

AN ANALYSIS OF LANDLORD—TENANT DISPUTES IN SUBSIDIZED HOUSING

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Any discussion of the legal disputes between landlords and tenants must necessarily examine the underlying causes of these problems. In the case of subsidized housing we must first look at the programs themselves, and the causes of the financial instability that has plagued government housing plans. Second, we must understand that because these programs have not delivered what was promised, both tenants and owners feel they have been treated unfairly. Third, we must recognize that both tenants and owners have looked to the courts to protect their interests and correct the injustices they feel were caused as a result of these programs.

I. THE ROOTS OF THE PROBLEM: GOVERNMENT PROGRAMS AND POLICIES

Section 221(d)(3) and Section 236 of The National Housing Act

When section 221(d)(3) of the National Housing Act was first passed in 1961,¹ the Senate Banking Committee, in reporting on the bill, stated: "The moderate income housing program which would be provided by this bill is designed to enable private enterprise to participate to the maxi-

* President, National Association of Housing Managers and Owners; LL.B., Chicago Kent College of Law, 1929; LL.M., Chicago Kent College of Law, 1930; Ph.D., Harvard University, 1952.

1. 12 U.S.C. § 1715(1976).

num extent in meeting the housing needs of moderate income families." The Committee recognized that "*this is a new and untried approach, which, as time goes on, may require many modifications.*"²

In short, Congress' purpose was to obtain maximum participation by private enterprise in a moderate-income housing program. Such a program would stimulate jobs, thus alleviating the depression in the home building industry at the time. More importantly, it would meet the country's greatest housing need, that of low- and moderate-income families.

To accomplish these purposes, the Government National Mortgage Association (GNMA) was authorized to make direct Below Market Interest Rate Mortgages with a three percent interest rate and forty-year term to approved housing sponsors. To keep rents as low as possible, housing sponsors and investors participating in the program were limited to a six percent return on investment in exchange for very favorable mortgage terms. It is important to note that this program was created in 1961 during a period of low inflation. The subsidy was geared to the mortgage only and not to operating expenses, which were then considered to be a stable factor.

In 1965, in Boston, the Department of Housing and Urban Development (HUD) set the following income limits on eligibility for Section 221(d)(3) housing: for one bedroom, \$5,150 for one person, \$6,250 for couples; for two bedrooms, \$7,350 for three or four people; and for three bedrooms, \$8,450 for five or six people. The maximum allowable rents were set at \$100.50 per month for a one-bedroom, \$116.50 for a two-bedroom, and \$132.50 for a three-bedroom apartment. The ownership was either non-profit or limited dividend (six percent) under the Housing Act of 1961 and the federal regulations. These rents were calculated at twenty percent of the maximum income limits. In order to enjoy the new housing available, many tenants with incomes lower than the maximum paid twenty-five percent, thirty percent, thirty-five percent or even higher percentages of income for rent.

As operating expenses rose, rents increased accordingly. Tenant incomes did not rise proportionately, so that gradually, tenants paying thirty-five percent to fifty percent of income on rents became a common occurrence. When it became clear that the section 221(d)(3) projects were not operating as projected, Congress acted to eliminate some of the early problems by creating the section 236 program. Here again, Congress

2. SUBCOMM. ON HOUSING, SEN. COMM. ON BANKING AND CURRENCY, S. REP. NO. 281, 87th Cong., 1st Sess., as reported in [1961] U.S. CODE CONG. & AD. NEWS 1923 (emphasis added).

reiterated its belief in the importance of a public-private partnership as the best vehicle for providing low- and moderate-income housing:

The Congress declares that in the administration of those housing programs authorized by this Act which are designed to assist families with incomes so low that they could not otherwise decently house themselves, and of other Government programs designed to assist in the provision of housing for such families, the highest priority and emphasis should be given to meeting the housing needs of those families for which the national goal has not become a reality; *and in the carrying out of such programs there should be the fullest practicable utilization of the resources and capabilities of private enterprise...*³

The mortgage interest rate was lowered to an effective one percent, but the impact on tenants of rapid increases in operating expenses, especially utilities expenses and property taxes, and the root problem of project viability still remained unaddressed.

Under sections 221(d)(3) and 236 of the housing programs, HUD required that projects be rented on a preferential basis to people at the lower end of the income scale. This means that most tenants initially paid between twenty-five percent and thirty-five percent of their incomes for rent. When inflation and skyrocketing operating costs raised rents, HUD's solution to this problem was to increase the income limits for admission to the developments. But HUD failed to consider three important factors. The people already living in the developments moved in under much lower income limits, under HUD rules most tenants are on the verge of being "under income" at the time they move in, and because of inflationary increases in fuel, utilities and taxes, rents were rising out of the reach of more and more current residents of these projects.

