
THE BOSTON HOUSING COURT:
AN ENCOURAGING RESPONSE
TO COMPLEX ISSUES

PAUL G. GARRITY*

I. INTRODUCTION

The purposes of this brief Article are neither to tout housing courts as the penultimate solution to housing problems nor to compare and contrast the many specialized courts adjudicating matters relating to housing.¹ Instead, it focuses on one such specialized court, the Housing Court of the City of Boston, describing its origin, nature and function. In addition, this Article supports the proposition that the establishment of housing courts is an appropriate response to the need to speedily and effectively adjudicate the complex legal, social and economic issues raised by housing disputes. In other words, the housing court's role is to provide justice. Also, suggestions with respect to the optimum organization for a housing court are offered. Finally, serving on a court of general jurisdiction, during the past two and one-half years adjudicating litigation

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1. Most large cities, e.g., New York, Chicago, Philadelphia, Detroit, Baltimore, St. Louis, Pittsburgh, have a housing or "landlord-tenant" court. Most of these courts prepare annual or other periodic reports which can be obtained on request. Occasionally a law review article descriptive of a housing court or housing courts is published. See, e.g., Mosier and Soble, *Modern Legislation, Metropolitan Court, Miniscule Results: A Study of Detroit's Landlord-Tenant Court*, 7 U. MICH. J. L. REF. 8 (1973). Periodically, a so-called "trade" journal such as the J. OF HOUSING, published monthly by the National Association of Housing and Redevelopment Officials, carries a similar article.

different from that encountered as a housing court judge, has reinforced my positive perceptions about housing courts in general. Those experiences, additional court watching outside Massachusetts, and much reflection, have altered somewhat my perspective of how to ensure that housing courts provide justice.

II. THE BOSTON HOUSING COURT

Political History

The reports of two special commissions² created by the Massachusetts Legislature during the late 1960's, as well as the observations by advocates and opponents of the Boston Housing Court,³ provide the primary source material for understanding the creation of the housing court. Those sources include landlords and tenants, who, as individuals and pressure groups, severely criticized the adjudication of housing disputes by existing courts of general jurisdiction. First, both proponents and opponents of a Boston housing court agreed that court congestion and delays impeded dispute resolution. For example, other categories of civil and criminal cases were perceived to have a higher priority than housing controversies which often required a speedy resolution, particularly in cases involving lack of heat or a destructive tenant. There were accompanying perceptions that by the time such cases were tried, decided and appropriate relief granted, either the heating season had passed or the residence had been destroyed by the tenant. In fact, such perceptions belied reality. As a result of court congestion and adherence to inappropriate priorities, trials of criminal indictments for non-housing-related minor offenses were held long before trials of serious criminal housing code violations.⁴

Second, a consensus believed that prompt adjudication and effective resolution of housing disputes required a judge with an extensive knowledge of substantive housing law. It was felt that the housing judge should be assisted by a staff with skills germane to housing problems, such as experience to estimate cost and duration of repairs and replacement of

2. REPORT OF THE SPECIAL COMM'N ON LOW-INCOME HOUSING, MASS. H. DOC. NO. 4040 (1965); REPORT OF THE SPECIAL COMM'N ON A HOUSING COURT FOR BOSTON, MASS. H. DOC. NO. 4498 (1968).

3. These observations are compiled in R. Johnson, *Legislative History of the Housing Court of the City of Boston* (September, 1972). The paper may be obtained on request from the Boston Housing Court.

4. *E.g.*, Motor vehicle tort litigation was routinely heard before civil actions seeking relief for severe housing deprivations.

defective heating systems, as well as social work skills to refer destructive tenants to appropriate government agencies or alternative destruction-proof housing.

Notwithstanding the “grass roots” or neighborhood support for a Boston housing court, opposition primarily consisting of those representing real estate interests and advocates of the existing court system successfully blocked such a court’s establishment for several years. It was only when the City of Boston, in response to citizen pressure, agreed to fully fund a housing court that enabling legislation was enacted late in 1971.⁵ The first judge and clerk of the court were appointed in May 1972, and the court began operating in August 1972.

