5:10-1.1 *et seq.* (1972). (Regulations were promulgated pursuant to N.J. STAT. ANN. § 55:13A-1 *et seq.* (Supp. 1974-75)). As of 1970, California, Connecticut, Massachusetts, Delaware, New York, and Michigan had statewide housing standards. Other states, such as Florida and Indiana, had county-wide standards. Regional housing codes are a rarity. *Housing Code Standards, Administration and Enforcement,* 3 MANAGEMENT INFORMATION SERVICE 7 (1971).

State involvement in housing did not begin until 1856 when in New York, a five-member committee was appointed by the New York legislature to investigate conditions in the squalid tenements of the cities of New York and Brooklyn. Little, however, resulted from this investigation other than a grim report. It was not until after massive outbreaks of violence—waged in part against abysmal living conditions—and after additional reports and studies were made, that the state upon exercising its police powers enacted the first housing code, The Tenement House Act of 1867, Law of May 14, 1867, ch. 908, [1867] N.Y. Laws 2265. *See* FRIED, *supra* note 4, at 134-36. And, only within the last decade, with the passage of Title III of the Housing Act of 1954, ch. 649, 68 Stat. 622, *as amended,* 42 U.S.C. §§ 1450-1460 (1970), have municipal housing codes been enacted on a large scale. Under Title III of this Act, federal aid for local slum clearance projects was conditioned upon the existence within a given locality of a "workable program" for the prevention and elimination of slums. *Id.* § 1451(c). The existence of "codes and regulations relating to land use and adequate standards of health, sanitation, and safety for buildings" was one requirement in determining whether a "workable program" existed. *Id.* § 1451(a). *See* FRIED, *supra* note 4, at 134-50; Comment, *Housing Codes and the Prevention of Urban Blight—Administrative and Enforcement Problems and Proposals,* 17 VILL. L. REV. 490, 491-94 (1972).

[44] N.J. STAT. ANN. § 55:13A-4 (Supp. 1974-75).

[45] Law of March 25, 1904, ch. 61, [1904] N.J. Laws 96, which defines "tenement-house" as

> any house or building or portion thereof which is rented, leased, let or hired out to be occupied or is occupied as the home or residence of three families or more, living independently of each other and doing their cooking upon the premises, or by more than two families upon any floor so living and cooking, but having a common right in the halls, stairways, yards, water-closets or privies or some of them.

Id. at 96-97.

persons.[46] Thereafter, in 1966, the state legislature enacted a bill designed to assist in the maintenance of habitable housing units by authorizing governing bodies of municipalities to regulate rents on substandard multiple dwelling units until such units satisfied minimum standards of health and safety.[47] To ensure that such a determination is made, the Bureau of Housing was required to promulgate a state housing code which shall be in force in any municipality which passes an ordinance pursuant to the Act.[48]

The next major event in the trend toward the state's present involvement in housing regulation and enforcement occurred in 1967 with the passage of the current Hotel and Multiple Dwelling Law.[49] This act promulgated

> remedial legislation necessary for the protection of the health and welfare of the residents of this State in order to assure the provision therefor of decent, standard and safe units of dwelling space . . . .[50]

The law continued the state's jurisdiction over all multiple dwellings of three or more units[51] while expanding its jurisdiction over hotels to include those buildings with ten or more units.[52]

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[46] N.J. STAT. ANN. § 29:1-11 (1964) defines a "hotel" as a

> building kept, used, maintained, advertised as or held out to be a place where sleeping accommodations are supplied for pay to transient or permanent guests, in which fifteen or more rooms are rented furnished or unfurnished, including any room found to be arranged for or used for sleeping purposes, with or without meals, for the accommodation of such guests, or every building, or part thereof, which is rented for hire to thirty or more persons for sleeping accommodations.

[47] *Id.* § 2A:42-74 *et seq.* (Supp. 1974-75). The regulation of rents, however, shall commence only after proper notice and a hearing have been afforded to the owner or person entitled to receive said rents and repairs, alterations, or improvements necessary to bring such property up to minimum standards of health and safety have not been made within a reasonable time. *Id.* §§ 2A:42-77(c)-(d).

An ordinance adopted under this act may also provide that when repairs, alterations, or improvements have not been made within a reasonable time after notice has been given, an action may be brought in superior court to appoint the public official responsible for administering the act as receiver *ex officio* of all rents and income of the building and to expend such rents and income as necessary to alleviate the harmful conditions. *Id.* § 2A:42-79. If there is a first mortgage on the building, the mortgagee shall be appointed as the receiver's agent to perform the task if he "is a proper person and is willing to accept such appointment"; otherwise, the receiver may appoint some other competent person to perform this function. *Id.* § 2A:42-80.

Unfortunately, implementation of this act has not been widespread, and its use has been limited. STATE OF NEW JERSEY, LANDLORD TENANT RELATIONSHIP STUDY COMM'N—INTERIM REPORT TO THE GOVERNOR AND LEGISLATURE 32 (1970) [hereinafter cited as LANDLORD TENANT RELATIONSHIP STUDY COMM'N].

[48] N.J. STAT. ANN. § 2A:42-76 (Supp. 1974-75).

[49] *Id.* § 55:13A-1 *et seq.*

[50] *Id.* § 55:13A-2.

[51] *Id.* §§ 55:13A-3(k), -4.

[52] *Id.* § 55:13A-3(j). The term "multiple dwelling" is basically coextensive in meaning

The responsibility for issuing, promulgating, administering, and enforcing such rules and regulations deemed necessary to implement the purpose of the law, including the promulgation of mandatory statewide standards,[53] was delegated to the Commissioner of the Department of Community Affairs.[54] The Bureau of Housing Inspection, within the Department and under the supervision and control of the Commissioner, was assigned the responsibility for the administration and enforcement of the provisions of the Act, including the requirements relating to registration and inspection.[55] As provided within the Act, all hotels and multiple dwellings therein defined, in existence or proposed for future construction, must be registered or approved by the Bureau.[56] Furthermore, all hotels are to be inspected once every three years and other multiple dwellings, once every five years.[57]

In addition to the aforementioned statewide standards,

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with the term "tenement house" referred to in the 1904 Act. In the latter Act, however, buildings housing two families instead of three could come under state jurisdiction. *Compare* Law of March 25, 1904, ch. 61, [1904] N.J. Laws 96 *with* N.J. STAT. ANN. § 55:13A-3(k) (Supp. 1974-75).

This law substantially expanded state regulatory activities by bringing under state jurisdiction previously exempted garden apartments and row house developments. NEW JERSEY DEP'T OF COMMUNITY AFFAIRS, THE NEW JERSEY STATE-LOCAL COOPERATIVE HOUSING INSPECTION PROGRAM 1 (1971) [hereinafter cited as HOUSING INSPECTION PROGRAM].

[53] The statewide standards promulgated pursuant to N.J. STAT. ANN. § 55:13A-7 (Supp. 1974-75) include a set of regulations which are both administrative and technical in nature. The technical standards are subdivided into standards for new construction and maintenance. N.J. ADMIN. CODE §§ 5:10-1.1 to -19.12 (1972).

[54] N.J. STAT. ANN. §§ 55:13A-6 (Supp. 1974-75). Under this statute, broad discretionary power was granted to the Commissioner who

> shall have and exercise, in addition to other powers herein granted, all the powers necessary and appropriate to carry out and execute the purposes of this act . . . .

Id.

In addition, broad general standards are set forth requiring the Commissioner to promulgate regulations that he

> may deem necessary to assure that any hotel or 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 or intended occupants thereof, or of the public generally.

Id. § 55:13A-7.

[55] *Id.* § 55:13A-4. For an analysis of the underlying legal structure of the Bureau and its effectiveness as a code enforcement agency see Metzger, *Statewide Code Enforcement—New Jersey, The Test Case,* 27 RUTGERS L. REV. 659 (1974).

[56] N.J. STAT. ANN. § 55:13A-12(a) (Supp. 1974-75). By this method, the Bureau of Housing Inspection obtains statistical data as well as names and addresses of owners or agents. An agent residing within the state or a corporation licensed to do business in the state must be appointed for every building registered so that he shall "receiv[e] service of process and such orders or notices as may be issued by the commissioner pursuant to this act." *Id.* § 55:13A-12(b).

[57] *Id.* § 55:13A-13(a). As of July 1973, 40,000, or approximately one-third of all buildings under the state's jurisdiction, had been inspected. Metzger, *supra* note 55, at 661.

numerous New Jersey municipalities have enacted their own ordinances regulating housing construction, installation, and maintenance[58] under authority granted by state enabling legislation. The provisions of such ordinances may not be less restrictive than the minimum statewide standards.[59] Traditionally, these ordinances had only affected construction and installation, while cities had employed zoning ordinances to regulate housing area and use patterns, and various building, plumbing, and electrical codes to establish technical standards.[60] However, municipalities as well as states recognized the need for regulating the upkeep of dwellings as well as new construction and, therefore, enacted housing code ordinances designed to further this purpose. The municipal housing code regulations were designed to operate in conjunction with and in conformity to the various other codes enacted for the purpose of providing safe and habitable housing conditions.[61]

The Department of Community Affairs, realizing the importance of coordination and cooperation between state and local housing code enforcement agencies, sought a method by which the

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[58] *E.g.*, NEWARK, N.J., REV. ORDINANCES § 15:1-1 *et seq.* (1966).

[59] N.J. STAT. ANN. § 55:13A-25(b) (Supp. 1974-75). *See* Boulevard Apartments, Inc. v. Borough of Hasbrouck Heights, 111 N.J. Super. 408, 268 A.2d 359 (L. Div. 1970), where the borough's multiple dwelling ordinance appeared less restrictive and was therefore held invalid in view of the state statute requiring that a municipality's own code be more restrictive.

Local ordinances may also assume jurisdiction over one- and two-family dwellings which presently are not under state control. *See* NEWARK, N.J., REV. ORDINANCES §§ 15:1-2 to -3 (1966).

Housing code regulations will be upheld as valid exercises of a state's police power where they are reasonably related to the promotion of public health, safety, and welfare, and are not violative of the federal or state constitution. *See, e.g.*, See v. City of Seattle, 387 U.S. 541, 548 (1967) (public health); State v. Schaffel, 4 Conn. Cir. 234, 229 A.2d 552 (App. Div. 1966) (welfare); Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955) (safety). *See generally* Note, *Municipal Housing Codes*, 69 HARV. L. REV. 1115, 1115-16 (1956).

A municipal corporation possesses no inherent power to regulate dwellings within its boundaries. Any such grant must be conferred by the state legislature. Bowen v. Mayor & Aldermen, 4 N.J. Misc. 228, 132 A. 334 (Sup. Ct. 1926). *See also* 7 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 24.505 (3d ed. rev. 1968).

[60] *See* Note, *supra* note 59, at 1115.

See *Housing Code Standards, Administration and Enforcement*, 3 MANAGEMENT INFORMATION SERVICE 7-8 (1971) for a discussion of the model housing codes which have played a significant role in the past 20 years.

Some cities do not have separate housing codes per se, but rely on a combination of building, health, and other housing related codes—including, but not limited to, electrical, plumbing, fire, sanitary, condemnation, demolition, and air pollution standards—to afford similar protection. Zoning and room ordinances also provide additional regulatory measures. *Id.* at 7.