In the 1977 Senate Housing Subcommittee hearings on distressed subsidized housing, the National Association of Housing Managers and Owners presented an analysis of what happened to the working poor and lower economic groups:

II. ANALYSIS⁴

In 1965, the maximum incomes for Section 221(d)(3) were set as shown

3. 12 U.S.C. §§ 1701(g)-1715 (1976).

4. *Hearings on S. 741, S. 1078, S. 1144, S. 1145, and S. 1246 Before the Senate Comm. on Banking, Housing and Urban Affairs*, 95th Cong., 1st Sess. 600 (1977) (statement of the Nat'l Ass'n of Housing Managers and Owners) [hereinafter cited as *1977 Hearings*].

below. HUD encouraged management to seek tenants for whom the rent would equal no more than thirty-five percent of their income. If we use this thirty-five percent limit for comparison purposes between then and now in Boston:

Original monthly rents for typical project in Boston according to the FHA Form 2458 signed Oct. 14, 1966		1979 HUD rents for typical projects		Percentage Increase
One bedroom (one or two people)	\$100.50	One bedroom	\$175.00	84
Two bedroom (three or four people)	116.50	Two bedroom	198.00	69
Three bedroom (five or six people)	132.50	Three bedroom	210.00	58
Maximum annual income limits for typical project in Boston according to FHA Form 1729 signed Oct. 17, 1966		Present maximum annual income limits for 1979:		Percentage Increase
1 person	\$5,150.00	1 person	\$ 7,800.00	51
2 people	6,250.00	2 people	9,500.00	52
3 & 4 people	7,350.00	3 & 4 people	11,200.00	52
5 & 6 people	8,450.00	5 & 6 people	12,900.00	53
The minimum allowable annual income based on no more than 35% of a person's income going towards rent		Present minimum allowable income based on no more than 35% of a person's income going towards rent		Percentage Increase
Small one bedroom	\$3,257.16	One bedroom	\$ 6,000.00	84 to 87
Large one bedroom	3,445.68			
Two bedroom	3,994.32	Two bedroom	6,788.52	69
Three bedroom	4,542.86	Three bedroom	7,200.00	58

Using thirty-five percent as the maximum percentage of a person's income allowable for rent, rent increases in the Boston area HUD projects would require tenants to have experienced corresponding income increases of eighty-five percent for one bedroom, sixty-nine percent for two bedrooms, and fifty-eight percent for three bedrooms.

Additional Subsidies

In late 1974 Congress enacted section 212 of the Housing and Community Development Act of 1974. Section 212 reflected Congress' recognition of the harsh impact rising utility costs and real estate taxes had upon

a section 236 project's operating expenses. By enacting the operating subsidy, Congress demonstrated its awareness of the excessive rental burden on tenants of subsidized housing. The operating subsidy attempted to alleviate some of the burden for tenants paying more than thirty percent of their incomes for rent. Offered to section 236 developments, the 1974 operating subsidy covered the portion of any rent increase directly attributable to increased tax and utility costs which rises above thirty percent of a tenant's income. In 1977, Congress expanded the operating subsidy to cover the difference between costs of utilities and real estate taxes at the time the project was rented and the current costs of these operating expenses.

The operating subsidy was only a partial solution, for by virtue of the narrow nature of the benefit offered, many tenants would still pay between thirty-five percent and fifty percent of income for housing. Furthermore, the operating subsidy is funded only by excess rental income flowing into HUD. Such excess income is sufficient to fund only about ten percent of the projects needing the subsidy.

Meanwhile, during the same time period, investor faith in government housing programs was severely shaken because of problems beginning to receive public attention. To promote investor confidence and to stimulate new housing construction, Congress enacted the section 8 Rental Assistance program.⁵ Under section 8, the federal government guaranteed the difference between twenty-five percent of a tenant's income and the actual amount of rent needed to cover operating costs and full debt service. New projects were granted section 8 commitments prior to construction so that investors were protected from the pitfalls faced by earlier investors and tenants were protected from rents rising out of their financial reach.

The lion's share of section 8 funding was allocated to new construction to stimulate housing production and the construction industry during a period of severe economic recession. A small portion was allocated to existing projects. Nevertheless, priority for this funding was given to newer developments to prevent them from experiencing the deep financial difficulties suffered by older projects. Eventually some assistance was earmarked for so-called "distressed properties," those which had failed to meet debt service requirements and thus had their mortgages assigned to HUD. However, by the time this assistance became available, the need far surpassed the funding supply, and many projects which could have been restored to viability with a timely infusion of section 8 funds were foreclosed and sold by HUD. Many more were left in limbo, threatened

5. Housing and Community Development Act of 1974, 42 U.S.C. § 1437f (1976).

by HUD foreclosure and were uncertain of receiving any kind of assistance.