The Court’s Jurisdiction

While the Boston Housing Court is a “state” court, with its judges and clerk appointed for life by the Governor of the Commonwealth, its geographical jurisdiction is limited to the City of Boston. Until 1978, when Massachusetts assumed the costs of all courts pursuant to “court reform” legislation, the court received funding from the county in which it was situated, as most other non-appellate courts in the Commonwealth.

The court’s jurisdiction is enormously broad; it could best be characterized as nearly all-encompassing with respect to criminal prosecutions and civil disputes between landlords and tenants involving housing. The enabling legislation grants to the court

common law and statutory jurisdiction concurrent with the Massachusetts District Courts and the Massachusetts Superior Court of all crimes and of all civil actions arising within the City...under the provisions of common law and any other general or special law, ordinance, rule or regulation as is concerned with the health, safety or welfare of any occupant of any placed used or intended for use as a place of human habitation.⁶

In 1974, discrimination, small claims and zoning cases were added to the court’s jurisdiction in order to round it out.⁷

Included within the court’s far-reaching substantive jurisdiction are criminal statutes providing for the imposition of severe penalties for

5. 1971 MASS. ACTS ch. 843 (codified in MASS. ANN. LAWS ch. 185A (West Supp. 1977)).

6. MASS. ANN. LAWS ch. 185A, § 3 (West Supp. 1977).

7. 1974 MASS. ACTS ch. 478 and 700 (codified in MASS. ANN. LAWS ch. 185A (West Supp. 1977)).

violations of various housing codes, several laws providing civil enforcement of eviction actions, rent receiverships, small claims between landlords and tenants, review of decisions of the Boston Rent Control Board, applications for restoration and termination of utility services and the like. Private rental housing, including owner-occupied units, quasi-public housing which use federal and state subsidies, and public housing are all subject to the court's jurisdiction. Occasionally, a case is filed involving a "place of human habitation" not coming within those categories of housing, such as a student dormitory room. Also, litigation has been commenced where the purported violation of law did not arise in a residence but impacted housing situated in a neighborhood where industrial air pollution blanketed a section of the city, violating municipal ordinances.

Powers

The housing court is a hybrid of the district and superior courts. For example, civil or criminal housing cases that can be commenced and tried in the district courts, with appeal to the superior court where there is a trial *de novo*, may also be commenced in the housing court with no allowable appeal to the superior court. After trial, the housing court, like the superior court, is the trial court of last resort; therefore, decisions are reviewable by the Massachusetts Appeals Court and ultimately, in certain instances, by the Supreme Judicial Court. The fact that appeals from decisions of the Boston Housing Court do not go to a "higher" trial court speeds housing code enforcement. With direct appellate review, jury trials are provided of right in criminal cases and on request in civil cases. However, jury trials are rarely claimed or requested because of confidence in the court's judges and the fact that claims or requests for a jury trial will not delay adjudication.

Although the grant of jurisdiction is concurrent with the district courts and the superior court, a party in a case "pending"⁸ in the district or superior court has a right to transfer the case to the housing court by filing an *ex parte* "notice of transfer" in both the housing court and the court in which the case originated. Filing the notice effectuates the transfer.

As to remedies that can be provided, the court as a "court of superior jurisdiction" with respect to the trial of criminal and civil cases commenced in or transferred to the court has the typically broad remedial powers usually granted to a court of general jurisdiction. For example, in

8. "Pending" is defined as either before trial or before judgment where a finding was entered by default.

criminal cases, the court can employ the carrot and stick approach by suspending a statutory penalty or a portion of it; in civil cases it has the power to grant injunctive relief, award damages and appoint hearing officers, such as masters and receivers. In addition, pursuant to a provision of the enabling legislation, if the court "finds that the offense charged was not willful, intentional, reckless or repeated," the matter is deemed noncriminal. Especially when injunctive relief is creatively fashioned and employed, this provision allows flexibility in resolving housing disputes appropriately and effectively.

The Court's Operations

(1) Caseload. In projecting the caseload of the court, the original estimate was that it would rise to and level off at approximately two thousand cases annually after a few years. An actual caseload of four times that estimate required the addition of a second judge late in 1974. The addition of a second judge was primarily facilitated as a consequence of a favorable report by the National Center for State Courts.

