THE NEW YORK CITY HOUSING COURT—AN EVALUATION

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The housing court, as part of the civil court of the City of New York, was created by state legislation in 1972.[1] The City Civil Court Act has been referred to as "a radical change in the enforcement of proper housing standards" and a "landmark" effort designed to retard the deterioration and subsequent abandonment of residential buildings, and seeks to encourage "new vitally needed housing investment."[2] In reporting on the court, a former administrative judge stated that "by providing decent housing, [the court] contributes to the vitality of the city's economy and tax base and significantly expands neighborhood stability while arresting the spread of urban blight and crime.... Rehabilitation was to be the new order of the day."[3] The statutory findings and policy statement clearly express that the Act is to provide "effective enforcement of state and local laws for the establishment and maintenance of proper housing standards...essential to the health, safety, welfare and reasonable comfort of the citizens of the state."[4]

It is in the context of these goals that five major aspects of the Act affecting housing litigation will be considered:

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1. 1972 N.Y. Laws ch. 982, currently codified at CITY CIV. CT. ACT § 110 (McKinney Supp. 1978-79).

2. E. THOMPSON, A PRIMER—THE HOUSING COURT (1976).

3. E. THOMPSON, CIVIL JUSTICE IN A DYNAMIC CITY (1974).

4. 1972 N.Y. Laws ch. 982, § 1(a).

1. The city's judicial structure and related statutory remedies for housing code enforcement designed to protect the tenant's rights to habitable housing—prior to and subsequent to the 1972 Act;
2. The reform strategy brought about by the Act in changing the civil court structure and creating a new housing court;
3. Resolution of landlord-tenant problems outside the jurisdiction of the court;
4. The effectiveness of reform strategy based on five years' experience with the housing court. Is it working? What are the court's weaknesses and strengths? Did the changes achieve substantial upgrading of housing and blighted neighborhoods?
5. Suggestions, improvements and questions toward a better court to enforce housing codes and protect tenant rights and remedies for habitable housing.

A. *Structural and Statutory Continuities in the Housing Court*

In order to understand changes brought about by the 1972 Act, one needs a perspective on the judicial structure, powers and code enforcement remedies available in landlord-tenant litigation before 1972.

The concept of a housing court is not new to New York. Before the Act became law, the civil court exercised exclusive city-wide jurisdiction over summary proceedings to evict tenants for non-payment of rent, or as holdovers for a breach of the landlord-tenant relationship. The civil court retains jurisdiction over these traditional matters, and summary proceedings remain as swift as in the past. The civil courts, however, were powerless to enforce housing maintenance codes. These codes involved penal sanctions and thus fell under the jurisdiction of the criminal court. This dichotomy ended with the 1972 Act, which brought these cases under the jurisdiction of the housing court, ending years of judicial fragmentation of much landlord-tenant litigation.

Prior to the Act, the trial, calendar, and motion parts involving summary proceedings were presided over solely by civil court judges. These judges were nominated by a direct political party primary electoral process and elected by party label in the general election.[5] The greater part of a civil court judge's duties extend to tort and commercial trials, conferences, *pro se* trials, small claims, motion calendars and assignment to

5. Recent Democratic party reform procedures in some counties, including New York and Bronx, have developed screening qualification panels that narrow the number of judicial aspirants for party nominations.

criminal court night or weekend arraignment parts. At least one-half of all civil court judges are assigned outside the civil court to the supreme, civil and criminal trial courts and to family and criminal trial courts under an archaic and inefficient multiple-tier state judiciary system. Today, a judicial assignment to the Landlord and Tenant Housing Part of the civil court lasts only three to four weeks annually.

The 1972 Act did not create a separate, independent tribunal, but rather grafted onto the existing civil court an additional administrative branch involving appointed housing court judges to hear non-jury trials.[6] Civil court judges serve, in rotation, on the calendar, motion and jury trial parts of the housing court. The civil court, beyond its new flexible powers of housing code enforcement and civil sanctions, continues its heavy annual docket involving hundreds of thousands of summary eviction petitions.

Compared to other cities, New York has a monumental volume of housing litigation, most of which is administered in the housing court. In 1977, more than 410,000 residential petitions were filed in the courts of all five counties, of which approximately 340,000 represented tenant defaults in failing to answer petitions.[7] The balance of about 70,000 petitions filed were either tried to completion (5,000); settled or discontinued (45,000); dismissed during trial (300); default judgments entered against tenants failing to appear for trial (16,500); and miscellaneous dispositions as inquests, mistrials, or off calendar (3,000).[8] At least 27,000 show cause orders, usually to vacate defaults or dismissals, were signed in 1977 and 150,000 eviction warrants were prepared by the clerks city-wide.[9] It is interesting to note that while the overwhelming majority of proceedings are for non-payment of rent, only 370 proceedings involved imposition of civil penalties and hardly any contempt orders were issued.[10]

Significantly, jury trials are virtually nonexistent because of appellate decisions enforcing jury trial lease waivers.[11] The New York appellate courts have refused to inquire into the validity of "knowing," "vol-

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6. CITY CIV CT. ACT § 110(e) (McKinney Supp. 1978-79).

7. Report of the Advisory Council of the Housing Court for New York City on the Activities of 1977 (Nov. 15, 1978).

8. THE JUDICIAL CONFERENCE AND THE OFFICE OF COURT ADMINISTRATION, 23D ANNUAL REPORT (1978).

9. Interview with Harry Joslin, Chief Housing Clerk, Civil Court of New York City, in New York City (Jan. 3, 1979).

10. *Id.*

11. *See* Avenue Assoc. v. Buxbaum, 83 Misc. 2d 134, 371 N.Y.S.2d 736 (Civ. Ct. N.Y. 1975), *rev'd*, 83 Misc. 2d 719, 373 N.Y.S.2d 814 (App. Term. 1975).

untary" waivers of statutory and constitutional jury trial rights in the context of the current housing shortage or to consider the unequal bargaining power of the parties to residential leases which often results in contracts of adhesion.