Assistant Secretary Lawrence B. Simons of HUD testified before the Senate Committee on Banking, Housing and Urban Affairs of the 95th Congress on October 17, 1977 as follows:

On a national basis, multifamily subsidized projects account for roughly 40 percent of the total volume of 14,000 FHA projects with insurance in force. At the same time, they account for about half of the 2,600 projects now in financial difficulty. Specifically, we have identified 1,366 projects, in three stages of distress:

- 204 projects in the HUD-owned acquired property inventory;
- 950 projects in which the mortgage has been assigned to HUD or the project is in the process of foreclosure; and
- 212 projects in serious default, posing potential insurance claims.

An estimated 154,724 families live in these projects which were originally insured under Section 236 and 221(d)(3).

Our Task Force has concluded that if present trends continue unchecked, HUD's inventory of troubled projects could rise to more than 3,000 projects, that is 342,000 units by 1982. This would be the equivalent of roughly two years of new construction of government assisted apartment units. According to our findings, HUD could easily find itself the owner of 1,286 of these projects—an estimated 150,000 units.

Losses to the insurance fund alone would be in excess of \$3 billion.⁶

Secretary Simons' testimony was limited to a basic financial inventory, the assessment of subsidized housing problems, and their eventual financial consequences to HUD. However, in examining the legal disputes which arose from the failures of these programs, we first must look at the consequences in human terms.

III. THE SEEDS OF DISCONTENT: HUD AND UNFULFILLED EXPECTATIONS

The obvious conclusion from Secretary Simons' testimony is that the government has failed to keep pace with the problems of those people who accepted the government's invitation to participate in the rental housing program. The government has not provided sufficient funds to

6. 1977 Hearings, *supra* note 4 (testimony of Lawrence Simons).

maintain its avowed purpose of providing a "decent home and suitable living environment" for those people promised help. Instead, programs feasible at inception did not work as projected because of unanticipated economic factors such as inflation and recession. In some ways, the partial programs have been worse than none, because they engendered unrealistically high expectations in many needy persons.

No remedy has been forthcoming. Increased expenses cannot be met by the tenants and are not met by the government. The owner-investors are threatened with foreclosure because they accepted the invitation of Congress to participate in furnishing good housing for low-income tenants. The government raised expectations by publicizing programs that sound good in concept, but in practice add to frustration and confrontation between tenants, landlords and government officials. Most people living in less-than-desirable housing manage to adjust themselves to their circumstances. Once freed from poor conditions to enjoy a better quality of life and environment, they understandably resist returning to poorer conditions. When tenants can no longer afford the rent levels needed to maintain the decent housing they were promised, they become angry, disgruntled and ready to lash out at the program administrators. In Boston, the organization of rent strikes and violent resistance to evictions led to long, protracted litigation.⁷

Owners' Expectations

The conventional housing investor is concerned with making a "good investment." So long as he feels the long-range value is positive, he is generally inclined to meet intervening short-range problems. The typical investor hopes to benefit from appreciation in the property's value, or at the very least, he hopes to own a property that keeps up with inflationary changes. He is, of course, subject to variations of increasing or decreasing neighborhood values, and to the pressures of a competitive rental market. These are the risks he assumes and still expects to overcome.

Land location usually determines whether or not he will invest. In conventional construction, land costs are normally two to five times greater than the usual cost of land deemed suitable for low-income housing. The conventional investor is willing to pay the higher price because the location is attractive to people in higher income groups, and because the land is likely to appreciate rather than stagnate or deteriorate in value. Having selected the land, the conventional investors generally build the best development they can build within the mortgage limits, and often add extra

7. 1977 Hearings, *supra* note 4, at 2.

funds to assure the development's success. The investors ask "How many amenities can be added now for future gains within currently acceptable rent requirements?"

The financial requirements of low-income housing programs such as sections 221(d)(3) and 236 of the Housing Acts, as well as HUD regulations, presume that program investors are similarly situated and motivated. Unlike conventional landlords who can charge "whatever the traffic will bear," subsidized rental housing investors have a maximum allowable dividend of six percent and are subject to restrictions regarding the amount of rent charged and the income and family composition of tenants.

Developers may be willing to accept a limited return in exchange for low interest subsidized mortgage rates and for special tax shelter provisions passed by Congress specifically to induce private investment in low-income housing.⁸ Thus, in order to attract private investors, the government offers personal tax benefits and reduces one of the essential "cost" items ordinarily carried by the developer, mortgage servicing payments. In return, the developer and investors agree to limit their profits to a maximum of six percent and to submit to certain government-imposed regulations.