[61] *Housing Code Standards, Administration and Enforcement*, 3 MANAGEMENT INFORMATION SERVICE 7 (1971).

statewide program that was carried out pursuant to the Hotel and Multiple Dwelling Law could best be coordinated with the local programs, thereby avoiding unnecessary duplication of staffing, funding, and effort. The State-Local Cooperative Housing and Inspection Program was the result.[62] This program provides mutual benefits to the state and to the local community by providing for state financial, supervisory, and technical assistance, with the local agency assuming certain of the state's inspection and registration duties.[63]

Recently enacted legislation[64] is an indication of the legislature's displeasure with the efforts of existing state and municipal agencies in securing compliance with the standards set out in their housing codes. The new provisions enable tenants to participate in code enforcement by depositing their rental payments with the court until minimum standards of health and safety are attained. Rental monies so deposited are expended on measures aimed at remedying conditions in substantial violation of either state or local housing codes.[65] Meanwhile, the legislature has

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[62] *See* HOUSING INSPECTION PROGRAM, *supra* note 52, at 1-2. Under this program, a locality may opt for instituting its own inspection program subject to the control and supervision of the Commissioner. N.J. STAT. ANN. § 55:13A-21 (Supp. 1974-75). Such localities will receive reimbursement for their inspection services. All enforcement procedures, however, are carried out at the state level. *See* Jackson, *New Jersey Cooperates with Local Government in Innovative Housing Inspection Program,* 27 J. HOUSING 37 (1970).

[63] *See* HOUSING INSPECTION PROGRAM, *supra* note 52, at 1-2. Other functions of the program are designed to:

> Standardize construction and maintenance standards on the State and local levels.
>
> Standardize housing inspection staffs in terms of both salary scales and technical competence.
>
> Improve local inspection capability by reviewing and evaluating local resources and providing grant-in-aid assistance to supplement local budgets for additional staff, modern equipment and materials.
>
> Encourage local administrative consolidation of functions related to building inspection standards.
>
> Maintain a State-supported record-keeping service for housing inspection activities for both the State and participating municipalities.
>
> Develop and maintain a complete State housing inventory.

Id. at 3.

[64] N.J. STAT. ANN. § 2A:42-85 *et seq.* (Supp. 1974-75).

[65] *Id.* § 2A:42-87. This action is maintained, however, only after the owner has been afforded notice and a petition containing facts that would warrant the relief sought by the tenant. *Id.* §§ 2A:42-89 to -90.

The owner, mortgagee, lienor of record, or any party interested in the property can, after the tenant has prevailed at trial, apply to the court for permission to remedy the situation on his own, providing that such person demonstrates a willingness and ability to promptly undertake the work and posts security for the completion of that work in an amount to be determined by the court. *Id.* § 2A:42-93.

continued to focus on the housing problem through the enactment of either new legislation or amendments, which serve as important adjuncts to the policies of the housing codes.[66]

HOUSING CODES

Arising from the strong public policy aimed at promoting the "health, safety, welfare and morals of the people,"[67] housing codes, designed to comprehensively and effectively regulate existing dwelling units, have been enacted with three objectives in mind. First, they establish minimum standards with which all housing must comply. Second, they delegate to building owners or managers and occupants the responsibilities attached to their respective roles in ensuring code compliance. Third, they provide adequate administrative procedures, remedies, and sanctions to correct any such violations as may be found.[68]

If housing codes are to be at all effective with respect to the rehabilitation, restoration, or prevention of deterioration in existing dwelling units, the three aforementioned objectives must be defined and enforced so that, individually, each can be met satisfactorily. Without such assurance, the national, state, and local housing policy designed to keep existing units on the market and

[66] In 1970, for example, an act was passed which prohibited a landlord from serving upon a tenant either a notice to quit or any action to recover possession of the premises as a reprisal for the tenant's efforts to secure habitable housing. This law protects equally the tenant who seeks to enforce his rights provided in the lease agreement, the tenant organizer, and the tenant who reports uninhabitable conditions to the proper authorities for remedial action. *Id.* § 2A:42-10.10.

In 1971, amendments were passed affording additional protection to the tenant with regard to distraint (*id.* § 2A:33-1 *et seq.*), forcible entry and detainer (*id.* § 2A:39-1 *et seq.*), and security deposits (*id.* § 46:8-19 *et seq.*).

In 1974, four bills were approved by the assembly to govern areas touched upon by the housing codes. N.J. Assembly Bill No. 940, 2 N.J. SESS. LAW SERV. 115 (1974) (The Fair Eviction Notice Act, *amending* N.J. STAT. ANN. § 22A:2-38 (1969)); N.J. Assembly Bill No. 1585, 2 N.J. SESS. LAW SERV. 116 (1974) (an act concerning the protection of tenants by requiring landlords to provide information regarding crime insurance); N.J. Assembly Bill No. 1586, 2 N.J. SESS. LAW SERV. 118 (1974) (an act setting forth grounds for the eviction of tenants and lessees of certain residential property, *amending* N.J. STAT. ANN. § 2A:18-53 (1952) and *repealing* § 1, P.L. 1973, ch. 153); N.J. Assembly Bill No. 1587, 2 N.J. SESS. LAW SERV. 120 (1974) (an act requiring certain residential property owners to file registration statements with municipalities and to inform their respective tenants of the same).

Such statutes are superimposed upon the rights and duties of landlord and tenant as expressed in the lease agreement. Tanella v. Rettagliata, 120 N.J. Super. 400, 411, 294 A.2d 431, 436 (Bergen County Dist. Ct. 1972).

[67] NEWARK, N.J., REV. ORDINANCES § 15:1-2 (1966). *See also* Mayor & City Council v. William E. Koons, Inc., 270 Md. 231, 232, 310 A.2d 813, 814 (1973).

[68] *See, e.g.*, NEWARK, N.J., REV. ORDINANCES § 15:1-2 (1966).

in a habitable condition cannot be substantially achieved. Thus, the strengths and weaknesses of each objective must be analyzed.

MINIMUM STANDARDS

Housing code regulations are often tripartite in nature.[69] First, provisions require that certain minimum standards be met for the installation and maintenance of facilities relating to the habitability of the dwelling. Such regulations may govern lighting, heating, ventilation, plumbing, and other sanitary facilities.[70] Second, provisions establish a limitation on the population density within the dwellings. Such a limitation is usually based upon a required quantity of floor area or rooms per occupant.[71] Finally, regulations direct compliance with standards of cleanliness and sanitation. Such standards serve to eliminate rodents, vermin, and other hazards to public health.[72]

The effectiveness of housing code regulations in maintaining habitable dwellings depends in part upon the criteria used to distinguish "standard" from "substandard" conditions. One frequently voiced criticism of existing codes is their failure to make this distinction with any semblance of uniformity.[73] Generally, the effectiveness of minimum standards is measured by the adequacy of protection, practicality of utilization, and compliance with constitutional requirements.[74] However, standards adequate for protection may well be inconsistent with the provisions of other housing-related codes. As a result, compliance with both may be extremely costly and impractical, if not impossible.[75] In fact, this has been a not uncommon occurrence.[76] Moreover, codes often require materials which have been effectively replaced in industry (but not in the codes) by less costly materials of like or superior

[69] *See* Note, note 59 *supra*, at 1116-17.

[70] NEWARK, N.J., REV. ORDINANCES §§ 15:7-4 to -7 (1966).

[71] *Id.* §§ 15:4-25 to -27.

[72] *Id.* §§ 15:4 to :7.

[73] *Hearings Before the Subcomm. on Housing of the House Comm. on Banking and Currency*, 93d Cong., 1st Sess. 2222 (1973). The National Commission on Urban Problems found in 1968 that even where jurisdictions had adopted as their own one of four available national model codes, local variations often lowered or eliminated the minimum standards set out in the model code. *Id.*

[74] *See* Note, *supra* note 59, at 1116.

[75] FRIED, *supra* note 4, at 30-31. Code revision is made a difficult procedure by the government's having to legislate whenever an amendment is desired. *See* Note, *Building Codes: Reducing Diversity and Facilitating the Amending Process*, 5 HARV. J. LEGIS. 587, 602 (1968).

[76] FRIED, *supra* note 4, at 30.

quality.[77] It is therefore desirable for all housing-related codes to provide uniform standards as well as means of continuously updating them to effect prompt and economically feasible enforcement. Such standards not only would prevent delay and needless frustration, but also would enable materials to be mass marketed throughout the area, resulting in large cost savings.[78]

Minimum standards may also prove less than effective when they do not take into consideration the needs of those they are primarily aimed at protecting—the tenants. Surveys have shown that certain items deemed important to tenants have often not been included in local housing codes, or, if included, were not actively enforced.[79] Although initial tenant involvement in policy decisions has at times led to delay and other problems, it would appear that if housing resources and enactments are to best serve the client population, the views and needs of the tenants must be taken into account in determining what the minimum standards ought to be.[80]

In assessing the effectiveness of the minimum standards established, one encounters another serious problem. Generally, minimum housing code standards are designed to maintain a marginal level of health and safety in dilapidated housing units often located in the slum areas of a municipality. A code designed to serve the needs of this housing population would appear both

[77] SUBCOMM. ON HOUSING, *supra* note 12, at 8-11; FRIED, *supra* note 4, at 30-31. For example, the National Commission on Urban Problems found that the vast majority of the nation's largest cities forbade the use of a type of plastic pipe in drainage systems notwithstanding that such pipe was permitted by most major model building and plumbing codes. *Id.* at 30-31.

[78] NEW HORIZONS, *supra* note 29, at 9-10. The New Jersey Builders Association, for example, has estimated that an average savings of $1,500 per home in construction costs alone would result if a uniform statewide code advanced in modern building techniques were adopted by all municipalities. *Id.* at 9. *See also* SUBCOMM. ON HOUSING, *supra* note 12, at 8-11.

California is promoting the cost savings concept of manufactured housing by providing state quality standards, thereby approving all material and construction identified as sound. Such state approval qualifies the manufactured housing for local area use. BLUEPRINT, *supra* note 22, at 5.

[79] For example, the New York City housing code does not fulfill tenants' expressed needs in several security areas: An outside door lock for multiple dwellings is not required by the code and defective mailboxes, although a code violation, have received little attention by code enforcement officers. M. TEITZ & S. ROSENTHAL, HOUSING CODE ENFORCEMENT IN NEW YORK CITY 50 (1971) [hereinafter cited as TEITZ & ROSENTHAL].

Likewise, a survey of tenants in Baltimore indicated that two of their top five priority housing needs were practically ignored by the city code. Another, the extermination of rats and roaches, was regulated, but those regulations went largely unenforced. Grigsby, *Economic Aspects of Housing Code Enforcement,* 3 URB. LAW. 533, 533-34 (1971).

[80] *See* FRIED, *supra* note 4, at 212-14.

inadequate in scope and impractical in application to satisfy the needs of a housing population in a conservational area, where deterioration has not progressed too far and the upgrading or conservation of existing units is the desired goal.[81] To achieve this goal, a more stringent code would be required. However, the code which is designed to meet the goals of a conservational area would probably be impractical, though not inadequate, for the slum area, in which severe housing shortages and financial problems of the landlords preclude the necessary repairs from being made.[82]

DELEGATION OF RESPONSIBILITY UNDER THE HOUSING CODE

Generally, housing codes contain provisions which explicitly define the various responsibilities of the owners or managers and the occupants.[83] Often, but not always, such duties and obligations are separate and distinct with respect to each party.[84] The owner or manager is charged with certain specific responsibilities set out in the code relative to the repairs and general maintenance of the property. Among these responsibilities is such maintenance as will comply with safety and health standards, as well as the upkeep or proper installation of those systems required in every habitable dwelling unit: heat, hot and cold water, light, ventilation, plumbing, and electrical facilities.[85] Tenants in turn have been delegated certain responsibilities respecting the upkeep of their individual dwelling units as well as the responsibility for the acts of their minor children.[86] When either party fails to perform according to the manner set forth in the code, the various remedies established within the code become available to correct the situation.[87] Supplemental remedies prescribed by statutes or case law may also be interposed.[88]

Perhaps the best way to assure that the parties fulfill their

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[81] Note, *supra* note 59, at 1118, 1122.