The jurisdiction of the civil court is not limited strictly to residential petitions. In addition to the tremendous volume of residential disputes presented before the court, 15,000 to 20,000 commercial landlord-tenant summary proceedings are brought each year.[12]

Substantively, significant statutory and common law remedies are available to ensure code compliance and habitable housing. Some of the important remedies include:

1. Tenants or the Housing Preservation and Development Agency (HPD) can bring a landlord to court to compel repairs if conditions are dangerous to life, health or safety. After trial the court may appoint a person, the tenants themselves, or (upon consent) HPD as an "administrator" to collect rents and make needed repairs to remedy dangerous conditions. The proceeding, known as an "article 7A" proceeding,[13] is an affirmative tenant remedy and must be commenced by joinder of at least one-third of the tenants in a building, or it may be initiated by HPD itself. This procedure often occurs after a tenant "rent strike" and subsequent commencement of summary proceedings by the landlord for non-payment. In 1977, less than 100 such proceedings were initiated in the entire city.[14]

2. If the code enforcement agency (HPD) discovers housing violations tantamount to constructive eviction or deprivation of the beneficial use of the apartment, or if the tenant proves the existence of dangerous conditions to life, health or safety, the court may stay eviction and order rent to be paid to the court. The rent may then be used by tenants themselves to perform repairs under court order. This procedural tenant defense, known as a "section 755" order,[15] may be used during a rent strike.

3. If the landlord fails to correct "rent impairing" violations of

12. Of this number, about 4,750 were tried, settled, dismissed, discontinued or reached conclusion because of tenant defaults. THE JUDICIAL CONFERENCE AND THE OFFICE OF COURT ADMINISTRATION, 23D ANNUAL REPORT (1978); Interview with Harry Joslin, Chief Housing Clerk, Civil Court of New York City, in New York City (Jan. 3, 1979).

13. N.Y. REAL PROP. ACTS LAW art. 7A, §§ 769-782 (McKinney Supp. 1978-79).

14. Report of the Advisory Council of the Housing Court for New York City on the Activities of 1977 (Nov. 15, 1978).

15. N.Y. REAL PROP. ACTS LAW § 755 (McKinney Supp. 1978-79).

record for six months, the rent may be abated and deposited into court. The abatement continues until the owner proves he has corrected the violations. This is a tenant defense to an eviction proceeding, and is known as a 302-a order.[16]

4. If the apartment is rented by a tenant on public assistance, the city's Department of Social Services may cease rent payments if conditions are dangerous to life, health or safety. This is a defense to an eviction proceeding which can only be invoked by the Department.[17] At present, social services issues two-party rent checks to publicly assisted tenants. The mayor has proposed that if the check is not delivered to the landlord, the latter shall have the right to the rent money directly. Such a procedure seriously undercuts effective code enforcement if a breach of warranty of habitability is raised.

5. A program was created in the 1960's allowing the city itself to directly undertake "emergency" or rehabilitative repairs. Emergency repairs are also performed by HPD. Should the owner fail to reimburse the agency, HPD may obtain a lien and levy against buildings, rents and the property itself. The city need only certify the emergency and give twenty-four hours' notice to the owner for the typical heat and hot water repairs, lack of windows, leaks and falling plaster.[18]

6. After inspection of a building, HPD can obtain a court order to be appointed the "receiver" of rents and profits, and perform work and improvements to remove nuisances.[19] A priority lien is obtainable by the agency on the building itself for these costs. Numerous scandals, financial losses and lack of capital funds have now curtailed this program to the extent that only twenty-four buildings have been taken into receivership since 1976.[20] An "emergency receivership" program was enacted in 1971 providing, under certain circumstances, for HPD receivership without the necessity of recourse to the courts.[21]

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16. N.Y. MULT. DWELL LAW § 302-a (McKinney 1974).

17. N.Y. SOC SERV LAW § 143(b) (McKinney 1976).

18. N.Y. MULT. DWELL. LAW § 309 (McKinney Supp. 1978-79); NEW YORK CITY, ADMINISTRATIVE CODE §§ D26-57.01, .03, .05, .09 & D26-51.01, .03 (1977).

19. N.Y. MULT. DWELL LAW § 309(5) (McKinney Supp. 1978-79); NEW YORK CITY, ADMINISTRATIVE CODE §§ D26-55.01 to 55.15 (1977).

20. *See* A HOUSING AND NEIGHBORHOOD DEVELOPMENT STRATEGY FOR CITY-OWNED PROPERTIES (1978) (prepared by a task force of elected officials appointed by the New York City Council, R. Messinger, chairperson).

21. NEW YORK CITY, ADMINISTRATIVE CODE § D26-57.11 (1977).

7. Under 1975 state legislation all residential rental space is impliedly warranted by the owner to be habitable and any waiver of this tenant right, by lease or otherwise, is void.[22] This entitles a tenant to rent abatement and consequential damages in the event of breach of the warranty. Under the statute, expert testimony is unnecessary in determining such damages.[23] But in the absence of any express formula for diminution of rent value due to a warranty breach, the courts flounder in determining damages, often rendering this right illusory. Ironically, prior to this express statutory warranty, abatements were judicially imposed without express formulas either under 302-a rent impairing violation orders or HPD administrative rent reductions ordered under rent control for diminution of services. These were reasonable guidelines. The appellate courts have yet to resolve these conflicts as to the measure of damages. The general rule of damages is to allow provable out-of-pocket expenses, some reasonable value of rental reduction, or any other practical means.[24] Some have suggested applying a strict products liability doctrine, the tenant's pro rata share of the employee salaries saved by the landlord for diminution of services, or damages for humiliation and mental anguish applicable to consumer contractual relationships involving hotel guests and airline passengers.[25] The practical effect of such diverse case law on calculating damages results in illusory protection of this substantial statutory right to habitability and rent abatement.

8. In 1976, the legislature further broadened the scope of judicial equitable power, allowing inquiry into claimed unconscionable residential and commercial lease clauses and giving the courts power to decline enforcement of such unconscionable leases, wholly or in part, after a hearing.[26] The full impact of this added equitable ten-

22. N.Y. REAL PROP. LAW § 235(b) (McKinney Supp. 1978-79).

23. *Id.*

24. Goldner v. Doknovitch, 88 Misc. 2d 88, 388 N.Y.S.2d 504 (App. Term 1976); B.L.H. Realty Corp. v. Cruz, 87 Misc. 2d 258, 381 N.Y.S.2d 659 (App. Term 1975); Steinberg v. Carreras, 74 Misc. 2d 32, 344 N.Y.S.2d 136 (App. Term 1974); Whitehouse Estates, Inc. v. Thompson, 87 Misc. 2d 813 (Civ. Ct. N.Y. 1976); Garcia v. Freeland Realty, 63 Misc. 2d 937 (N.Y. Civ. Ct. 1970).