Unlike conventional investors, those who invest in low-income housing face the added risk of restricting their purchase of land to a less desirable and less expensive location, which is more likely to depreciate in value. They are also limited as to the range of amenities they can offer.

Disappointment and Frustration

The confidence of owners and investors has been shaken because the programs have not lived up to expectation. Many investors have lost a great deal of money through foreclosure, some are receiving no dividends on their investments, and the risk of foreclosure threatens still more. If Congress is to depend on the private sector for supporting subsidized housing, it must take positive steps to see that mutual trust and confidence are restored.

At the same time, the government has a responsibility to tenants. It has promised higher living standards to low- and moderate-income families. Due to economic factors beyond their control, these families are losing whatever gains they have made over the past few years.

8. See I.R.C. §§ 1250 & 167(k). See also Halliday, *Low-Income Housing Shelters: Are Municipal Bonds a Better Investment from a Tax Viewpoint?* 6 J. REAL EST. TAX 143 (1979); Tucker, *Real Estate Depreciation: A Fresh Examination of the Basic Rules*, 6 J. REAL EST. TAX 101 (1979).

Preserving the national rental subsidized housing program with private investment requires a three-way partnership agreement between government, owners and tenants. The government is failing to uphold its part of the agreement, creating a loss of faith among owners and dissension between owners and tenants. Owners, who are more accessible and more easily identifiable than the government bureaucracy, have borne the brunt of housing program failures. Tenants blame owners for rising operating costs and rents, while at the same time the government exerts financial pressure to keep rents high enough to support operating costs and full debt service. Through rental assistance programs such as section 8, the government has the means to restore confidence, repair deficiencies, and reduce the pressures and dissension between landlords and tenants. Yet this assistance has been granted to relatively few projects.⁹

The government's present subsidized housing programs have frustrated tenants and owners. Tenants invited to participate since 1962 are facing impossible demands for rent increases to meet the rapid rise in expenses. Owners who were encouraged to enjoy tax shelter benefits in return for their help with the housing problem are now the messengers with bad tidings. General inflation and the concomitant rise in operating expenses have resulted in rent increases greater than the ability of tenants to pay, and that inability in turn has caused owner-landlords to face defaults in their mortgages. Though a 1971 HUD study predicted this situation,¹⁰ HUD has yet to assume responsibility. In the writer's opinion, if HUD were a private organization, the fact that it did not disclose to potential investors its own prediction that projects would default because operating expenses were rising faster than tenants' income, would create liability under the SEC's "full and fair" disclosure rules. Yet HUD is proceeding with many foreclosures, and still more are threatened.¹¹

In foreclosure, investors not only lose their cash investment but also are required to pay back in one lump sum the deferred taxes which they "sheltered" at Congress' invitation.

9. In one Massachusetts development, almost half the tenants withheld all or a portion of their rents because of their inability to meet constantly increasing rents. After 18 months of bitter litigation between tenants and the owner, during which time most of the tenant claims, including claims based upon alleged conditions violating health and safety standards, were determined to be unfounded, the development was awarded § 8 rent subsidies. As a consequence, the pending litigation, at the request of the tenants, was terminated, and all claims made by the tenants dropped. The tenants agreed to pay the past due rent and legal fees in monthly payments in addition to their rents.

10. U.S. Dep't HUD, *The Relationship Between Housing Production and Housing Policy* (1977) (unpublished study made by the Deputy Undersecretary for HUD).

11. In *Kent Farm Company v. Carla Hills*, 417 F. Supp. 297 (D.D.C. 1977), the court

The questions before HUD are:

- Whether it will equalize the subsidies for the older, in-residence tenants with the newer subsidy programs, recognizing the difference between subsidized housing projects (where income and expectation limitations created the defaults), and conventional and upper income projects where the landlords essentially assumed a "market risk," and,
- Whether consideration will be given to rent restrictions and limits, and to changing expense-to-income ratios.

The National Association of Housing Managers and Owners has proposed a law which would prevent foreclosures where the housing was serving community needs and the management was not deficient.¹²

stated:

While the project undoubtedly lacks financial promise, this alone is not enough to justify foreclosure. In exercising its admitted discretion, HUD must show more than a legal right to foreclose. HUD is not simply a banker. Before it acts because of default on a project clearly otherwise meeting housing objectives it must consider national housing policy and decide what further steps authorized by Congress it will take to assure continuity of the decent, safe, sanitary low-cost housing then being provided. This it has apparently failed to do. There is, for example, no plan for operating and managing the property after foreclosure, no allocation of Section 8 funds to it, no arrangement with local public housing authorities.