[82] *Id.* at 1117-18, 1122. Although such dual-standard codes have been contemplated, one has never been enacted into law.

[83] *E.g.*, NEWARK, N.J., REV. ORDINANCES § 15:4-1 *et seq.* (1966) (owner-operator's responsibilities); *id.* § 15:5-1 *et seq.* (occupant's responsibilities); AMERICAN BAR FOUNDATION, MODEL RESIDENTIAL LANDLORD-TENANT CODE 11-12 (1969).

[84] *E.g.*, NEWARK, N.J., REV. ORDINANCES § 15:1-7 (1966).

[85] *Id.* § 15:4-1 *et seq.*

[86] *Id.* § 15:5-1 *et seq.*

[87] *Id.* § 15:10-1 *et seq.*

[88] For a discussion of supplemental remedies emanating from the statutes see notes 30-66 *supra* and notes 107-58 *infra* and accompanying text. For a discussion of supplemental remedies emanating from the case law see notes 159-96 *infra* and accompanying text.

respective obligations under the code, assuming that such obligations are both economically feasible and within their control, is through the development of a working relationship between both parties based upon a clear understanding of the particular responsibilities, problems, and needs of each.[89] Landlord-tenant relationships have often dissipated into bitter hostility because one party was neither aware of nor interested in the problems of the other.[90] It would seem that this situation is particularly acute where there is absentee landlord control and necessary repairs are likely to remain neglected for periods ranging from days to months.[91] Where owners reside within their buildings, communication is notably enhanced and maintenance, rehabilitation, and upkeep are generally found to be at a higher level.[92] On the other hand, to the absentee landlord, the tenants often seem to have inflicted problems upon themselves by their own lack of responsibility or by their disrespect for their environment.[93]

HOUSING CODE ENFORCEMENT

The administrative process is triggered by a complaint of a housing code violation. Pursuant to a statutory scheme, the municipal or state housing code enforcement agency will undertake the necessary inspection.[94] If violations are found, the owner will re-

[89] One of the particular needs of the tenant, for example, is the need to feel secure in his own leasehold. Several jurisdictions which have enacted leasehold reform legislation have recognized that until this feeling is achieved, no effective allocation of duties and responsibilities between landlord and tenant will be possible. Within these jurisdictions, a tenancy cannot be terminated for anything less than "just cause." LANDLORD TENANT RELATIONSHIP STUDY COMM'N, *supra* note 47, at 13.

[90] *See id.* at 2-4.

[91] Repairs also may be delayed because of the lack of willingness of repairmen to work within certain inner city areas where threats of physical violence or theft of equipment is anticipated. G. STERNLIEB & R. BURCHELL, RESIDENTIAL ABANDONMENT—THE TENEMENT LANDLORD REVISITED 257 (1973) [hereinafter cited as STERNLIEB & BURCHELL].

[92] NHEDLP, *supra* note 28, at 23. *See* STERNLIEB & BURCHELL, *supra* note 91, at 74, 92; LANDLORD TENANT RELATIONSHIP STUDY COMM'N, *supra* note 47, at 4.

[93] *See* FRIED, *supra* note 4, at 4.

[94] *See, e.g.*, N.J. STAT. ANN. § 55:13A-16 *et seq.* (Supp. 1974-75) (enforcement procedure for a state housing code violation); NEWARK, N.J., REV. ORDINANCES § 15:2-1 *et seq.* (1966) (enforcement procedure for a housing code violation of the City of Newark).

In addition, the state Department of Health, as well as local health departments, may be of assistance. Created pursuant to N.J. STAT. ANN. § 26:2F-1 *et seq.* (Supp. 1974-75), the N.J. ADMIN. CODE § 8:51-4.5 (1972) provides:

> Each local health department shall:
>
> (a) *Act. 1.* Abate violations of local public health ordinances and State public health law concerning housing.
>
> (b) *Standard.* When inspections reveal violations of local public health

ceive written notification of their existence and be required to correct or eliminate the conditions. Any person served with such notice may request a hearing to demonstrate compliance with the code. If the appeal fails and no corrective action is taken, the department charged with administering the program may impose coercive sanctions on the violator.[95]

Most code enforcement programs are, however, plagued by a variety of ills including deficiencies in the administrative process, insufficiencies in the available range of remedies, and inadequacies in the enforcement of sanctions. The administrative problems are multifarious because of the nature of the task involved as well as the inadequacy of the financial resources available to effectively accomplish the code's objectives.[96] Lack of financial resources often precludes the hiring of a sufficient number of capable people at an adequate salary to perform the required tasks. Unfortunately, because of inadequate funding, the political nature of the appointment process, and the undesirable character of the work involved, one usually finds both an insufficient staff and a high degree of incompetency.[97] In addition, as a result of the too often haphazard nature of the inspection process, violations are seldom discovered and are thus likely to remain uncorrected.[98]

Effective code enforcement requires speed and the ability to match the appropriate relief to the violative condition.[99] When a code enforcement agency is either understaffed or inefficient in its work, the agency becomes overloaded with violations. Under such conditions, it possesses almost no effective means to resolve the

ordinances or State public health law concerning housing, action shall be taken to secure abatement of such violations.

[95] *See* N.J. STAT. ANN. § 55:13A-16 *et seq.* (Supp. 1974-75); NEWARK, N.J., REV. ORDINANCES § 15:2-1 *et seq.* (1966). *See generally* Lieberman, *The Administrative Process—Housing Code Enforcement,* 3 URB. LAW. 551, 554-55 (1971).

[96] *See generally* Gribetz, *Housing Code Enforcement in 1970—An Overview,* 3 URB. LAW. 525 (1971); Note, *Enforcement of Municipal Housing Codes,* 78 HARV. L. REV. 801 (1965).

[97] *See* Ackerman, *Regulating Slum Housing Markets On Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy,* 80 YALE L.J. 1093, 1093-95 (1971); Gribetz, *supra* note 96; Note, *supra* note 96, at 804-06. Code enforcement officers are resented by both the building owners, who are forced to make repairs, and the tenants, who often object to the delays that occur while their complaints are being processed. Even municipal government officials may not appreciate code enforcement because it might cost them future votes. Finally, the task is endless and usually does not lead to an improvement in the visible environment of the neighborhood. *See* Gribetz, *supra* note 96, at 526.

[98] *See Hearings Before the Subcomm. on Housing of the House Comm. on Banking and Currency,* 93d Cong., 1st Sess. 2222 (1973).

[99] Becker, *Crime and Punishment: An Economic Approach,* 76 J. POL. ECON. 169 (1968); TEITZ & ROSENTHAL, *supra* note 79, at 51.

problems. Moreover, the massive accumulation of data may itself hinder the enforcement program if serious problems are incapable of being distinguished from minor ones or multiple complaints go unrecognized.[100] Another obstruction to the effectiveness of a code enforcement program is the lack of a follow-up investigation. The understaffed agency usually is not equipped to reinspect those violations purportedly corrected by the landlord following the citation.[101] Since the effectiveness of preserving habitable housing conditions depends upon correction of substandard conditions, a reinspection program is essential to ensure that those conditions have in fact been corrected.[102]

A further hindrance to the enforcement of housing codes is the necessity for relocation of tenants which invariably accompanies major renovations. In fact, in areas of housing shortage, relocation is a virtual impossibility. At times it may also be politically, socially, and economically unfeasible.[103] Although states may have enacted relocation programs through which a small sum is awarded to the tenant who is required to relocate,[104] this sum is often insufficient to defray the total costs of moving. Where the tenant's new living quarters are no better than before, strong tenant opposition may be encountered.[105]

Another problem encountered in enforcement is the financial inability of the landlord to effect repair. In the worst areas, the amount of repair required to bring the dwellings within the standards set by the code is bound to involve relatively large expenditures. Although the average landlord may be economically unable to comply with the repair order or may view such an order as

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[100] *See* TEITZ & ROSENTHAL, *supra* note 79, at 51-52.

[101] *See id.*

[102] For a discussion of approaches to certification of code compliance, see *id.* at 51-58. One suggestion, which is both simple and economical, entails mailing a questionnaire to the aggrieved tenant to be completed and returned. *See id.* at 53.

[103] DOWNS, *supra* note 12, at 137-38. *See also* FRIED, *supra* note 4, at 86-94.

[104] For example, the Relocation Assistance Law of 1967, N.J. STAT. ANN. § 52:31B-1 *et seq.* (Supp. 1974-75), provides that assistance payments made pursuant to its provisions shall not exceed $200 for an individual or family. *Id.* § 52:31B-4(c). In 1973, New Jersey awarded $470,985 in relocation assistance to 22 localities for use in assisting those families displaced by local code enforcement efforts. 6 N.J. DEP'T OF COMMUNITY AFFAIRS ANN. REP. 7 (1973).

For those displaced by federally subsidized urban renewal activities, including concentrated code enforcement programs see 42 U.S.C. § 1465(c)(1) (1970). Relocation assistance is also provided by other federally funded programs. *See, e.g.*, 23 U.S.C. § 502 (1970) (displacement pursuant to interstate highway construction); 42 U.S.C. § 3074 (1970) (displacement resulting from anticipation of federally assisted urban renewal programs).

[105] *See* DOWNS, *supra* note 12, at 137.

economically unpalatable, repairs, nevertheless, must be made if code sanctions for noncompliance are to be avoided.[106]

SANCTIONS

The Criminal Sanction

The most commonly employed sanction, the criminal sanction, has proved less than effective in achieving the major goal of code enforcement—the restoration and maintenance of habitable dwelling units.[107] The rationale underlying criminal prosecution of housing code violations is that a breach of any state or municipal housing standard is a violation of the law and thereby punishable by a fine or imprisonment, or both.[108] Thus, in practice, the imposition of the penalty should not only discourage owners from allowing unlawful conditions to continue, but also deter other potential violators as well.[109]

The effectiveness of the criminal sanction is directly related to the swiftness and probability of conviction as well as the severity of the punishment imposed.[110] However, violators know that judicial

[106] *E.g.*, NEWARK, N.J., REV. ORDINANCES § 15:2-1 *et seq.* (1966). Nevertheless, the estimated costs of making housing improvements in order to comply with code regulations has been a factor considered in ascertaining the reasonableness of the legislation. *See* note 201 *infra* and accompanying text.

[107] F. GRAD, LEGAL REMEDIES FOR HOUSING CODE VIOLATIONS (Nat'l Comm'n on Urb. Problems Research Rep. No. 14, 1968) [hereinafter cited as GRAD].

[108] *Id.* at 22. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 17995 (West 1964) (fine of up to $500, imprisonment of up to six months, or both); N.Y. MULT. DWELL. LAW § 304 (McKinney 1974) (fine of up to $500, imprisonment of up to 30 days for the first offense, or both).