25. Goldner v. Doknovitch, 88 Misc. 2d 88, 388 N.Y.S.2d 504 (App. Term 1976); Kaplan v. Coulston, 85 Misc. 2d 745, 381 N.Y.S.2d 634 (Civ. Ct. Bronx 1976); Grover v. Lakeside Management Corp., 83 Misc. 2d 932, 373 N.Y.S.2d 807 (Civ. Ct. N.Y. 1975). *See also* York, *The Implied Warranty of Habitability,* N.Y.L.J., May 12, 1976, at 1, col. 2.

26. N.Y. REAL PROP. LAW § 235(c) (McKinney Supp. 1978-79).

ant shield has not been fully tested.[27] Abatement of rent or damages for deprivation of beneficial use and enjoyment of the premises as mutual interdependent lease covenants, when raised as a tenant affirmative defense and/or counterclaim, antedated the Act and the remedy of statutory breach of warranty right. Such remedies were used frequently by the court.[28]

9. Counterclaims by tenants for rent control overcharges, property and personal injury damages and actual cost of tenant repairs were and still are available as defenses to eviction proceedings.

10. Contempt powers to impose fines and imprisonment for willful failure to comply with court orders have always been available to the court.[29]

11. There is a growing abuse by commercial loft landlords in permitting conversion of loft space into illegal working and living areas, particularly for artists.[30] Over ninety percent of commercial buildings in specially zoned residential reuse districts do not have residential certificates of occupancy (CO's) and multiple-dwelling registration numbers (MDR) as required by law.[31] After trial it may be found that the commercial loft building had been used as a multiple dwelling for three or more families living independently of one another, or so designed for such use, and the owner willfully and knowingly has permitted and consented to such illegal conversion. In this event, the owner could be deprived of rent and the right to evict until he obtains a residential certificate of occupancy.

B. *Reforms: Strategy and Powers of the New Housing Court*

In creating a housing court, the legislature had as its overriding purpose the establishment of a more flexible mechanism to preserve the city's declining housing stock. In the absence of new construction, such preservation requires reliance on rehabilitation and maintenance strategies. City-conducted demolition and abandonment of apartments

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27. Flam v. Herrmann, 90 Misc. 2d 434, 395 N.Y.S.2d 136 (N.Y. Civ. Ct. 1977). *See also* York, *The Implied Warranty of Habitability*, N.Y.L.J., April 16, 1977, at 1, col. 2.

28. *E.g.*, Amanuensis Ltd. v. Brown, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (N.Y. Civ. Ct. 1971).

29. For a review of tenant remedies, see MFY LEGAL SERVICES, A HANDBOOK OF LANDLORD-TENANT PROCEDURES AND LAW WITH FORMS (1978) (available from MFY Legal Services, 214 East Second Street, New York, N.Y.).

30. See Lipkis v. Pikus, 96 Misc. 2d 581, 409 N.Y.S.2d 598 (N.Y. Civ. Ct. 1978).

31. N.Y. MULT. DWELL LAW § 302 (McKinney 1974).

together are estimated to have caused the demise of up to 30,000 units annually in the past seven or eight years.

The Act also intended to serve as a gradual progressive step toward balancing the rights and needs of tenants with those of landlords, given the historical view of landlord-tenant laws as a grant of an estate in land where neither duties to repair nor warranties of habitability were enforceable unless expressly covenanted. The structure chosen to counterbalance this traditional view and to readjust the law and cast the tenants as "consumers of space" was the housing court.[32] To achieve this objective, the court was granted new, broad equitable statutory authority, and civil (economic) sanctions. The strategy attempted to ensure effective state and local housing code enforcement, and provided affirmative tenant redress and defenses to compel proper maintenance, upgrading and rehabilitation of deteriorating housing and blighted neighborhoods.

To comply with this strategy, numerous changes were introduced by the Act which restructured judicial powers and procedures. First, the Act consolidated criminal and civil sanctions involving landlord-tenant litigation into one comprehensive court, the housing court. Jurisdiction included cases involving violations of housing maintenance code standards. In August 1977, the Act was amended to provide concurrent enforcement jurisdiction for local structural, fire and health codes, which were formerly within the exclusive jurisdiction of the criminal court.[33] Thus all local codes pertaining to housing are now enforceable in the housing court. Despite this 1977 amendment, city building, fire and health agencies have not affirmatively sought code enforcement through civil injunctive relief. These agencies continue to use traditional methods, relying solely upon criminal sanctions for enforcement. Thus the housing court is unused for such code compliance.

Second, the Act decriminalized housing maintenance code enforcement, as distinct from fire, health and building structural codes, and instead relied on civil fines for uncorrected violations. One of the great weaknesses of the pre-1972 handling of housing matters was that criminal penalties were neither imposed nor enforced to remedy violations of housing maintenance codes. Such violations were treated as penal, enforceable only in the criminal court, while evictions and tenant claims fell under civil court jurisdiction. The criminal court was too preoccupied

32. For a thorough, critical review of the housing court, see Rutzick & Huffman, *The New York City Housing Court: Trial and Error in Housing Code Enforcement,* 50 N.Y.U. L. REV. 738 (1975).

33. CITY CIV. CT. ACT § 110(a)(9) (McKinney Supp. 1978-79).

with non-housing misdemeanors and district attorneys were also otherwise occupied, indifferent and ill-equipped to prosecute repetitive violations. Criminal sanctions were weak, fines minimal and imprisonment a rarity. The tenants themselves were compelled to assume the frustrating burden of prosecuting and proving their cases. The state legislature found in its statement of policy that

> past reliance on criminal prosecution has provided an opportunity for some building owners to resist the proper enforcement of housing standards by abuse of procedural devices for dilatory purposes, evasion of service of process, and failure to heed orders to remove violations. Building owners treat the payment of small criminal fines merely as a lesser cost of doing business than would be their expenditure for the cost of repair and removal of violations.[34]

To replace unworkable criminal sanctions, the Act established an economic civil penalty system for code violations, with fines and the time allotted for compliance graduated in proportion to the severity of the hazards. The HPD has authority to commence an action to impose civil penalties after a protracted procedure of inspection, landlord certifications of repair, reinspection, and opportunity for landlord defenses.[35]

Third, the Act permits the court, on motion by any party or *sua sponte,* to consolidate all pending housing actions and proceedings dealing with any one building, or to continue jurisdiction of any action or proceeding relating to a building until all violations are removed and immediate recurrence is judged unlikely.[36]

Fourth, the court in its discretion may recommend or employ any lawful remedy, program, procedure or sanction, regardless of the type of relief originally sought, to enforce housing standards if it believes such procedure will achieve effective code compliance and promote the public interest. If the proposal involves an expenditure by the city, however, HPD approval is a prerequisite.[37]

Fifth, the impleader or joinder of any person or city department is permitted on application of any party (or *sua sponte)* in order to effectuate proper housing maintenance standards and promote the public interest.[38]

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34. 1972 N.Y. Laws ch. 982, § 1(a).