Note that the above statement is made from the tenants' point of view. The writer believes the Housing Acts should be consulted before banker-like foreclosure action is taken against owner/investors who entered the housing programs in good faith and are carrying out their responsibility by giving good management service to the tenants. *See U.S. v. American Nat'l Bank*, 443 F. Supp. 167 (N.D. Ill. 1977)

12. The law would amend 12 U.S.C. § 1713 by adding the capitalized words beginning with "PROVIDED."

ACQUISITION OF PROPERTY BY CONVEYANCE OR FORECLOSURE

(k) The Secretary is authorized either to (1) acquire possession of and title to any property, covered by a mortgage insured under this section and assigned to him, by voluntary conveyance in extinguishment of the mortgage indebtedness, or (2) institute proceedings for foreclosure on the property covered by any such insured mortgage and prosecute such proceedings to conclusion: *PROVIDED*, THAT NO PROCEEDINGS FOR FORECLOSURE SHALL BE INSTITUTED WHERE THE PROPERTY COVERED BY ANY SUCH INSURED MORTGAGE IS SERVING THE POLICY OF THE NATIONAL HOUSING ACT, AS SET FORTH IN SECTIONS 1441 and 1441A of TITLE 42, BY PROVIDING SAFE AND SANITARY LIVING QUARTERS FOR LOW- AND MODERATE-INCOME FAMILIES AT BELOW MARKET RENTS, *UNLESS* THE SECRETARY SHALL DETERMINE THAT THERE EXISTS A SURPLUS OF SAFE AND SANITARY LIVING QUARTERS FOR LOW- AND MODERATE-INCOME FAMILIES AT

Due to the government's failure to resolve satisfactorily the important problems faced by tenants and owners, both groups have become increasingly disappointed, frustrated and even combative. Both feel they have been treated unfairly and, in the absence of positive solutions from HUD or of any other viable alternative, both have, in increasing numbers, brought the matter to the courts for adjudication.

IV. HOUSING EXPERIENCE IN THE COURTS

As operating expenses rose steeply, especially after the recent drastic increases in heating costs, owners raised rents to meet mortgage payments. In luxury housing, tenants faced with such increases accepted the changes in their rent-to-income ratio, or moved to less expensive housing in due course. To move from one luxury unit to a more modest unit of the same class was not a great hardship.

In federally subsidized housing, where the ability to move to "decent, safe, and sanitary housing" was not readily available, tenants and tenant-aid societies raised a hue and cry that these tenants, the beneficiaries of government aid, were being forced to leave their homes because of high rents they could not afford.¹³ In public housing, the "Brooke Amendment" limited rents payable to twenty-five percent of the tenant's income.¹⁴ Subsidized housing tenants believed they were entitled to similar treatment. Once the government had undertaken to make housing available, tenants expected housing to remain within their financial reach. When these expectations were frustrated, tenants resorted to rent strikes and protracted legal defenses to evictions.

In 1973, in *Boston Hous. Auth. v. Hemingway*,¹⁵ the Supreme Judicial

COMPARABLE RENTS IN THE HOUSING MARKET SERVED BY THE PROPERTY. The Secretary at any sale under foreclosure may, in his discretion, for the protection of the General Insurance Fund, bid any sum up to but not in excess of the total unpaid indebtedness secured by the mortgage, plus taxes, insurance, foreclosure costs, fees, and other expenses, and may become the purchaser of the property at such sale. The Secretary is authorized to pay from the General Insurance Fund such sums as may be necessary to defray such taxes, insurance, costs, fees, and other expenses in connection with the acquisition or foreclosure of property under this section. Pending such acquisition by voluntary conveyance or by foreclosure, the Secretary is authorized, with respect to any mortgage assigned to him under the provisions of subsection (g) of this section, to exercise all the rights of a mortgagee under such mortgage, including the right to sell such mortgage, and to take such action and advance such sums as may be necessary to preserve or protect the lien of such mortgage.

13. 1977 Hearings, *supra* note 4, at 4.

14. Housing and Urban Development Act of 1969, § 213, 42 U.S.C. § 1402(1) (1976).

15. 363 Mass. 184, 293 N.E.2d 831 (1973).