In New Jersey, any person responsible for violating the state housing code after the time set by the administrative hearing for its abatement shall be liable to a minimum fine of $50, not to exceed $500 for each violation. For every day thereafter that the violation continues, the violator is liable to an additional minimum fine of $500, not to exceed $5,000. N.J. STAT. ANN. § 55:13A-19(b) (Supp. 1974-75). A "continuing violation" is defined as follows:

> [A]ny violation . . . where notice is served within 2 years of the date of service of a previous notice and where violation, premise and person cited in both notices are substantially identical.

Id. § 55:13A-3(n). In recognizing the impracticability of literally enforcing this statute, the Bureau of Housing Inspection presently assesses penalties by dwelling unit rather than by violation. Jackson, *Enforcement Practices and Principles Under the New Jersey Housing Inspection Program,* 93 N.J.L.J. 441 (1970).

The Newark housing ordinances impose, upon the conviction of a violator, a fine not to exceed $100 for each provision violated. Every day thereafter for which the violation is allowed to continue constitutes a separate offense. NEWARK, N.J., REV. ORDINANCES § 15:2-7 (1966).

[109] GRAD, *supra* note 107, at 29.

[110] Becker, *supra* note 99, at 176. Several other variables may also aid in determining whether an offense has been committed: (1) the income available from the illegal activity

proceedings are often deferred for long periods of time and that courts often do not treat them as criminals per se so that only a minimal fine will be levied.[111] Because jail terms have been imposed but infrequently and fines have been relatively insignificant, the criminal sanction lacks the deterrent effect necessary for its successful application.[112] In practice, the cost of code compliance is far greater than the penalty and, therefore, it is a matter of sound economics for the landlord to merely pay the fine as one of the expenses of doing business.[113]

The Civil Sanction

The theory behind the establishment of a system of civil penalties is that the would-be violator of housing code standards is receiving an unjust economic benefit from his violations and therefore should be held economically liable.[114] Unfortunately, some of the weaknesses inherent in the imposition of a criminal fine also surface in the civil approach. In neither case are the penalties imposed directed toward the restoration or maintenance of the building, nor are they reflective of the length of time a violation has been in existence. As a result, there is little, if any, impetus for violators to make speedy corrections.[115] Moreover, the collection of

compared with income available through legal channels; (2) the willingness to commit an illegal act; and (3) the frequency of nuisance arrests. *Id.* at 178.

[111] *See* GRAD, *supra* note 107, at 29; Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies,* 66 COLUM. L. REV. 1254, 1278 (1966).

In 1965, the average fine in New York City was estimated to be under $14, and the average assessment per violation was fifty cents. *Id.* at 1276. *See also* Comment, *The Enforcement of the New Orleans Housing Code—An Analysis of Present Problems and Suggestions for Improvement,* 42 TULANE L. REV. 604 (1968).

It has been suggested that a municipal judge's reluctance to impose stringent monetary penalties is due in part to his lack of appreciation of the importance of housing laws, the non-support of imposed penalties by public officials, and the lack of interest and ingenuity of the municipal attorney presenting the case. Lieberman, *The Administrative Process—Housing Code Enforcement,* 3 URB. LAW. 551, 553 (1971).

[112] *See* GRAD, *supra* note 107, at 29. *Cf.* Ackerman, *supra* note 97, at 1093-98.

[113] GRAD, *supra* note 107, at 29. *See* Becker, *supra* note 99, at 176. A person commits an offense when the expected utility to him exceeds the utility he could attain by spending his time and resources in other ways.

This frequently is the situation in New Jersey, where litigation by local housing code officials against intransigent landlords for unremedied housing violations has often resulted in

> the assessment of low fines for serious code violations, continuances which have ranged up to 18 months, general contempt of the procedure by landlords who find it more profitable to ultimately pay the fine rather than remedy the defect, and disillusionment by the local authorities charged with the responsibility of enforcement.

LANDLORD TENANT RELATIONSHIP STUDY COMM'N, *supra* note 47, at 29.

[114] GRAD, *supra* note 107, at 34.

[115] *Id.* at 35.

a civil penalty or a criminal fine imposes an additional and time-consuming burden upon the municipality.[116] However, one notable exception is New Jersey's Penalty Enforcement Law,[117] which provides for summary proceedings.

The choice of a civil proceeding over a criminal prosecution is procedurally advantageous in several ways.[118] First, a lesser burden of proof applies. The municipal attorney charging an owner with a civil violation of the code need only prove his case by a preponderance of the evidence rather than beyond a reasonable doubt.[119] Furthermore, rules governing the service of process on a civil defendant are broader in scope. Service by mail or by posting and publication may suffice in many jurisdictions where rules of criminal procedure would require personal service only.[120] An additional advantage inuring in a civil action is the potential for proceeding directly against the building rather than against its owner, whose whereabouts may not be known. Unlike criminal proceedings, the individual owner-defendant need not be physically present in court when this quasi-in-rem action is brought.[121]

Notwithstanding the aforementioned procedural advantages, municipal attorneys often find the paper work involved in civil proceedings time-consuming and costly. This problem, often coupled with a congested court calendar, probably accounts for the disuse into which the civil sanction has fallen.[122]

Many state statutory schemes provide for civil sanctions alongside criminal ones.[123] New Jersey enforces its state housing code primarily through administrative proceedings.[124] Notice of a code violation is given to the owner who may then petition for a hearing.[125] Following this hearing, an order may issue, either in-

[116] *See id.* at 36. The procedure involved in the collection of a municipal debt is the same as that employed by a private person. The case is docketed with other actions for money judgments, and the parties are given a plenary hearing. Once the judgment is rendered, normal collection avenues are pursued. *See* N.Y. MULT. DWELL. LAW § 307 (McKinney 1974). Under that section, an uncollected penalty becomes a lien on the property.

[117] N.J. STAT. ANN. § 2A:58-1 *et seq.* (1952).

[118] *See generally* GRAD, *supra* note 107, at 35-36.

[119] C. MCCORMICK, LAW OF EVIDENCE § 339 (2d ed. 1972).

[120] *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

[121] *See* GRAD, *supra* note 107, at 35.

[122] *Id.*

[123] *See, e.g.*, IOWA CODE ANN. §§ 431.107, .109 (1949); MICH. COMP. LAWS ANN. § 125.501 (1967).

[124] N.J. ADMIN. CODE §§ 5:10-1.13, -1.15 (1972).

[125] N.J. STAT. ANN. § 55:13A-16 (Supp. 1974-75) (notification of violation and issuance of an order); *id.* § 55:13A-17(d) (hearing before the Commissioner).

junctive or penal in nature.[126] Fines imposed under a penal order may be collected administratively.[127] When an owner fails to voluntarily comply, the penalty order is reduced to judgment in a civil proceeding under the New Jersey Penalty Enforcement Law.[128] Since the proceeding is summary in nature, it provides a quick method for judicially enforcing the order.[129]

Equitable Relief

The attractiveness of the injunction as a sanction lies in its flexibility.[130] Unlike criminal and civil penalties, it can be directed toward future acts and can be tailored to the specific conduct of a particular defendant. Although there is statutory authorization for injunctive relief for housing code violations in several states,[131] the remedy has been used with regularity only in Chicago. But even there, only the worst of dwellings and the most uncooperative of landlords have been subject to the jurisdiction of the chancery court.[132] Failure to comply with the order will result in the issuance of a civil contempt citation, demolition, or receivership.[133]

Even though used to remedy only the most egregious of violations, injunctive relief does offer several distinct advantages: service to absentee landlords may be effected by publication; the chancery court may direct all parties to appear; and courts of equity are better suited than criminal courts to grant the type of relief called for by housing code violations.[134] Unfortunately, the

[126] *Id.* §§ 55:13A-16(b), -19(b).

[127] *Id.* § 55:13A-19(b).

[128] *Id.* § 2A:58-1 *et seq.* (1952).

[129] *Id.* § 2A:58-1.

[130] *See generally Developments in the Law—Injunctions,* 78 HARV. L. REV. 994, 996 (1965).

[131] *See, e.g.,* CAL. HEALTH & SAFETY CODE § 17980 (West 1964); N.J. STAT. ANN. § 55:13A-16 (Supp. 1974-75); N.Y. MULT. DWELL. LAW § 306 (McKinney 1974); PA. STAT. ANN. tit. 53, § 4102 (1972).

[132] *See* Note, *Enforcement of Municipal Housing Codes,* 78 HARV. L. REV. 801, 827 (1965). Two factors undoubtedly add to the effectiveness of the Chicago scheme: (1) The chancery court has jurisdiction to see the controversy through. City of Chicago v. Miller, 27 Ill. 2d 211, 214, 188 N.E.2d 694, 696, *appeal dismissed,* 375 U.S. 11 (1963). (2) The court may direct that any interested party be joined. City of Chicago v. 934 Willow Bldg. Corp., 36 Ill. App. 2d 72, 77-78, 183 N.E.2d 572, 575 (1962).

The injunction in California has been used rather sparingly. But when it has been employed, some rather sweeping orders have resulted. *See, e.g.,* Knapp v. City of Newport Beach, 186 Cal. App. 2d 669, 9 Cal. Rptr. 90 (1960), where the owner was required to effect an almost total reconstruction of his building.

That the New Jersey statute has not been utilized has been attributed to the Bureau of Housing Inspection's lack of experience with injunctive relief. Metzger, *supra* note 55, at 671-72.

[133] Note, *supra* note 132, at 827.

[134] *Id.*

remedy is not without limitations. Proceedings that seek permanent relief are likely to be lengthy, and judges may well consider that an injunction is too harsh a penalty for ordinary code violators.[135]

The equitable remedy of receivership has been praised, perhaps somewhat extravagantly, as the most effective means of correction for housing code violations.[136] Pursuant to a statutory scheme, the court appoints a municipality, government agency, or private party to take control of a building from the owner's hands. Chief among the receiver's duties are collection of rents, application of the income to the expenses incurred in management of the building, and effecting the needed repairs and rehabilitation. Generally, the building will be restored to its owner only after all of its debts and operational expenses have been paid.[137]

In 1962, New Jersey enacted a receivership statute which provided that where an owner shall violate the code or allow the continuance of a condition dangerous to the building's occupants and the general public, the municipal officer charged with administration and enforcement of the code may initiate an action

> to be appointed receiver ex officio of the rents and income of such real property for the purpose of collecting the rents and income from such property and expend the same for the purpose of abating said [harmful] conditions.[138]

A more recently enacted New Jersey law allows either a designated public official, presumably a housing code enforcement officer, or a tenant to petition the court for receivership proceedings.[139] Inasmuch as there are no reported instances of the application of the 1962 statute and but a few known instances of the utilization of the new law, their potential cannot be evaluated.

New York's experience with receivership is more enlightening. Its statute[140] offers a more comprehensive scheme, covering any nuisance "which constitutes a serious fire hazard or is a serious threat to life."[141] If the income from the property should prove

[135] *Id.*

[136] *See, e.g.*, Rosen, *Receivership: A Useful Tool for Helping To Meet the Housing Needs of Low Income People*, 3 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 311, 323 (1968); Comment, *The Pennsylvania Project—A Practical Analysis of the Pennsylvania Rent Withholding Act*, 17 VILL. L. REV. 821, 845 (1972).

[137] *See* CONN. GEN. STAT ANN. §§ 19-347b-c (1969); ILL. ANN. STAT. ch. 24, § 11-31-2 (Smith-Hurd Supp. 1974); IND. ANN. STAT. § 48-6144 (Supp. 1974); N.J. STAT. ANN. §§ 40:48-2.12h-i (1967); N.Y. MULT. DWELL. LAW § 309 (McKinney 1974).