While there are some slight delays in adjudicating non-housing code cases, code cases are heard fairly quickly. For example, a hearing on interlocutory relief in a civil action seeking enforcement of the state building code provisions requiring boarding-up of abandoned residential premises can be scheduled for forty-eight hours after entry of the case. Arraignment for a criminal prosecution for failure to provide heat, immediately followed by trial where the parties are agreeable, can proceed after service of process usually requiring three to four days after filing the criminal complaint. Both evictions and small claims cases are heard about four weeks after entry with provision for postponement if the controversy requires discovery. Civil actions usually are heard from three to six months and in a few instances within a year after a trial date is requested.

(2) The Court's Housing Specialist Department. In response to the expertise gap perceived by the court's advocates, a staff of housing specialists who function somewhat analogously to probation officers has been authorized. The court's enabling legislation requires that:

All housing specialists shall be knowledgeable in the maintenance, repair and rehabilitation of dwelling units, the problems of landlord and tenant as they pertain to dwelling units, the types of funds and services available to assist landlords and tenants in the financing and resolution of such problems, and the federal and state laws, rules

and regulations pertaining to the maintenance, repair and rehabilitation of such units and the financing and resolution of such problems.⁹

Hearing specialists become involved in all stages of proceedings before the court and typically function from the perspective that mediation and conciliation is preferable to trial. In practice, for example, in a housing code case where liability is not in dispute, the housing specialist provides the judge and litigants with an assessment of the scope and cost of repairs. In the majority of cases, the party responsible for repairs has insufficient funds to do so. In those situations a housing specialist will suggest, if feasible, a relatively inexpensive manner of repair and, if that is not feasible, will recommend financing alternatives, including available government grants. Where the only source of repair funds is current rents withheld by tenants, a receiver assisted by a housing specialist may be appointed, if requested, to collect the withheld rents and apply them to repairs.

In addition, in code enforcement cases where liability is contested and in any other type of housing case where physical facts are in dispute,¹⁰ the housing specialist performs an investigative function. Where the parties agree — and in almost every instance an agreement is reached or a judge will take a view — a housing specialist will inspect the physical evidence and provide the judge with a judgment-call on liability. This usually resolves the controversy. Where a judgment-call cannot be made, the specialist will furnish the judge with color photographs of the physical evidence to be considered in connection with testimony during the trial.

Housing specialists do not replicate the activities of municipal housing inspectors. Prior to entry of a case and its trial they neither respond to citizen complaints by inspecting nor do they review the performance of municipal inspectors. However, housing specialists facilitate access to the court, for example, by assisting citizens in filling out applications for relief, answering general telephone inquiries, and effectuating judgments after cases are adjudicated.

Citizen Access

Staff at the court have placed great emphasis on citizen access to the court's adjudicatory processes and on citizen involvement in its administrative processes.

9. MASS. ANN. LAWS ch. 185A, § 16 (West Supp. 1977).

10. *E.g.*, Whether an exterior wall requires repair or whether the holes in an interior wall resulted from deterioration or from tenant abuse.

From the court's inception, it was recognized that most of the court's potential litigants either would be too poor to pay minimum fees for legal services or would be too affluent for eligibility for free government and bar association legal services. In response to that dilemma, simple court forms and procedures were developed, a bar association reduced-fee program for the marginally indigent was encouraged, and approval from the Supreme Judicial Court was obtained for *pro se* prosecution of housing code cases.¹¹ These devices, and additional mechanisms oriented toward increasing public awareness of the court, such as court sessions conducted in various Boston neighborhoods, have contributed to citizen access to the court's adjudicatory processes.

At the outset it also was recognized that an ongoing citizen review of the court's administration would be helpful. A Citizen's Advisory Council, now defunct, was established. The council met monthly for almost five years, serving in part as an early warning system to alert the court's staff to administrative problems arising in day-to-day operations. The council developed suggestions for long-range plans geared toward improving court administration, and monitored the day-to-day administrative functioning of the court by periodically reviewing the scheduling of cases to ensure rational performance. The council recruited and screened court staff and made recommendations for employment; this was especially helpful in recruiting minority candidates for employment. The council never attempted to influence the court's adjudication of cases in any manner.