35. NEW YORK CITY, ADMINISTRATIVE CODE § D26-51.01 to 51.05 (1977).

36. CITY CIV CT. ACT § 110(b) (McKinney Supp. 1978-79).

37. *Id.* § 110(c).

38. *Id.* § 110(d).

Sixth, the Act established full-time trial hearing officers[39] who, by amendment, were renamed "housing judges" in order to "lend vitally needed dignity and greater respect to the court's proceedings."[40]

Seventh, an advisory council for the housing part of the court was established, composed of two members from each of the following fields or organizations: the real estate industry, tenants' organizations, civic groups and bar associations, and four from the public at large. These twelve persons are appointed by the administrative judge with the approval of the first and second department appellate division presiding justices. The mayor also appoints one member and the State Commissioner of Housing and Community Renewal automatically becomes a member.

The council screens a list of applicants having housing expertise for possible appointment as housing court judges. The council meets at least quarterly—its members are unpaid and must visit the court from time to time, make recommendations and prepare an annual report.[41]

Eighth, the administrative judge has appointed sixteen housing judges, who serve for a five-year term with reappointment at the discretion of the administrative judge on the basis of performance, competency and results.[42] The decisions of housing judges are final and appealable.[43] The hearings are recorded by mechanical and electrical tape recorders, not by manual stenography, as with civil court judges.[44] A new index card file system stores maintenance code violations and case information by building as does a computerized video print-out data system available in each courtroom. The video computer omits building, fire and health code violation data.[45]

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39. *Id.* § 110(e), (f) & (i).

40. Memorandum in support of N.Y. Sess. Laws ch. 310 (1970) (Sen. Minority Leader Manfred Ohrenstein).

41. CITY CIV. CT. ACT § 110(g), (h) (McKinney Supp. 1978-79).

42. *Id.* § 110(i).

43. *Id.* § 110(e).

44. *Id.* § 110(k).

45. One reform the court's critics succeeded in implementing was a computerized visual print-out of housing maintenance code enforcement data, introduced directly into the housing courtrooms. Instantaneously, information about complaints, inspections, violations and remedies, emergency repairs and tax arrears, filed by building and apartment, appear on a console. This data is prima facie evidence of the matters stated therein and its authenticity is accepted as if certified under the seal of a departmental commissioner. N.Y. MULT. DWELL. LAW § 328(3) (McKinney Supp. 1978-79). Drawbacks of the system include its exclusion of structural, building, health, and fire code violations and its inability to maintain up-to-date data.

By virtue of the 1977 and 1978 amendments to the Act, the housing and civil court judges have coordinate power to hear, determine and grant relief in any action or proceeding within the Act's scope.[46] These powers include the ability to issue contempt citations, but it does not give the housing court judges jurisdiction to hear jury trials. This is a right reserved under the state constitution only for elected civil court judges.[47] A constitutional issue is raised, however, by renaming hearing officers as judges who exercise powers similar to elective civil court judges. The only civil court judges provided for by the state constitution are elected and it would appear from *dictum* in an appellate division decision that such legislation may be unconstitutional.[48]

Ninth, to further supplement the housing court staff, the court is mandated to provide a sufficient number of *pro se* clerks to assist persons who appear in court without the aid of counsel with procedural information, filing, forms and advice regarding administrative relief.[50]

Tenth, the tenant now has a new affirmative right to initiate a proceeding directly against the owner by a show cause order to correct code violations and impose civil penalties. This process is available if HPD either fails to inspect upon a tenant's complaint, fails to reinspect upon a tenant's application alleging false landlord certification of violation corrections, or if thirty days have elapsed from the time the owner was notified by HPD of a violation and the violation remains uncorrected.

HPD itself has authority to commence an action to impose and collect the new civil penalties for code violations and to recover money expended by the city.[51]

Eleventh, the housing and civil court judges have broad equitable powers to grant injunctive relief and to sign show cause orders with "stays" to vacate dismissals or default judgments pending a hearing on the matter.[52] Equitable relief is often exercised before, during and after trial to achieve code enforcement and habitable housing. Contempt

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46. CITY CIV. CT. ACT § 110(e) (McKinney Supp. 1978-79).

47. N.Y. CONST. art. IV, § 15.

48. *See* Glass v. Thompson, 51 A.D.2d 69, 379 N.Y.S.2d 427 (1976). *See also* Strutt v. Mont. N.Y.L.J., Jan. 3, 1979, at 14, col. 1 (N.Y. Civ. Ct. 1978).

49. CITY CIV. CT. ACT § 110(o) (McKinney Supp. 1978-79).

50. Matter of Diaz, N.Y.L.J., Jan 8, 1979, at 14, col. 1 (Sup. Ct. 1978).

51. CITY CIV. CT. ACT § 110(a)(7) (McKinney Supp. 1978-79); NEW YORK CITY, ADMINISTRATIVE CODE § D26-51.01 (1977).

52. CITY CIV. CT. ACT § 110(a)(4) (McKinney Supp. 1978-79).

powers are also conferred on all judges of the court.[53] Deposit of rent as a pre-condition for tenant relief is often invoked by judges, but this is discretionary.[54]

Finally, the court retains jurisdiction over all traditional eviction summary proceedings, which are the bulk of its landlord-tenant work.

These new powers are indeed sweeping and innovative. It is clear that the legislative strategy sought to ameliorate housing deterioration and to protect tenants against code violations and uninhabitable housing by a new judicial code enforcement mechanism.