[138] N.J. STAT. ANN. § 40:48-2.12h (1967).

[139] *Id.* § 2A:42-88 (Supp. 1974-75). For a discussion of this law see notes 64-65 *supra* and accompanying text.

[140] N.Y. MULT. DWELL. LAW § 309 (McKinney 1974).

[141] *Id.* § 309(1)(e).

insufficient to effect the removal of the nuisance, the department of real estate is authorized to advance sums to the receiver. This advance gives rise to a lien against the property in favor of the department.[142] It appears that the program has met with modest success, at least for periods during which the authorities have seen fit to utilize the remedy vigorously.[143]

In any case, receivership does offer some special advantages over other types of sanctions: (1) it is a remedy which judges, who are reluctant to impose criminal penalties, are less hesitant to apply; (2) it deprives the landlord of income to which he would be entitled were a receiver not in control, and which income may be applied to rehabilitative efforts, thereby directly benefitting the tenant; and (3) it serves as an impetus for a landlord to make repairs when he has knowledge that the receiver will do so or will be appointed to do so.[144]

Vacation and Demolition

Orders to vacate or demolish buildings may issue in situations where a dwelling has become so dilapidated as to be unfit for human habitation. A vacate order affects those buildings which, although uninhabitable, might still be restored to meet code standards through proper rehabilitative efforts.[145] Demolition, on the other hand, occurs where a building threatening health or safety cannot be repaired without substantial reconstruction.[146]

The decision to initiate a receivership action in New York City is made by the Deputy Commissioner of the Office of Special Improvements after that office collects detailed information regarding the building's status from a variety of sources. Armed with that data, the Deputy Commissioner may recommend further action in the nature of a detailed physical survey, including estimates of the cost of repairs. If the Deputy Commissioner still desires to pursue the action, a demand for compliance will be made. *See* Comment, *Receivership of Problem Buildings in New York City and its Potential for Decent Housing of the Poor*, 9 COLUM. J.L. & SOC. PROB. 309, 335 (1973).

Once the existence of that nuisance is thus certified, the Department of Buildings may issue an order to the owner demanding abatement of that nuisance within a specified time, but that time shall not be less than 21 days. N.Y. MULT. DWELL. LAW § 309(1)(e) (McKinney 1974). Thereafter, the Department may petition the court to have a receiver appointed. *Id.* § 309(5)(a).

[142] N.Y. MULT. DWELL. LAW § 309(5)(d)(1) (McKinney 1974). The receiver's liens are given "priority over all other mortgages, liens and encumbrances of record except taxes and assessments levied pursuant to law." *Id.* § 309(5)(e).

[143] The upswing in the incidence of application of the receivership remedy in New York coincided with personnel changes in the Housing and Development Administration which took place in early 1970. Whereas at that time there were but few buildings in receivership, by early 1973 the number grew to 140, with an additional 200 in the processing stage. *See* Comment, *supra* note 141, at 333-34.

[144] *See* Rosen, *supra* note 136, at 323.

[145] GRAD, *supra* note 107, at 56.

[146] *Id.* at 60. Demolition laws vary with respect to what constitutes a "substantial

Vacate and demolition orders, originally based on the common law right to abate public nuisances, are now considered to be part of the police power of the state.[147] In New Jersey, this power has been extended to municipalities in the form of a statute that allows for the "closing or demolition" of any building that poses a threat to the public welfare.[148] It is left to the municipality to determine whether or not the health and safety of the public is endangered and, if such is the case, to take appropriate action.[149] The statute is remarkable in that it allows the governing body to deprive the owner of his property without compensation and sets up a municipal lien against the property in the amount of the costs of demolition where the owner fails to comply with the order.[150] However, it should be noted that municipal enforcement of these regulations has not been entirely satisfactory. Accordingly, the legislature seems to have granted the Commissioner of the Department of Community Affairs broad powers to vacate buildings or compel repair regardless of whether a municipality has acted.[151]

One extraordinary aspect of the New Jersey demolition statute is that it allows municipal action without a prior hearing.[152] This failure to allow for a prior hearing was first challenged in *Ajamian*

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reconstruction." Many demolition laws do not permit the issuance of a demolition order unless the costs of repairing the building would exceed 50 percent of its value. *See, e.g.*, KY. REV. STAT. ANN. § 80.660 (1971).

Statutes have been upheld where a less rigorous standard was required. *See, e.g.*, A.H. Jacobson Co. v. Commercial Union Assurance Co., 83 F. Supp. 674, 677 (D. Minn. 1949) (ordinance which authorized demolition when fire damages to a building amounted to 40 percent of the value of a similar new building).

[147] *See, e.g.*, North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908); Lawton v. Steele, 152 U.S. 133 (1894); Ajamian v. Township of North Bergen, 103 N.J. Super. 61, 246 A.2d 521 (L. Div. 1968), *aff'd*, 107 N.J. Super. 175, 257 A.2d 726 (App. Div. 1969), *cert. denied*, 398 U.S. 952 (1970); Thornton v. Chase, 175 Misc. 748, 23 N.Y.S.2d 735 (Sup. Ct. 1940).

[148] N.J. STAT. ANN. § 40:48-2.3 (1967).

[149] *Id.*

[150] *Id.* § 40:48-2.5.

[151] *Id.* § 55:13A-17(a) (Supp. 1974-75). *See* Metzger, *supra* note 55, at 672-73.

[152] Although N.J. STAT. ANN. § 40:48-2.5 (1967) provides for a hearing to decide whether a municipality's determination that a building is unsafe is correct, section 40:48-2.11 provides that this scheme is supplemental to and not meant to replace the powers which are conferred on municipal officers by other state statutes. Ajamian v. Township of North Bergen, 103 N.J. Super. 61, 71 n.2, 246 A.2d 521, 526 (L. Div. 1968), *aff'd*, 107 N.J. Super. 175, 257 A.2d 726 (App. Div. 1969), *cert. denied*, 398 U.S. 952 (1970).

It has long been within the police power of municipalities to abate such a "public nuisance" in a summary fashion. Lawton v. Steele, 152 U.S. 133, 136-37 (1894). Such action is not a taking that violates due process of law and that is without compensation. It amounts to no more than the destruction of a use that is noxious and unlawful. Apartment House Council v. Mayor & Council, 123 N.J. Super. 87, 99, 301 A.2d 484, 490 (L. Div. 1973).

v. Township of North Bergen[153] by an owner whose building the defendant township had declared to be a nuisance and had ordered to be vacated summarily. The court answered by asserting that the denial of a hearing prior to municipal action was within the authority given to local boards of health.[154] Of paramount importance in the statutory scheme was the immediate closing of such buildings as are judged "unfit for human habitation."[155]

In finding for the defendant, the court held that the township had acted within its police powers in abating a public nuisance, at the same time declaring that the right to abate such a nuisance is also a common law right that preexisted the federal Constitution and thus would not fall within its prohibitions.[156] Further, the court denied any compensation to the owner of the building because it found that

> abatement for public safety or health is not a *taking* of private property for public use without compensation or due process of law, in the sense of the Constitution. It is simply the prevention of its noxious and unlawful use and in that context the safety of the public is the paramount law.[157]

Finally, the court held that the township's determination that the building posed a threat to the public was not final and that judicial review of such determination was available in the interest of due process of law.[158]

JUDICIALLY-FASHIONED REMEDIES

Because the legislative sanctions that have been employed to remedy violations of the housing codes have proved incapable of

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[153] 103 N.J. Super. 61, 72, 246 A.2d 521, 527 (L. Div. 1968), *aff'd*, 107 N.J. Super. 175, 257 A.2d 726 (App. Div. 1969), *cert. denied*, 398 U.S. 952 (1970).

[154] 103 N.J. Super. at 72, 246 A.2d at 527. The municipal ordinance under attack which allowed summary abatement was found to be authorized by N.J. REV. STAT. §§ 26:3-46 to -50 (1937). 103 N.J. Super. at 72, 246 A.2d at 527. N.J. REV. STAT. § 26:3-46 provides in part:

> The local board, within its jurisdiction, shall examine into and prohibit any nuisance . . . which, in its opinion, [is] injurious to the health of the inhabitants therein, and shall cause the same to be removed and abated at the expense of the owner.

[155] N.J. STAT. ANN. § 40:48-2.3 (1967). *See also* 103 N.J. Super. at 71, 246 A.2d at 526.

[156] 103 N.J. Super. at 73, 246 A.2d at 527.

[157] *Id.* at 74-75, 246 A.2d at 528 (emphasis in original). *See also* Mandelker, *Housing Codes, Building Demolition, and Just Compensation: A Rationale for the Exercise of Public Powers over Slum Housing*, 67 MICH. L. REV. 635 (1969).

[158] 103 N.J. Super. at 75, 246 A.2d at 529. A hearing cannot be denied altogether. At some point in the proceeding, the property owner is entitled to a judicial determination that his property actually was a public nuisance. *Id.*. *See* North American Cold Storage v. City of Chicago, 211 U.S. 306, 316 (1908).

even maintaining the number of habitable dwelling units on the market, the judiciary has been engaged in fashioning new remedies on a case by case basis. These remedies, born of routine summary dispossess actions brought by landlords,[159] show promise of being more effective than their statutory counterparts as they are presently enforced. The initial involvement of the courts in this area arose out of their treatment of residential leaseholds as contractual arrangements rather than as interests in property.[160]

In 1961, the Supreme Court of Wisconsin considered the nature of the residential lease in *Pines v. Perssion.*[161] Although

[159] *E.g.*, N.J. STAT. ANN. § 2A:18-53 (Supp. 1974-75). In the New Jersey case discussions which follow, landlord initiated proceedings were held pursuant to *id.* § 2A:18-53(b), which permits a landlord to dispossess a tenant "[w]here such person shall hold over after a default in the payment of rent, pursuant to the agreement under which the premises are held."

[160] *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074-77 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970); Note, *Implied Warranty of Habitability in Housing Leases,* 21 DRAKE L. REV. 300, 306 (1972). Many recent decisions concerning the landlord-tenant relationship discuss the degree to which the law of contracts should govern the leasehold. Historically, leaseholds have been regulated solely by the law of real property. *See* Lesar, *Landlord and Tenant Reform,* 35 N.Y.U.L. REV. 1279, 1280-82 (1960), and cases cited therein.

Initially, the lease was a conveyance of an interest in land. As the emphasis in renting shifted from the land to dwellings on the land, courts began to read into residential leaseholds covenants to repair the demised property. *See* Javins v. First Nat'l Realty Corp., 428 F.2d at 1076-77.