III. IN SUPPORT OF HOUSING COURTS

Some years ago, a court housing specialist related his observations, as an interested resident, of a closing transaction for approximately two hundred units of low- and moderate-income family housing constructed in his neighborhood. The housing specialist mentioned that there were several attorneys present representing the developer, the permanent and construction lenders, the Department of Housing and Urban Development, and state financing agency, a prospective tenant union, and others. According to the housing specialist, the amount of paper passed around boggled his mind.

Current federal, state and local governments regulate all aspects of housing matters including regulation of traditional property rights and responsibilities and the landlord-tenant relationship. New rights and re-

11. *Commonwealth v. Haddad*, 364 Mass. 795, 308 N.E.2d 899 (1974).

sponsibilities have been legislatively and judicially created, additionally complicating the field.

For example, a formerly simple case involving a tenant eviction for rent nonpayment now has become extraordinarily complex. Suppose the tenant is an occupant of a residential development which received government assistance in the form of a federally-insured mortgage. Should the premises be considered "subsidized housing," it must be determined whether that tenant is constitutionally entitled to extensive pre-eviction procedural due process rights in addition to a court's adjudication of the facts concerning the eviction. Conflict of law problems may arise if the development is situated in a community which adopted a rent control ordinance mandating a thirty-day notice of termination for non-payment but state law requires only a seven-day notice. Problems also may occur if one of the tenant's defenses to the eviction proceeding is that he is engaged in "legal rent withholding" due to the landlord's failure to make repairs, and justified in refusing to permit the landlord access to verify the need for repairs and make them because the development's tenants' union is headquartered in his apartment. If tenants' unions, appointed as temporary receivers for bankrupt developers, petition to convert the development into cooperatives, not permitted under the local zoning code, interesting legal questions arise.

While the above may sound like a law school final examination in a property course, these hypothetical issues illustrate complex economic and social housing problems that must be addressed by a court adjudicating the legal issues involved. It takes more than a court of general jurisdiction with no expert supporting staff of housing specialists to quickly and effectively adjudicate such disputes. It requires an approach and sensitivity similar to that employed by domestic relations and juvenile courts. It requires broad subject matter jurisdiction and procedural flexibility with expertise analogous to that of a tax or patent appeals court. The Boston Housing Court seems to meet these standards as an adequate model.

IV. SOME SUGGESTIONS

Whether or not a city, county, or state should have a housing court or system of housing courts can only be decided after assessing state or local needs and conditions. A housing court need not be considered solely as a response to a need to adjudicate housing problems in urban areas. Late in 1973, the Hampden County (Massachusetts) Housing Court was established, and to date the court has successfully functioned with a geographical jurisdiction which encompasses urban, suburban and rural

communities.¹² If a local government unit should have a housing court, the establishment of such a court or court system presents legal—home rule and political—issues which are probably *sui generis*.

When the Boston Housing Court was being organized, one task assigned the volunteer attorneys and lay persons who in 1972 assisted in getting the court off the ground was to study and report on the structure and operations of a number of other housing courts then in existence.¹³ Since then, both the judges and other staff at the Boston Housing Court have had much contact both by way of correspondence and visits by judges, staff and proponents of existing and planned housing courts. From the 1972 study and report and the many contacts made to date, there appear to be certain generalized preconditions to the establishment of an effective housing court or housing court system.

First, the adjudication of cases heard by such a court or court system must be performed by judges selected in the same manner as their peers in other courts affording similar privileges to all. Much of the criticism leveled at housing dispute adjudication stems from a perception that such disputes receive second-class judicial treatment. To establish a housing court and provide for adjudication by hearing officers or special masters would only reinforce such perceptions. Selecting a housing court judge in the same manner as his peers may mean that the new judge may have little, if any, theoretical or practical housing law experience. Inexperience, however, will be irrelevant in the long term if the new judge is fair-minded in hearing, determining facts and applying the law. Of course, housing expertise would be helpful, but being a good judge is of overriding importance. Because even the best of judges may very well be “burned-out” after a few years of adjudicating complex and emotionally difficult housing matters, some consideration might be given to rotating housing judges to other courts after a specified term of service.