Court of Massachusetts abolished the precedents of "independent covenants" for habitability and rents and found an "implied" warranty of habitability in a rental apartment.¹⁶ The legislature also acted to improve the tenants' position.¹⁷

Furthermore, the Sanitary Code of the Commonwealth of Massachusetts reflected the new tenant-protection approach.¹⁸ All the aforemen-

16. *Id.* at 199, 293 N.E.2d at 843. The modern view favors a new approach which recognizes that a lease is essentially a contract between landlord and the tenant wherein the landlord promises to deliver and maintain the demised premises in habitable condition and the tenant promises to pay rent for such habitable premises. These promises constitute interdependent and mutual considerations. Thus, the tenant's obligation to pay rent is predicated on the landlord's obligation to deliver and maintain the premises in habitable condition. *Id.* at 198, 293 N.E.2d at 842.

17. MASS. GEN. LAWS ANN. ch. 239, § 8A (Michie/Law. Co-op Supp. 1978), which states in part:

In any action under this chapter to recover possession of any premises rented or leased for dwelling purposes, brought pursuant to a notice to quit for nonpayment of rent, or where the tenancy has been terminated without fault of the tenant or occupant, the tenant or occupant shall be entitled to raise, by defense or counterclaim, any claim against the plaintiff for breach of warranty, for a breach of any material provision of the rental agreement, or for a violation of any other law. The amounts which the tenant or occupant may claim hereunder shall include, but shall not be limited to, the difference between the agreed upon rent and the fair value of the use and occupation of the premises, and any amounts reasonably spent by the tenant or occupant pursuant to section one hundred and twenty-seven L of chapter one hundred and eleven and such other damages as may be authorized by a law having as its objective the regulation of residential premises

There shall be no recovery of possession under this chapter if the amount found by the court to be due the landlord equals or is less than the amount found to be due the tenant or occupant by reason of any counterclaim or defense under this section. *If the amount found to be due the landlord exceeds the amount found to be due the tenant or occupant, there shall be no recovery of possession if the tenant or occupant, within one week after having received written notice from the court to the balance due, pays to the clerk the amount due the landlord, together with interest and costs of suit less any credit due the tenant or occupant for funds already paid by him to the clerk under this section. In such event, no judgment shall enter until after the expiration of the time for such payment and the tenant has failed to make such payment. Any such payment received by the clerk shall be held by him.* (emphasis added)

18. MASS. SANITARY CODE, REGULATION 29 (1977). (Violations which may endanger or materially impair the health or safety, and well-being of an occupant.) The regulation states:

29.1 Any one or more of the conditions specified in Regulation 29.2, when found to exist in residential premises, shall always be deemed to be a condition which may endanger or materially impair the health or safety, and well-being of an occupant. The

tioned conditions may occur occasionally in any apartment building and they are usually remedied in due course. However, the fact that any of these requirements might not have been met at a particular time during tenancy can be used as defenses and offsets to rents.¹⁹ Thus, an ordinary equipment breakdown although acted upon promptly, may require a period of time to return to full operation and could suffice as an eviction defense. All of the legal proceedings necessary to determine whether the violations existed and whether the rent was more than the amount the tenant claimed as an offset would delay the case until one week after the initial finding on the counterclaim.²⁰ The criterion of conditions which "may endanger or materially impair the health or safety" encourages miniscule tenant claims and resulting delays in court proceedings.

Applying the Statutes in the Courts

The variety of available defenses leads to drawn out, complicated

conditions specified in Regulation 29.2 are specifically not intended as an exhaustive enumeration of such conditions. In addition to the conditions specified in Regulation 29.2, the inspector shall determine if any other violations of Regulations 2-18 are conditions which may endanger or impair the health or safety, and well-being of an occupant.

29.2 The following conditions when found to exist in residential premises, shall be deemed conditions which may endanger or impair the health or safety, and well-being of a person or persons occupying the premises.

(d) Failure to provide a supply of water sufficient in quantity to meet the ordinary needs of the occupant and from a safe water supply, as required by Regulation 4.1. In determining whether or not such a condition exists the inspector shall examine the plumbing system and its actual performance. (If possible, such examination shall occur at the times the occupant has identified the system as being insufficient.)

(e) Failure to provide and maintain in good working order facilities capable of heating water, or the failure to supply hot water within the temperatures provided for or in the quantity and of the pressure sufficient to meet the ordinary use as required by Regulation 5.1. In determining whether such a condition exists, the inspector shall examine the hot water system and its actual performance. (If possible, such examination shall take place at the times the occupant has identified the system as being insufficient.)

(f) Failure to provide and maintain a heating system in good operating order as required by Regulation 6.1; or a failure to provide heat as required by Regulation 6.2 and Regulation 6.3; or improper venting or use of a space heater or water heater as prohibited by Regulation 6.4 and 6.5.

(i) Shut-off or failure to restore water, hot water, heat, electricity or gas.

(o) Failure to maintain a dwelling or dwelling unit free from rodents, cockroaches and insect infestation or failure to provide screens as required by Regulation 14.