Such covenants to repair were independent of the tenant's covenant to pay rent as "the rent issues out of the land, without reference to the condition of the buildings or structures upon it." Hart v. Windsor, 152 Eng. Rep. 1114, 1119 (Ex. 1843). Therefore, the tenant was obliged to pay the rent whether the landlord kept the premises habitable or not. More recently, however, these covenants have become either "dependent or independent according to the intention and meaning of the parties and the good sense of the case." Marini v. Ireland, 56 N.J. 130, 145, 265 A.2d 526, 534 (1970) (quoting from Higgins v. Whiting, 102 N.J.L. 279, 280, 131 A. 879, 880 (Sup. Ct. 1926)). Thus, it was only in the exceptional early cases in which a breach of an implied warranty of habitability was found, that the courts construed the covenant to pay rent and the covenant to let a habitable dwelling as mutually dependent. In such cases, as in any contractual arrangements, a breach of one covenant permitted the termination of obligations under the other. *See, e.g.*, Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892); Smith v. Marrable, 152 Eng. Rep. 693 (Ex. 1843). Modern decisions finding a breach of an implied warranty of habitability in residential or commercial leaseholds generally recognize this dependency of covenants in lease agreements. They have permitted contractual remedies on the ground that the intent of the parties was that the dwelling would remain habitable during the entire term of the lease. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d at 1079; Brown v. Southall Realty Co., 237 A.2d 834, 836 (D.C. Ct. App. 1968); Marini v. Ireland, 56 N.J. at 144, 265 A.2d at 533-34; Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969).

[161] 14 Wis. 2d 590, 111 N.W.2d 409 (1961). The premises in this case was a house leased from the defendant-owner by students at the University of Wisconsin. The house was in a state of advanced disrepair and the students tried to clean it up, but failed. The Madison, Wisconsin building inspector found numerous building code violations including "inadequate electrical wiring, kitchen sink and toilet in disrepair, furnace in disrepair." *Id.* at 593, 111 N.W.2d at 410-11.

concluding that the interest of a tenant was that of an estate in land, the court found a mutual dependence between the tenants' covenant to pay rent and an implied warranty of habitability.[162] Undoubtedly contributing to the court's decision was its recognition of the "social desirability of adequate housing."[163] Towards the end of the decade, similar public policy considerations played a large part in overcoming the notion that a lease constituted an interest in land.[164]

New Jersey courts have been among the leaders in this nationwide reform movement. In the past five years, tenants in New Jersey have been afforded considerable judicial relief from the problems which have rendered their dwellings unfit for habitation. The flood began in 1969 when, in *Reste Realty Corp. v. Cooper,*[165] the Supreme Court of New Jersey held that the failure of the landlord to prevent continual seepage of rainwater onto a basement display floor, caused by a latent defect in an exterior wall, rendered a commercial leasehold substantially useless for its intended purpose.[166] This latent defect breached the lessee's covenant of quiet enjoyment[167] and, by creating a constructive eviction, permitted the lessee to vacate the premises without incurring liability for future rent.[168] Although constructive eviction had previously existed as a remedy,[169] the significance of *Reste* lay in the policy considerations upon which the decision was based:

> [P]resent day demands of fair treatment for tenants with respect to latent defects remediable by the landlord, either within the

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[162] *Id.* at 596, 111 N.W.2d at 413.

[163] *Id.*

[164] *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970); Brown v. Southall Realty Co., 237 A.2d 834 (D.C. Ct. App. 1968); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969).

[165] 53 N.J. 444, 251 A.2d 268 (1969).

[166] *Id.* at 460-62, 251 A.2d at 276-77.

[167] *Id.* at 460, 251 A.2d at 276. In Pierce v. Nash, 126 Cal. App. 2d 606, 612, 272 P.2d 938, 943 (1954), the court defined the covenant of quiet enjoyment as follows: "Whether expressed or implied, this covenant means that a tenant shall not be wrongfully evicted or disturbed in his possession by the lessor." *Accord,* Stewart v. Drake, 4 N.J.L. 139, 141 (Sup. Ct. 1827).

[168] 53 N.J. at 460-61, 251 A.2d at 276-77.

[169] A tenant's right to claim constructive eviction, however, will be waived if he does not vacate the premises within a reasonable time after the right comes into existence. *See* Weiss v. I. Zapinsky, Inc., 65 N.J. 351, 357, 167 A.2d 802, 805 (App. Div. 1961). Occasionally, however, an inferior court may waive the requirement to vacate where a critical housing shortage exists. *See, e.g.,* East Haven Associates, Inc. v. Gurian, 64 Misc. 2d 276, 280, 313 N.Y.S.2d 927, 931 (Civ. Ct. 1970); Majen Realty Corp. v. Glotzer, 61 N.Y.S.2d 195 (New York City Mun. Ct. 1946).

> demised premises or outside the demised premises, require imposition on him of an implied warranty against such defects.[170]

Also of importance in the decision was the court's recognition of the existence of an implied warranty against latent defects in commercial leases.[171]

One year later, in *Marini v. Ireland*,[172] the court clarified its position, which was based in part upon the policy espoused in *Reste*, by holding that any residential lease carries with it an implied warranty or covenant of habitability.[173] In addition to the remedy permitted in *Reste* for breach of such a covenant—constructive eviction—the court, cognizant of a statewide housing shortage, provided the tenant with two additional remedies. First, and perhaps more important, the tenant was permitted to raise the existence of a breach of the implied warranty of habitability as an equitable defense to a summary dispossess action.[174] Second, *Marini* allowed the tenant to repair the defect which rendered his premises uninhabitable and to deduct the cost of such repair from his rent.[175] Although such a solution directly effects an improvement in the habitability of a tenant's premises, it is not a total solution since to condition relief on the tenant's first making repairs would in effect deny such relief to tenants for whom the

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[170] 53 N.J. at 454, 251 A.2d at 273.

[171] *Id.* at 461, 251 A.2d at 276-77.

[172] 56 N.J. 130, 265 A.2d 526 (1970). In *Marini*, the tenant and landlord had entered into a one-year residential lease agreement whereby the tenant agreed to pay rent in monthly installments of $95.00. After the toilet cracked and the tenant was unsuccessful in her attempts to contact the landlord, she hired a plumber to repair the toilet and sent the landlord a check for $9.28 for her monthly rent payment and the receipted repair bill for $85.72. The landlord brought an action to dispossess the tenant for non-payment of rent. *Id.* at 134-35, 265 A.2d at 528.

[173] *Id.* at 144, 265 A.2d at 533-34. For the origin and history of the implied warranty of habitability see Note, *Abatement of Rent Allowed for Breach of the Implied Warranty of Habitability in a Patent Defect Situation*, 4 SETON HALL L. REV. 714, 718-21 (1973).

[174] 56 N.J. at 140, 265 A.2d at 531. Prior to this time, in most cases, only a legal defense, payment or accord and satisfaction, was permitted to a summary dispossess action. *See, e.g.*, Peters v. Kelly, 98 N.J. Super. 441, 444, 237 A.2d 635, 636 (App. Div. 1968). *But see* Vineland Shopping Center, Inc. v. De Marco, 35 N.J. 459, 469, 173 A.2d 270, 275 (1961). *Marini* specifically overruled the *Peters* holding, thus permitting tenants to plead breach of warranty of habitability as a defense to rent not paid. 56 N.J. at 140, 265 A.2d at 531. Previously, a tenant's only recourse was to pay the rent and then bring an action for damages based upon the landlord's breach of an express or implied covenant to repair. *See* Berzito v. Gambino, 63 N.J. 460, 467-68, 308 A.2d 17, 21 (1973).

The holding in *Marini* was recently extended to tenants leasing commercial premises for the delivery of professional services. Demirci v. Burns, 124 N.J. Super. 274, 306 A.2d 468 (App. Div. 1973).

[175] 56 N.J. at 146, 265 A.2d at 535. This remedy is allowed, however, only after the tenant has made a reasonable attempt to have the landlord make such needed repair. *Id.*

capital outlay is not feasible. And those tenants who could not afford such repairs, which may be well in excess of their rent, are likely to be those who are most often the occupants of uninhabitable dwellings—tenants in multi-unit buildings.[176] In addition, as in the case of constructive eviction, the burden of proof remains with the tenant to show that the premises were, in fact, in an uninhabitable condition.[177]

Following closely upon these two decisions, New Jersey's lower courts began to grant additional relief to tenants within the context of summary dispossess actions. In *Academy Spires, Inc. v. Brown,*[178] the existence of latent defects impelled a trial court to extend *Marini* by allowing a diminution of rent in lieu of repair for those conditions which were clearly in breach of the implied warranty of habitability.[179] Then, in *Samuelson v. Quinones,*[180] the appellate division permitted an abatement in rent for breach of the warranty where the defects were patent at the inception of the lease and the defendant had leased the premises "as is."[181] These additional remedies, although clearly of great value to the tenant in his battle against uninhabitable conditions, were rather limited in scope. The abatements were permitted only to offset the rent for the term during which the payments had not been made. The tenant was unable to recoup rent paid prior to this time even though the condition that rendered the premises uninhabitable was already in existence.[182]

This limitation was removed in the summer of 1973 when the Supreme Court of New Jersey decided *Berzito v. Gambino.*[183] The

[176] *See* Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 484, 268 A.2d 556, 560 (Essex County Dist. Ct. 1970).

[177] Should the tenant fail to sustain his burden of proof, he is liable for the unpaid rent. Berzito v. Gambino, 63 N.J. 460, 466, 308 A.2d 17, 20 (1973).

[178] 111 N.J. Super. 477, 268 A.2d 556 (Essex County Dist. Ct. 1970).

[179] *Id.* at 482, 268 A.2d at 559. The court reasoned that a tenant financially unable to make repairs should not be forced to seek another apartment in a time of a severe housing shortage, but should be allowed a partial abatement of rent as an equitable remedy. *Id.* at 480, 268 A.2d at 558.

[180] 119 N.J. Super. 338, 291 A.2d 580 (App. Div. 1972). In *Quinones,* the tenant had accepted the apartment "as is," knowing that the apartment contained no heating fixtures and that the sole source of heat was a gas range. *Id.* at 339, 291 A.2d at 581. There was no express or implied covenant to furnish heating facilities. Brief for Appellant at 8, Samuelson v. Quinones, 119 N.J. Super. 338, 291 A.2d 580 (App. Div. 1972).

[181] 119 N.J. Super. at 342-43, 291 A.2d at 583. For a detailed analysis of this case see Note, *supra* note 173.

[182] N.J.R. 6:3-4 prohibits the joinder of a summary action for possession with any other claim, counterclaim, or third-party complaint.

[183] 63 N.J. 460, 308 A.2d 17 (1973). In *Berzito,* various uninhabitable conditions, which existed at the time of the letting, persisted uncorrected to the time of trial even though the

court cited both *Academy Spires* and *Quinones* with approval, thus recognizing abatement as a remedy available to a tenant in a summary dispossess action.[184] The court then expanded the remedy by permitting a tenant to initiate an action for breach of the implied warranty of habitability, enabling him to recoup the difference between the rent paid and the value of the property in its defective condition.[185] The amount of recoupment is thus based upon the reasonable rental value of the dwelling with its defect.[186] The court justified its position by recognizing a mutual dependence between the landlord's implied warranty of habitability and the tenant's covenant to pay rent.[187] Prior to *Berzito,* a tenant could initiate an action for damages based only on an express or implied covenant to repair.[188] Thus, New Jersey courts have afforded the full range of remedies to the tenant—constructive eviction, repair and deduct, abatement of rent, and suit for damages—when the landlord has breached his implied warranty of habitability.

The Supreme Court of New Jersey, while greatly enhancing the tenant's power to obtain habitable housing, has still shown sensitivity to the landlord's position.[189] In response to his problems both the supreme court as well as the lower courts have on occasion refused to extend requested relief to tenants. Recently, in *Dwyer v. Skyline Apartments, Inc.,*[190] the New Jersey supreme court summarily upheld an appellate division decision which ruled that damages will not be allowed for personal injuries received by a tenant from a

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court and municipal authorities had continually asked the landlord to make the needed repairs. *Id.* at 463, 308 A.2d at 18-19.