Second, while a housing court or housing court system need not be at the highest trial court level, it is critical that in addition to disincentives to taking frivolous appeals there is a process for speedy review. Further, a housing court should have sufficient power to adjudicate civil and criminal cases effectively by way of granting comprehensive civil relief and by way of imposing appropriate criminal sanctions including incarceration. Whether or not housing courts should have extensive housing-related jurisdiction or, merely be housing code enforcement courts, is primarily an issue to be determined according to local needs. However,

12. MASS ANN. LAWS ch. 185B (West Supp. 1977).

13. That study is available on request from the Boston Housing Court.

experience at the Boston Housing Court reveals that the legal and factual issues in criminal and civil housing code, eviction, rent control and other kinds of housing cases usually are interrelated. Likewise, the skills and assistance available from housing specialists should and would be relevant to almost the entire range of housing cases. Again, whether or not housing courts have exclusive or concurrent jurisdiction of cases within their jurisdiction is primarily a local issue. The strongest argument in favor of concurrent jurisdiction, with the right to transfer cases as done in the Boston Court, is that competition cannot help but be an incentive toward improved court administration. However, the contrary might be argued since forum shopping may penalize persons less affluent and least informed about the existence of alternative forums.

Third, while there is no necessity that a housing court judge have housing experience, and while a strong argument exists for assigning judges of general jurisdiction courts to rotating terms on a housing court for a few years, the *sine qua non* of a successful housing court are full-time specialists who have statutory qualifications and who function in accord with the Boston Housing Court.

V. ENSURING THE PROVISION OF JUSTICE

In the past two and one-half years, the author, both on request as well as on his own, has visited several courts outside Massachusetts. These courts have generally been situated in urban areas, and typically have been very busy courts of general jurisdiction which spend much of their time adjudicating housing disputes. In almost every instance, the author has been impressed by the inability of those courts to provide fair, effective and sensitive adjudication and resolutions of housing disputes involving countless landlords and tenants.

If fairness, effectiveness and sensitivity are equated with justice, then injustice was the norm. Litigants were both ignorant and uninformed of their procedural and substantive rights and responsibilities. Also, they did not comprehend the litigation process. Cases were summarily disposed of rather than adjudicated. Even when adjudications were fairly and sensitively made, the results obtained did not respond effectively to the needs of the litigants. For example, if an adjudication was made that there was inadequate heat, and that it was the landlord's responsibility to rectify the situation, there was usually no legal or practical mechanism to insure that adequate heat was furnished. By way of further example, a judgment that a tenant was responsible for the damage to his apartment typically did not answer the need to dispossess the tenant quickly or in-

sure that further damage did not occur. In sum, a system designed to dispense mass justice to countless landlords and tenants was actually delivering mass injustice. It should be noted that most of the providers of that injustice were not "bad" people; typically, they were well-intentioned persons having no idea of their court system's inadequacies.

Rather than continuing to make value judgments about such court systems, an example focusing upon a "no heat" case might be helpful to illustrate the basic inadequacies of such systems. To begin, the substantive law in most jurisdictions clearly indicates who is legally obligated to provide adequate heat, what "adequate heat" means, and what remedies are available when adequate heat is not provided. Further, the procedural remedies of most jurisdictions for a failure to provide adequate heat are also quite clear. Finally, although there are probably countless persons, often poor, entitled to adequate heat, the courts are usually not responsive to the needs of such persons when they are denied heat in violation of the law.

Unfortunately, those who administer courts typically conclude that the function of courts is limited to providing a forum to have disputes litigated and adjudicated. The general public, however, has a vastly different perception of the judiciary; they evaluate a court system in terms of whether justice is received by persons seeking redress of their grievances. Such an evaluation is not unreasonable; a housing court should not only be a forum for adjudicating housing disputes, but also should be a place where those legally entitled to improved housing can obtain such relief. Finally, I suggest that the Boston Housing Court, with its housing specialist system and its emphasis on citizen involvement, is an appropriate model to follow to ensure housing justice by means of fair, effective and sensitive resolution of housing disputes.