C. *Landlord-Tenant Dispute Resolution Outside Housing Court Jurisdiction*

The housing court is not the sole adjudicatory forum for landlord-tenant litigation. A major portion of the housing stock of the city is under some form of rent regulation such as a rent control or stabilized statutory program, low-income public housing, or city and state middle-income housing administered by government.

A special legal relationship between residential landlords and tenants exists in about 1,300,000 apartments in the form of an economic incentive code enforcement concept under the city's emergency rent control and rent stabilization laws. This concept fixes maximum rental and ensures continued tenant occupancy and other statutory rights.[55] The continual efforts by landlords to remove rent control are in part based upon their demands for increased rentals due to rising costs. These efforts also result from landlord desires to dismantle the administrative code enforcement apparatus and regain full control over rent-controlled apartments, denying tenants their statutory right to possession.

Since 1972, the city has had a maximum base rent system (MBR) that provides for an automatic annual 7.5% rent increase for 400,000 statutorily controlled apartments.[56] The MBR is keyed to a complex cost formula which operates when the landlord complies with city and state housing maintenance codes. In effect, the system guarantees a fixed level of landlord profit. An administrative city rent control hierarchy of hundreds of employees, independent of the judiciary, exercises intricate and complex adjudicatory powers over rent increases or reductions, code

53. *Id.* § 110(e).

54. Kelley Street Block Ass'n v. Thompson, N.Y.L.J., July 24, 1978, at 7, col. 1 (App. Div. 1978).

55. NEW YORK CITY, ADMINISTRATIVE CODE §§ Y51-1.0 & YY51-1.0 (1977).

56. *Id.* § Y51-5.0.

compliance and housing repairs for privately owned statutorily controlled housing.

Leased housing constructed after World War II and voluntary vacancies of statutorily controlled apartments—another 850,000 apartments—fall under a rent stabilization program offering landlords an economic incentive for rental increases, in theory conditioned on removal of substantial violations.[57] This program is administered outside the housing court—indeed outside city government—by a conciliations and appeal board of insufficient staff, controlled and financed by the real estate industry.[58] There are numerous problems with this system because landlords are regulating themselves, and doing the job poorly. This self-regulating, non-adversary, private system is backlogged with complaints and hearings, understaffed, and ineffective in producing code enforcement.

The administrative code enforcement procedures and remedies for regulating rents under rent control are cumbersome, time consuming, frustrating and unaffected by the Act. The sole review of these final administrative orders is by appeal to another trial level—the supreme court. The housing court is bound by the administrative orders. Furthermore, if a landlord chooses to ignore code compliance, forego a rent increase or perhaps accept a small diminution of rent, the rent control and stabilized rent laws do not provide for affirmative action, civil sanctions or equitable relief to compel compliance.

Heretofore this discussion has been limited to privately owned housing. Low-income public housing and middle-income publicly aided housing is not subject to rent control laws. Low-income housing works under a month-to-month tenancy with its own due process, administrative procedures, and hearings on evictions for above-income occupancy, alleged "undesirables," and nuisances. Regulation of low-income housing and middle-income publicly-aided dwellings is conducted by the appropriate city and state agencies or the city's housing authority. The supreme court has the power to review the authority's orders to vacate, which is another example of obsolete judicial trial tier multiplicity.

D. *Critical Evaluation of the Court*

Is this strategy working? Is it achieving public policy goals? Conceptually a giant step was mandated by the state legislature, but in practice a

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57. *Id.* § YY51-1.0.

58. *Id.* §§ YY51-1.0, 4.0, 5.0 & 6.0 (Supp. 1978-79); RENT GUIDELINES BOARD ORDER NO 1 (1971); CODE OF REAL ESTATE INDUSTRY STABILIZATION ASSOC. OF N.Y.C., INC. (1978).

stalemate has evolved between tenant and landlord combatants. The daily scene in the overcrowded and inadequate courtrooms and corridors is warlike: this litigation evokes the most passionate feelings.[59] As long as owners and financiers of private urban housing desire the greatest economic yield with the least investment and without public accountability, often at the expense of tenants' basic human needs for decent shelter at affordable rents, a built-in conflict between human and property interests is ensured. This is particularly evident in a depressed economy, which has made housing scarce or non-existent and produced a landlord's market. The conflict is further exacerbated by overwhelming poverty and exploitation, coupled with racial, language and cultural prejudice and fears.

There are many reasons why the housing court, though possessed of broad statutory powers, is unable to cope with the problems placed before it. Foremost among them is the failure of the city and state to provide leadership or policy commitment for a comprehensive, full-scale attack on code violations, encouragement of rehabilitation and new construction with the necessary public funds and programs in order to offset the historical and traditional landlord remedy of immediate eviction and possession. For example, the court's broad remedial powers to exercise discretionary *sua sponte* sanctions and create programs to effectuate code compliance is dependent upon HPD approval where city funds are required. Such approval by HPD is rarely given.[60] The direct city receivership programs designed to rehabilitate deteriorated housing require HPD initiative and city funds to commence repairs. However, because of the current budget crisis and depressed economy, available funds are limited, if existent at all.

Statutory civil penalties apply only to HPD-initiated housing code violations and exclude actions for violations by other city agencies such as those violations involving health, building or fire departments. Although these city agencies may directly commence civil injunctive actions to compel code compliance, no such actions have been brought in the housing court to date.

Further, there is an unresolved conflict in HPD between the traditional code inspection method of responding to individual tenant complaints and a more selective, multi-building single owner enforcement, a planned

59. *See* E. GOODMAN, THE TENANT SURVIVAL BOOK (1973) (distributed by Women's Law Center, 1414 Sixth Avenue, New York, N.Y. 10019). *See also* Goodman, *Housing Court: The New York Tenant Experience,* 17 URBAN L. ANN. 57 (1979).

60. *See* HDA v. Ruel Realty Co., 94 Misc. 2d 43, 404 N.Y.S.2d 941 (Civ. Ct. 1977).

neighborhood enforcement, block enforcement, or combinations of these approaches.

There is a bureaucratic multiplicity of city agencies with diverse staff, operating administrative responsibilities, authority, funding sources, budget, and specialized programs implementing code enforcement and habitable housing. Each functions independently of one another. The cumulative effect is a lack of cohesion, strategy and leadership prejudicial to public policy and the law guaranteeing habitable housing in the city.