19. MASS GEN LAWS ANN ch. 239, § 8-A (Michie/Co-op. Supp. 1978).

20. *Id.*

court proceedings to evict a tenant for non-payment of rent. Under the statute, all damages must be determined and balanced against the rent. If, after the balance is reached, the amount due for rent is greater than the tenant's claim, the tenant may pay the balance he owes to the landlord into the court. If the tenant pays the balance within one week after the order is entered, he cannot be evicted.²¹ Thus, a tenant can successfully defeat an eviction by showing any slight violation which "materially impairs" habitation. If there is no violation which "materially impairs health and safety," the tenant can still avoid eviction simply by paying rent due after the lengthy resolution in court of the respective claims. Although his true reason may be lack of money to pay, he nevertheless can remain in possession during all the proceedings, including up to one week after the court finds rent due the landlord, and the landlord is by statute denied the ability to enforce collection of rent during the pendency of the claim.²²

Due to a backlog in the courts, months could pass before the tenant is ordered to pay anything into the court as rent. The issue of the existence or non-existence of health code or other violations must be litigated first. Interrogatories, depositions, discovery and pre-trial hearings, as well as the delay in being assigned a full hearing date in an already overburdened housing court, all spell endless delay.²³

Appeals Statute

In 1977, the issue of timeliness of summary process appeals in Massachusetts was excised from chapter 231, section 97²⁴ and transferred to

21. *Id.*

22. As a practical matter, this usually means that the rent not collected is lost forever because the tenants lack the financial resources to make *any* payments on account of the accumulated arrears, particularly if they have vacated.

23. The Greater Boston Legal Assistance project prepared mimeographed forms filed automatically in all eviction cases which raised numerous "materially impairs" defenses. In *Brandywyne v. Ruggiero*, a typical case filed July 21, 1976, there were 37 defenses filed. Defendant asked for all 400 tenant files to show notice of defects to landlord. Court granted a protective order. There were 62 docket entries in court on January 19, 1978—18 months later. From April 14, 1977 to January 1978, there were protracted hearings before the master. The tenant then received section 8 help and abandoned all claims of violations agreeing to pay the past due rent plus attorneys' fees in monthly payments in addition to his rent. In *Camelot v. Silver* and *Camelot v. Smith*, after similar motions lasting 18 months, the Housing Court judge ordered the tenants to file detailed affidavits as to the defects—when they appeared, to whom reported, etc. When the tenants failed to file these, the judge ordered their defenses stricken.

24. Until 1973 the tenant was required to file an appeal from summary process within twenty-four hours from the time the trial court entered judgment. *See* MASS. GEN. LAWS

chapter 239, section 5²⁵, which deals with appeal bonds and summary process actions. Currently, the appeal time is ten days, and the judgment cannot be enforced until after the appeal is decided. Ordinarily, the defendant must file an appeal bond, but "if the defendant has insufficient funds available to himself or his family to furnish the necessary bond or security without depriving himself or his family of the necessities of life," he may make a motion to waive the appeal bond. "The court shall require any person for whom such bond or security has been waived to pay in installments as the same becomes due, pending appeal, all or any portion of any rent which shall become due after the date of such waiver."²⁶

Again, after lengthy delays before the decision in the *nisi prius* court, the landlord must wait for resolution of the appeal. Meanwhile, the tenant will pay such rent as the judge shall set. In practice, this usually means whatever the tenant can afford, even if not adequate to meet the owner's operating expenses. Note that if the judge were to set a rent higher than the tenant could afford, the tenant would have to vacate the apartment before a decision on what might be a meritorious appeal.

Who Bears the Burden?

The intent of the new statutes and decision was to ensure safe and comfortable housing for tenants. The new laws favor the poorer and more helpless litigants. A tenant who cannot pay his rent does need help, but the real question is whether the landlord of that indigent tenant should bear the economic loss, or whether the government should absorb that burden. The humanitarian overlay of the statutes and decisions have created lengthy and unreasonable delays in the ultimate adjustment of rights between landlord and tenant. Gladstone observed that "justice delayed is justice denied."²⁷ Yet the legislature has mandated changes in the law providing manifold opportunities for delaying and subverting judicial process, possibly because legal systems and legal order follow the sentiments and mores of the times. Perhaps, the Bible, the fundamental document on social justice, needs re-reading.²⁸

ANN ch. 231 § 97 (Michie/Co-op. 1974). This section was amended in 1973 to extend the appeal period to six days. *Id.*

25. MASS GEN LAWS ANN. ch. 239, § 5 (Michie/Co-op. Supp. 1978).

26. MASS GEN LAWS ANN. ch. 239, § 8-A (Michie/Co-op. Supp. 1978).

27. Quoted in T. EDWARDS, THE NEW DICTIONARY OF THOUGHTS (1954).

28. See *Leviticus* 19:15 (you shall not favor a poor man because he is poor, nor a rich man because he is powerful).

Roscoe Pound postulates:

A legal system attains the ends of the legal order (1) by recognizing certain interests, individual, public and social; (2) by defining the limits within which those interests shall be recognized and given effect through legal precepts according to an authoritative technique; and (3) by endeavoring to secure the interests so recognized within the defined limits.