[184] *Id.* at 471 n.1, 308 A.2d at 22.

[185] *Id.* at 469, 308 A.2d at 22.

[186] *Id.* The supreme court in *Berzito* accepted the factual issue of the fair rental value determined by the trial court. *Id.* at 473, 308 A.2d at 24. It would seem equally likely that the fair rental value as determined in a summary dispossess action would also be determinative. Therefore, any value so established in such a proceeding, if less than what the tenant presently is paying for rent, would be an incentive for the tenant to institute a separate action against the landlord for the recoupment of rent back to the time in which the uninhabitable condition occurred.

[187] *Id.* at 470, 308 A.2d at 22. Various other jurisdictions hold similarly. *See, e.g.,* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1082 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970); Lemle v. Breeden, 51 Hawaii 426, 433, 462 P.2d 470, 474 (1969); Pines v. Perssion, 14 Wis. 2d 590, 596, 111 N.W.2d 409, 413 (1961).

[188] 63 N.J. at 467-68, 308 A.2d at 21. *But see* Academy Spires, Inc. v. Jones, 108 N.J. Super. 395, 401-02, 261 A.2d 413, 416 (L. Div. 1970).

[189] *See, e.g.,* 63 N.J. at 470, 308 A.2d at 22; Dwyer v. Skyline Apartments, Inc., 123 N.J. Super. 48, 55-56, 301 A.2d 463, 467 (App. Div.), *aff'd,* 63 N.J. 577, 311 A.2d 1 (1973).

[190] 63 N.J. 577, 311 A.2d 1 (1973). *See generally* Note, *Landlord's Implied Warranty of Habitability Does Not Give Rise to Strict Tort Liability for Tenant's Personal Injuries,* 5 SETON HALL L. REV. 409 (1974).

latent defect absent proof of the landlord's negligence.[191] The court reached this holding notwithstanding the presence of a defect that apparently had breached the landlord's covenant of habitability.[192]

On a more fundamental level, the New Jersey courts have not as yet equated the standards established by the implied warranty of habitability with those mandated by municipal housing codes, although courts in other jurisdictions have been willing to do so.[193] In *Quinones,* the appellate division took judicial notice of the severe housing shortage, the numerous code violations within existing housing, and the economic burden that would be placed upon landlords if full compliance were mandated:

[191] Dwyer v. Skyline Apartments, Inc., 123 N.J. Super. 48, 301 A.2d 463 (App. Div.), *aff'd,* 63 N.J. 577, 311 A.2d 1 (1973). The court took the position that

> [t]o apply the broad brush of strict liability to the landlord-tenant relationship in a dwelling house would impose an unusual and unjust burden on property owners. It would mean that the landlord would be faced with liability for every injury claim resulting from any untoward condition in every cranny of the building, whether it is reasonably foreseeable or not.

Id. at 56, 301 A.2d at 467.

[192] *Id.* at 54-55, 301 A.2d at 466.

[193] In Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970), the court read the District of Columbia Housing Regulations into all leases to which they applied. It was by the standards set out in that code that the warranty of habitability was to be measured. *Id.* at 1082. A housing code was looked upon as an expression of "the expectations and intentions of most people." *Id.* at 1081 n.56. The Supreme Court of Kansas has recently reached the same conclusion. *See* Steele v. Latimer, 214 Kan. 329, 521 P.2d 304 (1974).

In Brown v. Southall Realty Co., 237 A.2d 834 (D.C. Ct. App. 1968), the court held that a lease in violation of the municipal housing ordinance was void, illegal, and unenforceable at inception. *Id.* at 837. In such a situation the tenancy created is a tenancy at will. *See* Katz v. Inglis, 109 N.J.L. 54, 55, 160 A. 314, 315 (Ct. Err. & App. 1932) (lease void under the Statute of Frauds). *Cf.* Schiro v. W.E. Gould & Co., 18 Ill. 2d 538, 545, 165 N.E.2d 286, 290 (1960) (a breach of contract occurs where a house is constructed in violation of the Chicago building code). New Jersey courts have not yet taken this position. In *Berzito,* the court ruled that municipal housing, building, or sanitary code violations will be only one of the factors involved in the consideration of whether an implied warranty of habitability has been breached. The court cited with approval factors taken into consideration by the Supreme Court of Iowa in Mease v. Fox, 200 N.W.2d 791, 796-97 (Iowa 1972):

> 1. Has there been a violation of any applicable housing code or building or sanitary regulations?
> 2. Is the nature of the deficiency or defect such as to affect a vital facility?
> 3. What is its potential or actual effect upon safety and sanitation?
> 4. For what length of time has it persisted?
> 5. What is the age of the structure?
> 6. What is the amount of the rent?
> 7. Can the tenant be said to have waived the defect or be estopped to complain?
> 8. Was the tenant in any way responsible for the defective condition?

63 N.J. at 469-70, 308 A.2d at 22. The court went on to say that

> [e]ach case must be governed by its own facts. The result must be just and fair to the landlord as well as the tenant.

Id. at 470, 308 A.2d at 22.

> We take judicial notice of the fact that there is an acute shortage of low-income housing in the City of Newark, and that such housing which exists is frequently not in full compliance with the city's housing ordinances and building codes. *We must also recognize the hard practical facts of life that if landlords, under existing conditions, were to be deprived of all rents because of noncompliance with such ordinances and building codes there would be far fewer available low income housing units—landlords would either abandon their properties, or if they spent the money needed to comply with the ordinances and codes the amount of rent they would have to charge would price low income tenants out of the market. The problem seems to be almost insoluable* [*sic*].[194]

Thus, the courts' refusal to establish the housing code as the standard by which habitability is to be measured might be viewed as a pragmatic attempt to avoid an unnecessarily broad holding which, in the name of tenant protection, would eliminate what little low income housing was still in existence.

It would appear therefore that the courts are deferring to the legislature not only for the broad and sweeping reform which is desperately needed in this area, but also for the policy direction upon which to base their decisions. In *Berzito,* the court referred to the public policy underlying the recently enacted receivership law.[195] Although that legislation did not take effect until after the action in that case had been instituted and could not be applied retroactively, the court indicated that this enactment might provide such an aggrieved party with an additional valuable remedy.[196]

In any case, both the legislature and the judiciary are seeking new solutions to the problems of substandard housing as well as attempting to breathe new life into presently existing solutions. Although the nature of the problem is such as to lend itself to no one simple solution, most partial solutions center around the creation of a viable housing code and enforcement program. Two of the more attractive answers are treated below.

Two Proposals

Zoned Housing Codes

Most, if not all, of the housing codes in existence at the present time are single-standard codes.[197] These codes fix minimum stan-

[194] 119 N.J. Super. at 343, 291 A.2d at 583 (emphasis added).

[195] 63 N.J. at 471-73, 308 A.2d at 23-24.

[196] *Id.* at 473, 308 A.2d at 24.

[197] *See* Guandolo, *Housing Codes in Urban Renewal,* 25 Geo. Wash. L. Rev. 1, 42-44 (1956); Comment, *supra* note 43, at 505.

dards for all dwellings within the code's jurisdiction regardless of condition. As previously discussed, large variations in housing standards and desired housing goals are frequently found within different subdivisions of a particular community. To accommodate such variations and maintain habitable housing throughout the community, the concept of the zoned housing code has been proposed. This concept contemplates the coexistence within a given municipality of two or more housing codes, each designed to regulate and control a different housing condition. Zoned housing codes are usually conceived of as comprising two codes—one to effectively regulate and ameliorate existing deteriorated conditions in slum housing, the other to prevent housing deterioration in conservational or gray areas.[198]

The zoned housing code, which imposes different regulations for dissimilar municipal subdivisions, is vulnerable to an equal protection attack, although this issue has not as yet been adjudicated. The equal protection clause demands that the objective of the statute be a valid one and that it bear some rational relationship to the classification drawn by the legislature to accomplish this end.[199] To satisfy this standard, it might be argued that division of a municipality into two housing code zones serves the purpose of promoting two valid statutory objectives—slum amelioration and slum prevention. In need of judicial approval is the non-tested proposition that "equal protection is not denied when different methods are employed to obtain validly differentiated immediate objectives."[200] The alternative, a stringent single-standard code, would make compliance too costly for the owners of slum dwellings and would depend on selective enforcement, a practice clearly at odds with the equal protection clause.[201] Other factors might favor judicial acceptance of the zoned housing code: the fact that courts may accept preservation of property values as a valid legislative goal, the presumption of validity usually accorded to legislative enactments, a somewhat relaxed view of the "public welfare for police power purposes," the readiness of courts to accept zoning

[198] *See* Comment, *supra* note 43, at 505-06; Note, *supra* note 59, at 1121.

[199] *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1077-78 (1969). Courts have generally exercised great restraint in the belief that a state will be unable to function without the power to classify its citizens for some purposes and to treat those in one classification differently from those in another. Thus, such a discrimination will not be set aside if it can be justified by any conceivable state of facts. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). Municipal housing ordinances also run the risk of violating equal protection provisions in state constitutions.

[200] Note, *supra* note 59, at 1121.

[201] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

ordinances, and the recognition by the judiciary of realistic attempts to deal with the housing crisis.[202]

Although it has been suggested that the concept of a municipal zoned housing code falls within constitutional limits in that there appears to be a rational relationship between any classifications drawn and a governing body's valid interest in ensuring for each citizen a safe and healthy environment through the dual purpose of slum amelioration and prevention, one concrete proposal for a municipal zoned housing code had been withdrawn in the face of a constitutional attack.[203] In any case, it would appear to be most difficult to formulate a single code which could effectively achieve housing goals viable for both slum and conservational areas.

Perhaps these goals might best be attained—and attained so as to survive constitutional attack—by the enactment of two different codes: one by the state, to set uniform, minimum health and safety standards to govern all dwellings, particularly those in slum areas;[204] the other by local governing bodies, to set the standards for the prevention of blight and the conservation of salvageable dwellings lying within their respective conservational areas.[205] Although it is questionable whether a municipality has the authority under its general police powers to enact such regulations,[206]

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[202] *See* Guandolo, *supra* note 197, at 44.

[203] *See* Note, *supra* note 59, at 1121.

[204] That the drawing of a distinction between slum and conservation areas is not without difficulty does not affect the validity of a legislature's attempts to make such a distinction. *Id.*

The rigid single-standard regulations that are presently enforced are virtually self-defeating in areas in which landlords are abandoning their buildings. *See* STERNLIEB & BURCHELL, *supra* note 91, at xix. This is certainly an argument for allowing a legislature flexibility in drawing statutory distinctions. For it would be neither economically feasible nor prudent to require that a slum landlord comply with a non-flexible code within a short period of time, especially where the building is ultimately salvageable. In such cases, it would appear to be in the best interests of the tenant, the public, and even the property owner to allow the owner to comply with the code over a reasonable time period and thus distribute his costs. In any case, the building which does not meet even the most basic standards of health and safety could be a candidate for immediate demolition.

[205] Planning experts have not clearly formulated the requirements necessary to forestall or prevent deterioration of dwellings within conservational areas. However, they generally agree that such requirements should be designed to encourage owners, as well as tenants, to repair, refurnish, and keep the buildings in an otherwise attractive condition. Since local support for enforcement of improved standards ought to be less difficult to achieve in conservational areas, where pride and property values are stronger, effective sanctions should be provided to compel recalcitrant owners to comply with code standards. It is in the conservational areas that housing codes have the greatest potential for effectiveness. Note, *supra* note 59, at 1117-18.