The city lacks a strategy of high priority for rehabilitation of the declining housing stock, utilization of neighborhood skills and resources for planning, upgrading and rehabilitation. The city has only recently launched a program accelerating the vesting of title to abandoned tax delinquent, occupied but uninhabitable buildings within the city.[61] This foreclosure *in rem* program, to be completed in 1980, encompasses 10,000 to 25,000 buildings (75,000 families) under a $100 million federal community development and urban improvement fund.[62] The bulk of these funds will be concentrated in selected communities.[63]

Although this massive program is ambitious, the funds are inadequate and the court and its judges have not been informed by HPD as to the policy planning commitments and program scope. Nor has the court as yet experienced the impact of this program on the statutory habitability rights of tenants and its code enforcement mandate.[64]

The legislature established an isolated housing court structure but failed to supply the funds and the high-priority programs required for a true overhaul of the city's housing stock. It left intact a fragmented, complex and uncoordinated administrative and judicial code enforcement process.

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61. NEW YORK CITY, ADMINISTRATION CODE § D17-4.0 (Supp. 1978-79).

62. Martin, *Can HPD Handle the In Rem Crisis?* WESTSIDER, Nov. 2, 1978, at 3, col. 1; *New York City as Landlord,* N.Y. Times, Dec. 27, 1978, § 1, at 1, col. 4.

63. Bailey, *In Rem: A Catastrophe?* Heights & Valley News, Holiday Season 1978, at 3, col. 3 (publication of Columbia Tenants Union); *Planned Shrinkage Now?* Heights & Valley News, Holiday Season 1978, at 5, col. 1.

64. It appears the new city administration has begun to utilize federal community development funds for 3% mini-loans to renovate older structures and other federal funds for rent subsidies. In addition all new private housing construction, which is on the luxury rent level, is subsidized by a partial, graduated 10-year tax exemption under N.Y. PRIV. HOUS FIN LAW § 421(a) (McKinney 1976). This latter luxury program accounts for about one-third of all new housing starts in the city. *Housing Aided by Governments at 5-Year High,* N.Y. Times, Jan. 15, 1979, § 6 (Business), at 1, col. 1. However, luxury tenants are rarely litigants in the housing court.

Despite innovative efforts by judges to implement the legislative strategy, the traditional preeminent right permitting a landlord's insistence on swift rent payment in a summary eviction proceeding has overshadowed the Act's purposes. Eviction actions based on rent nonpayment constitute the bulk of the court's caseload. For example, the Civil Court Advisory Committee on Judicial Education studied the impleader provision of the statute expressly authorizing joinder of "any person or city agency" to effectuate proper housing maintenance standards and recommended it be narrowly construed to preclude the joinder of any city agency which "presents a possibility of delay" to the landlord and where the entrance of which may adversely affect the character (that is, the summary nature) of the third-party joinder as "more harmonious with other fundamental objectives of summary proceedings." The effect of this recommendation was not to seek housing related procedural changes to effectuate the flexible purposes of the Act, but to let eviction proceed swiftly and to later litigate elsewhere the issue of public assistance for the tenant. The judicial centerpiece remains the landlord's summary relief for rent or possession.

This is further evidenced by judicial administrative insistence upon a rent deposit with the court as an automatic pre-condition for a show cause order or a hearing regardless of a tenant's claim of uninhabitable conditions. Code enforcement is of secondary consequence despite the fact that rent deposits are discretionary, and notwithstanding administrative directives requiring such deposits.[65]

The city comptroller issued a stinging report in January 1979 critical of the effectiveness and efficiency of the housing court and HPD in dealing with maintenance code enforcement as comtemplated by state enabling legislation.[66] The report pointed up the failure of the court to fully utilize the available video computerized data to undertake a comprehensive view of repairs needed for an entire building instead of dealing, as currently, with only a single apartment. Moreover, by rarely exercising its civil penalty powers, the court has diluted such deterrent effect. The report was likewise critical of HPD for its lack of initiative in commencing litigation to enforce the housing code as well as its undue delays in court disposition of such litigation.

The report also found tenant-initiated actions for repairs infrequent and cumbersome, and that there was a lack of initiative by HPD and the court in preparing forms, disseminating printed information, and dis-

65. *See* note 54 and accompanying text *supra.*

66. OFFICE OF THE NEW YORK CITY COMPTROLLER, MONITORING REPORT ON THE PERFORMANCE ANALYSIS OF THE NEW HOUSING COURT (1979).

tributing supportive staff. Additionally, the report noted that court guidelines emphasizing comprehensive removal of serious building violations and encouraging the exercise of tenant rights were insufficient.

While the report urges a broader view of the role of the court in remedying code violations in buildings, the administrative judge views the court and its statutory mandate in more traditional terms as simply a judicial body which presides over adversary proceedings involving housing and unsuited, in the absence of legislation, as a super administrative agency which both prosecutes and adjudicates. Therefore, notwithstanding the new flexible statutory powers, within the internal judicial process an unresolved conflict prevails as to the court's mission and scope of authority in implementing public policy objectives of the Act.

Judicial productivity and effectiveness tend to be measured solely in quantitative dispositional terms which are often unrelated to human, qualitative results. Statistically, the volume of dispositions appears impressive, but in fact most proceedings are summary defaults and the nature or extent of "rehabilitation" is neither compiled nor explained in court reports. Moreover, no evaluative statistics are compiled as to funds expended, publicly and privately, for the "rehabilitation" or repairs required by a court order or stipulation of settlement.

The housing court finds itself frustrated by lack of funds and the absence of supportive administrative and legal staff. Although there is no independent housing court budget, the annual estimated budget for housing court personnel and other services amounts to $2,160,000. The landlord and tenant court filing fees are over double this amount. Revenues, however, are not specifically earmarked but go to the general state treasury.

The advisory council has no staff or independent source of funding. Although it issues an annual report and has recommended some desirable changes, the civil court judges are neither consulted nor informed by the council of its activities. Nor does the council have sufficient tenant representation, and its annual report fails to identify the interest group each member represents.