For the present purpose an interest may be defined as a demand or desire or expectation which human beings, either individually or in groups or associations or relations, seek to satisfy, of which, therefore, the adjustment of human relations and ordering of human behavior through the force of a politically organized society must take account.²⁹

Have consumerism and compassion for the poor gained such influence over the last decade that tenants' demands, desires, and expectations are the only adjustment of human relations that the courts can take into account?

The courts should recognize that residence in a house or apartment should be within the required health and comfort standards, and that owners who provide the residence must maintain these standards. There must be an additional underlying expectation that the housing conditions will never fall below required standards, even though the cause may be unexpected or unavoidable. This expectation must be reconciled with the landlord's expectation that, having complied with health, comfort and maintenance standards, he can expect the rent to flow in an orderly manner so that he can meet mortgage payments and expenses, and earn a return on his investment.

In luxury apartments, these interests are readily reconcilable. The tenant who cannot afford an increase in rent easily moves to another less expensive apartment. The tenant living in subsidized housing, where rents have risen beyond his income, finds no such easy alternative.

England appears to have reconciled these interests in an orderly and efficient court process. The English social service procedure and court eviction proceedings are tied together. Under the English law of landlord and tenant, the court must assure that suitable alternative accommodation is available to the tenant who cannot afford the rent. There is no pressing need for delay and obfuscation. In effect, English law as applied to tenants on welfare or in controlled housing (the equivalent of our HUD sub-

29. 5 R. POUND, JURISPRUDENCE, III-16.

sidized or otherwise rent-controlled housing) requires that the entire problem be brought into court. The court must be involved in determining the fate of the tenant.

Thus, if we followed the English system, legal aid lawyers could be involved more constructively by solving the tenant's problem instead of concentrating on ingenious defenses to delay evictions. If the tenant were to lose his job or become a welfare client, housing would become a welfare problem, not an owner's problem. The social or welfare worker would be subjected to court scrutiny. The court would be meeting the social problem in the best traditions of law and procedure rather than coping with obfuscations and delays in judicial proceedings. The tenant would feel that everyone in government service was concerned with doing the utmost to help with his problem.

In the United States, the presence of housing courts is a step in the right direction. There are additional alternatives. For example, Cambridge and Springfield, Massachusetts, housing authorities have divisions called housing services, which are crisis-intervention alternatives.³⁰ When the manager of a public housing project feels that a tenant's difficulties might lead to eviction, the manager contacts housing services. Massachusetts, under the auspices of the American Bar Committee on Housing and Urban Development Law, is working to set up a legal volunteer group similar to one in Denver, Colorado, to mediate landlord/tenant disputes and to report to the court.³¹ It is contemplated, however, that the Massachusetts mediator would also look into the social service aspect of finding new shelter when required, and report this finding to the court. This last step would bring Massachusetts closer to the English system by injecting compassion and humanity into the judicial procedure.

V. RECOMMENDATIONS

This paper has recounted old expectations and new interests held by tenants and the public which have interfered with an orderly procedure in the courts. The following are the remedies recommended:

1. In subsidized housing, confront the problems of those originally invited to share the benefits, and provide them equal treatment given newer beneficiaries by giving them the benefit of the subsidies in the later laws.

30. See generally Croteau, *Housing Specialists in the Hampden Housing Court*, 17 URBAN L. ANN. 85 (1979).

31. See Ebel, *Landlord-Tenant Mediation Project in Colorado*, 17 URBAN L. ANN. 279 (1979).

Specifically, section 8 or operating subsidies should be granted to replace or add to the section 221(d)(3) and section 236 subsidies.

2. Recognize the difference between market rent ownership and limited dividend ownership with respect to the limitations placed on the owners by HUD rules which limit the available solutions for defaulted projects.

3. The courts should assume full jurisdiction over a tenant's problem, including alternative residence and social agency responsibility. The courts should utilize mediation methods to assess the problem and correct deficiencies, or arrange for suitable accommodations elsewhere for a tenant whose income is insufficient to cover rental payments on the present dwelling unit.