[206] This precise issue has never been litigated. However, N.J. STAT. ANN. § 40:48-2 (1967) provides:

> Any municipality may make, amend, repeal and enforce such other ordinances,

specific state enabling legislation may permit it to do so.[207] And this is true even though the problem is of statewide concern, for "practical considerations may warrant different or more detailed local treatment to meet varying conditions or to achieve the ultimate goal more effectively."[208]

While directed toward the same goals as municipal housing codes, such a dual-standard scheme offers additional advantages. First, it establishes a uniform minimum standard rather than allowing a municipality broad discretion in defining its own minimum set of standards. Second, it governs all housing within the state's jurisdiction regardless of whether a municipality elects to establish housing regulatory measures.

Constitutionally, the concept of two codes—state and local—would appear safe when viewed from the perspective of an equal protection attack. Because each locality would be defining its own housing code standards according to the particular needs of its conservational areas, such definition would appear to bear a rational basis to the exercise of its own police powers.[209] And it is

regulations, rules and by-laws not contrary to the laws of this state or of the United States, as it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants, and as may be necessary to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law.

It seems that the above statute would permit municipalities to enact conservational area housing codes notwithstanding the existence of a state housing code governing minimal health and safety standards. In Inganamort v. Borough of Fort Lee, 62 N.J. 521, 303 A.2d 298 (1973), the supreme court held that the statute authorized a municipality to enact rent control legislation when the state had not seen fit to deal with the subject. *Id.* at 536-38, 303 A.2d at 306-07.

[207] It may be argued that in New Jersey such enabling legislation already exists inasmuch as municipal ordinances specifically designed to shore up substandard and otherwise defective housing are both state sanctioned and encouraged. *See* N.J. STAT. ANN. § 2A:42-74 *et seq.* (Supp. 1974-75). A municipal ordinance enacted pursuant to the above statute has been deemed an expression of the state legislature's desire to permit "local control over housing problems which are essentially local in concern and thus should be local in solution." Apartment House Council v. Mayor & Council, 123 N.J. Super. 87, 91, 301 A.2d 484, 486 (L. Div. 1973).

[208] Inganamort v. Borough of Fort Lee, 62 N.J. 521, 528, 303 A.2d 298, 302 (1973).

[209] The Supreme Court of Wisconsin set out what might be considered the clearest example of what constitutes a rational basis for a proper exercise of a state's police power:

"(1) All classification must be based upon substantial distinctions which make one class really different from another.

"(2) The classification adopted must be germane to the purpose of the law.

"(3) The classification must not be based upon existing circumstances only.

"(4) To whatever class a law may apply, it must apply equally to each member thereof."

Brennan v. City of Milwaukee, 265 Wis. 52, 56, 60 N.W.2d 704, 706 (1953) (quoting from State *ex rel.* Ford Hopkins Co. v. Mayor & Common Council, 226 Wis. 215, 222, 276 N.W. 311, 314 (1937)). Commentators have concluded that such standards are compatible with a

constitutionally insignificant that local regulations will mean diversity of treatment throughout the state. As the Supreme Court of New Jersey said in *Inganamort v. Borough of Fort Lee:*[210]

> Diversity is an inevitable incident of home rule, for home rule exists to permit each municipality to act or not to act or to act in a way it believes will best meet the local need.[211]

Receivership

For any housing code regulatory solution to be effective, viable sanctions for its enforcement must exist. It would appear that one of the most effective sanctions would be receivership.[212] Should a recalcitrant or economically strapped owner fail to comply with code standards within a sufficient, but minimal, period of time, the code might provide that this owner lose control of his property to a receiver until the necessary repairs are completed. Moreover, the impetus given to private actions through the New Jersey supreme court's decision in *Berzito v. Gambino*[213] would suggest that private parties could petition for receivership concurrently with alternative forms of relief—perhaps coincident with an action for summary dispossession.[214]

carefully conceived, properly designed, and fairly administered zoned housing code. *See* Guandolo, *supra* note 197, at 43-44; Comment, *supra* note 43, at 508-15; Note, *supra* note 59, at 1121.

Moreover, it should be noted that various federal assistance programs provide financial aid only to certain well defined areas within a given municipality. *See, e.g.*, 42 U.S.C. § 1450 *et seq.* (1969). The code enforcement programs for these areas are often separate and distinct from the enforcement programs elsewhere in the municipality. *See id.* § 1468.

[210] 62 N.J. 521, 303 A.2d 298 (1973).

[211] *Id.* at 529, 303 A.2d at 302.

[212] *See* notes 136-44 *supra* and accompanying text.

[213] 63 N.J. 460, 308 A.2d 17 (1973). For a discussion of this decision see notes 183-88 *supra* and accompanying text.

[214] The *Berzito* court remarked that the receivership act will "afford a further remedy . . . to tenants of substandard dwellings." 63 N.J. at 473, 308 A.2d at 24 (citing N.J. STAT. ANN. § 2A:42-85 *et seq.* (Supp. 1974-75)). Presumably this remedy would be routinely available to an aggrieved tenant provided that the statutory conditions were met. It is foreseeable that both retroactive relief in the form of damages and prospective relief in the form of receivership would be desirable in many disputes arising out of uninhabitable conditions. Although both the New Jersey receivership law and the landlord's action to recover the leased premises are designed to operate through summary proceedings, N.J.R. 6:3-4 prohibits the joinder of any claim or counterclaim in a summary dispossess action. Academy Spires, Inc. v. Jones, 108 N.J. Super. 395, 402, 261 A.2d 413, 416 (L. Div. 1970). To require a tenant to first defend against a summary dispossess action and thereafter institute an action for receivership where the landlord has been extremely dilatory in making repairs is extremely impractical and time consuming. All the issues must be relitigated, for a summary dispossess action is not res judicata in another action between the parties over the same subject matter. Vineland Shopping Center, Inc. v. De Marco, 35 N.J. 459, 462, 173 A.2d 270, 272 (1961). Consolidation of these actions in a single hearing would seem desirable in light of legislative policy and recent court decisions.

The current New Jersey receivership statute possesses many desirable attributes. That law, unlike others which attempt to afford relief from uninhabitable conditions, is designed to operate in a summary fashion.[215] Traditional concepts of mutuality of remedy would suggest that the landlord's remedies not be more efficient than the tenant's.[216] Allied with this sanction is the concept, borrowed from other areas of the law, of enforcement through individuals in the private sector acting as "private attorneys general."[217] By granting incentives to citizens for their efforts in enforcing the code standards directly affecting habitability, government would save large sums otherwise required for its inspection programs and, perhaps, many violations would be corrected that might otherwise be ignored.[218]

Assuming that one is operating with a functional code and the receivership remedy, there remains the problem of ensuring that funds are available to make the needed repairs. While some sources of revenue are often suggested—most often, subsidies, tax relief, and expanded mortgage services—they are probably not practicable in the existing political climate. Under the receivership sanction, the receiver may be afforded the authority to seek additional funds where required.[219] This is of particular significance in that it makes available for repairs monies beyond those generated by rental.

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[215] N.J. STAT. ANN. § 2A:42-92 (Supp. 1974-75). This summary action allows for a speedy and just resolution of the problem. The complaint, verified by affidavit, may be presented to the court ex parte. Where the court is satisfied with the sufficiency of the complaint, it shall order the defendant to show cause why final judgment should not be rendered for the relief sought. If no objection is made, if the defendant defaults, or if no genuine issue regarding any material fact exists, the court may try the action on the pleadings and affidavits. Should an objection be made and a genuine issue exist, the court shall hear the evidence on those matters in issue before rendering its judgment. For a full discussion of this procedure see N.J.R. 4:67-1 *et seq.*

[216] Equity will grant a decree of specific performance only where there is mutuality of remedy and obligation. United States v. Noe, 64 U.S. (23 How.) 312, 315-16 (1860).

The concept of mutuality was recently invoked in Apartment House Council v. Mayor & Council, 123 N.J. Super. 87, 301 A.2d 484 (L. Div. 1973), where the court held valid the requirement that owners of multiple dwellings post security for repairs with the Multiple Dwelling Emergency Commission. In addressing itself to the owner's contention of unreasonableness, the court noted that "[t]he ordinance was designed to establish a counterpart to the requirement that tenants post a security deposit upon occupying an apartment." *Id.* at 103, 301 A.2d at 493.

[217] *See* Comment, *Housing Code Enforcement by Private Attorneys General: A Better Way?*, 1973 URB. L. ANN. 299.

[218] *See id.*

[219] The New York receivership statute provides for a revolving fund where the income from the property cannot cover the cost of abating the nuisance. N.Y. MULT. DWELL. LAW § 309(5)(d)(1) (McKinney 1974).

A likely candidate for receiver is a first mortgagee, since he may well desire to protect his interests in the building.[220] And even if such a mortgagee would not himself become receiver, he could agree that the payments to him be temporarily stayed. Under what may be termed the "mortgage theory,"[221] the mortgagee declares a moratorium on mortgage payments currently due. The moratorium would release additional cash to the receiver who could then use it to effectuate the required repairs. Meanwhile, the interest would continue to compound during the moratorium, thus protecting the mortgagee's interest. As long as the moratorium is reasonable, both in terms of duration and scope, it would not appear to place an especially heavy burden upon mortgagees.

CONCLUSION

It has been amply demonstrated that rehabilitation and maintenance are the necessary elements of a successful program for conserving an adequate supply of habitable dwelling units in this nation. Perhaps the best comprehensive method yet devised to accomplish such a program is through the enforcement of the existing housing codes although such codes have been less than effective in areas of slum and marginal housing. Therefore, new solutions are essential if housing codes are to be a viable device. This Comment has proposed one such solution—the simultaneous use of state and local housing codes designed to ameliorate and prevent uninhabitable housing conditions in slum and conservational areas respectively.

Although housing codes may be one of the most comprehensive ways to confront the problems created by the lack of maintenance or the need for rehabilitation, they are not capable of resolving such difficulties where financial assets are limited or nonexistent. Other solutions are required to make such resources available. Two of these solutions, receivership and the "mortgage theory," have been discussed. Both concepts draw from the

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[220] Statutes have recognized the first mortgagees' interests to the extent of their being appointed receiver if they are competent and willing to undertake the responsibilities. *See, e.g.*, N.J. STAT. ANN. § 2A:42-80 (Supp. 1974-75).

[221] The roots of this "mortgage theory" can be traced to Connor v. Great W. Sav. & Loan Ass'n, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968). The bank had loaned money to a tract developer under conditions that afforded the bank pecuniary advantages, without taking the precautions usually taken in such situations. Under those circumstances, the bank was held liable to homeowners whose dwellings had sustained damage as a result of defective construction. *Id.* at 867, 447 P.2d at 618, 73 Cal. Rptr. at 378.

financial resources available from private enterprises, but unfortunately remain limited in scope because they are primarily concerned with individual situations, not with the broader problem.

While a vast amount of funds would be needed to totally resolve the crisis, a substantial concerted effort is required. Both the legislature and the courts have provided a number of devices which could be used to facilitate housing rehabilitation. To delay the effective implementation of these devices would only be to postpone the problem and increase the ultimate cost. Once a fully funded and effective program is well under way, the savings which can be derived from a viable code enforcement program, the ability to attract more outside capital, and the rapid correction of substandard conditions will be enhanced by a decrease in expenditures presently required for health, safety, and fire protection.

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