Bar associations and civic groups have justifiably criticized the court for inadequate courtroom space and inconvenient scheduling of trials and court appearances. Many have pointed out the need for temporary day-care facilities, manual stenographers, faster trials, increased housing judges' salaries, better selection methods and computer access to all types of housing records.[67]

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67. *See, e.g., New York County Lawyers Ass'n Committee Report on the Housing Court*, N.Y.L.J., June 2, 1976, at 6, col. 1; Report of the Advisory Council of the Housing

The remedial civil sanction deterrence concept has proven ineffective. For the first sixteen months of the court's operation, civil penalties were rarely imposed. Contempt orders with civil fines imposed on tax delinquent owners of abandoned but occupied, uninhabitable housing have proven futile either to punish the owner or to remedy violations.[68] Since tenants rarely use their new initiative powers, responsibility to commence civil penalty actions rests primarily with HPD. But the statutory structure in this regard is self-defeating. The necessity for repeated inspections, widely varying compliance periods, and stringent process service requirements result in inordinate delays, continual court appearances and inefficiency in the trial and dispositions of these HPD actions to impose civil penalties. This is in sharp contrast to the swiftness of action and waiver of procedural technicalities demanded by landlords in proceedings to evict tenants. Often, too, the stiff cumulative effect of the penalties dissuades compliance and encourages abandonment. Judges, therefore, exercise restraint in imposing severe penalties. As stated above, the civil sanction concept has not been exercised by health, fire and structural building city agencies.

In practice the court is only an updated version of the former landlord and tenant part, where promises far exceed performance. The court is caught in the cross-fire between the litigants themselves, the small but seasoned landlord bar and the dedicated but diminishing publicly-funded programs providing free legal services for indigent tenants. Nevertheless, despite these free legal services most tenants are unrepresented by counsel in court. Even though the majority of tenants do not receive free legal services, without these legal aid programs, the code enforcement structure and the court operations would collapse.

The result of these problems is that negotiated settlements and compromise on a case-by-case basis have become the order of the day. It is generally agreed that the court is superior to the former system. But sixteen housing judges and five calendar judges in the city cannot daily, by themselves, resolve the unmanageable New York housing crisis.

What has significantly changed is the efficiency of individual dispute resolution and disposition of the enormous volume of summary proceedings. Trial backlog has been substantially reduced. This change was made possible by doubling and tripling the number of judicial personnel, while at the same time increasing flexible remedies, coercive sanctions

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Court of New York City (November 1975); *id.* (May 1976). *See also* Goodman, *Housing Court: The New York Tenant Experience,* 17 URBAN L. ANN. 57 (1979).

68. HDA v. Ruel Realty Co., 94 Misc. 2d 43, 404 N.Y.S.2d 941 (N.Y. Civ. Ct. 1977).

and discretionary powers. However, fulfillment of tenant rights and remedies under law and consistent with the purposes of the Act require much more than rendering a traditional final judgment between adversaries.

A large body of housing court case law has evolved. Ironically, however, there is no organized, indexed, evaluative reference source of published and unpublished decisions.[69]

Assignment to the housing court may not necessarily follow the legislative public policy which provides that, in addition to housing law expertise, the judge should be a person with a "determination to secure the expeditious enforcement of state and local laws concerning the maintenance of proper housing standards."[70]

E. *Toward a Better Court*

In light of the New York experience, and based on the assumption that no legislative action changing private residential ownership to public ownership is anticipated, several considerations toward an improved court can be examined.

First, a city-state comprehensive strategy with adequate funding must be developed to meet the increasing housing crisis. Such action must include a more coordinated and effective code enforcement program to upgrade declining buildings and neighborhoods. The court has a role in this strategy but it is not the sole component.

Centralized and accountable urban leadership must coordinate the diverse administrative and funding components involved in implementing public policy. Without a city-state priority housing commitment, the judicial case-by-case dispute resolution process will continue to be overwhelmed by traditional swift rent collection and eviction demands, and the impact on increasing habitable housing will be negligible.[71]

HPD has vast organizational structure covering at least twenty broad functions, ranging from code enforcement and community development to rent control and *in rem* management, with perhaps fifty sub-bureaus

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69. Only recently the newly appointed administrative Judge Francis X. Smith has instituted a monthly afternoon seminar for judges assigned to the housing court under the direction of Bronx Administrative Judge Benjamin Nolan, assisted by the Chief Housing Court Clerk, Harry Joslin, wherein current published decisions are circulated to all judges.

70. 1972 N.Y. Laws ch. 982, § 1(c).

71. *See* Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future,* 38 FORDHAM L. REV. 225 (1970).

and sections to carry out specialized programs.[72] It is a top-heavy bureaucratic structure under-funded for tangible tenant results on the massive scale required in the city. Moreover, this structure is not coordinated with the city's Human Resources Administration (HRA) which administers public assistance, including rent allocations of hundreds of millions of dollars annually. Welfare rent payments average $160 monthly, less than rent control maximums. In 1976 these figures were estimated to be $100 million short of annual minimum maintenance requirements.[73] The relationship between poverty, welfare, unemployment, racism and uninhabitable housing is intertwined in the daily experience of the court, where it is estimated eighty percent of the tenants are welfare recipients and, unlike most landlords, are unrepresented by counsel.[74] Nor does HPD coordinate its myriad functions with job opportunity and training programs to generate economic development, including housing rehabilitation. Massive job generating housing rehabilitation, in and of itself, if adequately planned and funded, would produce enormous economic growth within the city's economy. The city planning agency, as an overall policymaking mechanism, is structurally disconnected from the HPD hierarchy.

The city-state strategy therefore ought to include affirmative action programs which include mobilization of community resources on a block or neighborhood basis, job opportunity and training programs, government guaranteed low-interest loans, subsidies, cooperative incentives, the coordination of social services and city planning, tenant legal and *pro se* clerical assistance, special single-room occupancy programs, and the exercise of judicial civil sanctions and equitable powers. It is crucial that the strategy blend the components essential to habitable housing and economic growth into a coordinated, concerted, high-priority, adequately funded effort. This is particularly important where a city, like New York, is launched on a massive acquisition program of tax delinquent uneconomic properties[75] involving mostly tenants whose rent funds are

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72. *Department of Housing Preservation and Development: Organization Chart and Program Description,* The City Record, Dec. 13, 1977 & Aug. 21, 1978.

73. *Trapping Welfare Tenants,* N.Y. Times, Jan. 7, 1979, § IV, at 19, col. 1 (Midwest ed.).

74. *See* Marion Seal Corp. v. Queen McCrea, N.Y.L.J., Jan. 11, 1979, at 14, col. 4 (Civ. Ct. Bronx 1979).

75. For a review of a plan and strategy for city-owned properties, see A HOUSING AND NEIGHBORHOOD DEVELOPMENT STRATEGY FOR CITY-OWNED PROPERTIES (1978) (prepared by a task force of elected officials appointed by the New York City Council, R. Messinger, chairperson).

paid by social service. A 1976 law reduced the time for the city to foreclose on tax delinquent properties from three years to one year.[76] In acquiring, under this law, an estimated 75,000 run-down abandoned apartments by 1980, the city warrants code maintenance and habitability relying solely on federal funds, with no financial assistance from the state or city.[77] The court may ultimately be the arena for massive eviction proceedings brought by the city, as the largest slumlord, for the nonpayment of rents.

There is no question that habitable housing and other social problems are largely dependent upon crucial national, state and city policies, particularly nationalization of welfare. The court, however, is faced daily with the impact of the failure of such policies, and is often the last resort for justice.

Second, stricter regulation of landlords should be imposed. One method would be licensing, subject to revocation after due process hearings for persistent violators. Landlords who "milk" properties or operate speculative, under-financed, poorly-maintained properties should be prevented from retaining ownership. It has been suggested that owners post bonds for repairs and maintenance to ensure code standards.

Third, selective code enforcement by neighborhoods should be undertaken, supplementing the usual functions of code enforcement agencies as to individual tenants or building complaints.[78]

Fourth, greater affirmative use of judicial equitable powers and civil sanctions should be made by building, fire and health code enforcement agencies of the city. Moreover, the video computer system should include data on inspections, violations and corrective action taken regarding such local codes. Notwithstanding the 1977 amendment to the Act conferring such enforcement powers on the court, civil recourse and violation video data are still not pursued.

Fifth, tenant groups ought to be better represented on the court's advisory council in the light of public policy warranting habitable housing by residential owners. In addition, a small staff with sufficient funds ought to be allocated to the council to conduct periodic evaluative reviews and reports of the court's efforts to achieve habitable housing. Neither the court, council, nor the state-wide office of court administration has ever conducted such an evaluative study. At most, there are

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76. NEW YORK CITY, ADMINISTRATIVE CODE § D17-4.0 (1977).

77. Goodwin, *City-owned Houses Come Complete with Pandora's Box,* N.Y. Times, Jan. 7, 1979, § IV, at 6, col. 63 (Midwest ed.).

78. *See generally* Phillips, *Residential Rehabilitation Financing: The Elements of a City-Wide Strategy,* 15 URBAN L. ANN. 53, 53-73 (1978).

quantitative dispositional statistics and monthly generalized court compilations of the number of individual apartment rehabilitations, with no explanation whatsoever as to whether such changes were substantial or merely cosmetic in nature.

The council could also address itself to the increasing needs of publicly funded attorneys (Legal Aid Society and Mobilization for Youth) who represent indigent tenants. Most of the tenant litigants are Black, Hispanic, or elderly, and are poor, unemployed and unrepresented by counsel.

Sixth, the legislative mandate providing for *pro se* clerical support staff should be implemented immediately. In addition, social services and HPD ought to have appropriate coordinating staff available in the courthouses to assist judges and litigants to expeditiously resolve disputes and confusion over public assistance entitlement, rent checks, payments, repairs, inspections, etc.

Seventh, minimum guidelines should be established to fix reasonable standards of diminution of rental value for a breach of the implied warranty of habitability. The courts are troubled as to the type of proof necessary to establish damages in this regard. Equitable standards have been rejected as mere opinion, and expert testimony is recognized as economically unfeasible for tenants. The result has been nominal "six cents" tenants awards upon proof of a breach by the landlord thereby, in effect nullifying the statutory mandate.[79]

Eighth, assignment to the housing court should follow the legislative public policy guidelines which provide, in addition to housing law expertise, that the judge ought to be a person with a "determination to secure the expeditious enforcement of state and local laws concerning the maintenance of proper housing standards."[80] Recent statutory and common law changes in landlord and tenant litigation have shifted the emphasis from an owner's independent right to rent as a *quid pro quo* for possession to a mutuality of interdependent obligations and rights. Rent payment is no longer dependent solely on possession but on *habitable* possession. Nevertheless, judges still cling to the former possession-rent payment orientation, thereby producing a chilling effect on tenant habitability rights under law. Therefore, it is essential to assign to the court only those judges who are determined to further public policy and achieve habitable housing.

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79. *See* Steinberg v. Carreras, 74 Misc. 2d 32, 344 N.Y.S.2d 136 (App. Term 1974); Kekllas v. Saddy, 88 Misc. 2d 1042 (Dist. Ct. Nassau 1976).

80. 1972 N.Y. Laws ch. 982, § 1(a).

Ninth, disclosure of individual financial interest or ownership of residential multiple dwellings should be required upon registration with the city, and such data should be computerized for code enforcement purposes. All tenants should be provided with adequate information as to which city agencies receive code complaints. This should be posted conspicuously in buildings. Local laws have been proposed in this regard by the city council for single-room occupancies.[81]

Tenth, all trial courts in the state, including the housing court, ought to be unified into a single trial tier statewide judicial system. This would eliminate current confusing and fragmented jurisdiction between the supreme and the housing courts. It will also remove the "inferior" status of the court in terms of funds, staff and facilities, and the appearance of unequal justice to the litigants involved in a court with the greatest volume of civil litigation in the city. Moreover, within the court itself, it would eliminate the dichotomy between housing and civil court judges. This state constitutional reform has been endorsed by bar associations, civic groups, the media and the governor.[82]

It is clear that the court is not the panacea for quality housing, as the monumental problems and needs involve social and political decisions beyond the ken of the judiciary. However, strengthening the judicial system with statutory civil sanctions and broad equitable powers supported by a city housing strategy of the highest priority is a crucial step toward fulfilling effective code enforcement and habitable housing.

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81. *See* N.Y.C. Council Intro. 554 & 555 (to amend NEW YORK CITY ADMINISTRATIVE CODE §§ D26-41.12 & D26-21.09).

82. *See* continued Court Reform Urged by Carey, N.Y.L.J., Jan. 4, 1979, at 1, col. 2; *City Bar Committee Reports,* N.Y.L.J., April 19, 1979, at 1; Pound, *Principals and Outline for a Modern Unified Court Structure* (1979) (reprint from J. Am. Jud. Soc'y).