RESIDENTIAL REHABILITATION AND RENT CONTROL: THE MASSACHUSETTS PRIORITY

A critical problem surrounding the rebuilding of American cities is the resulting dislocation of lower-income residents to whom urban dwellings "filter" down.[1] After rehabilitation has occurred, the prior low-income occupants must compete for the restored shelter with persons of higher income whom the restoration was designed to attract.[2] Their lack of economic means to compete causes the seemingly unjust result of dislocation. The alternative is to prevent economic competition in the housing market, thus dampening incentive to return capital investment to the cities.[3] In Boston, demand from both high- and low-income persons has raised rents and increased the incentive to rehabilitate older homes.[4] Rent control legislation was enacted to shield the low-income residents from the higher rents resulting from this demand.[5] In *Mayo v. Boston Rent Control Administrator*[6] the Supreme Judicial Court of Massachusetts found that the intent of this act was also to protect low-income tenants from the threat of eviction for

1. *See* R. WEAVER, DILEMMAS OF URBAN AMERICA 69-72 (1965). *See also* B. BARRON & E. BARRON, THE INHUMANITY OF URBAN RENEWAL (1965). "Filtering" describes the process by which housing is passed from higher to lower income groups as it ages. This phenomenon has occurred in American cities as wealthier groups migrated to the suburbs. D. MANDELKER & R. MONTGOMERY, HOUSING IN AMERICA: PROBLEMS AND PERSPECTIVES 225-26 (1973). *See* Hirsch, Hirsch & Margolis, *Regression Analysis of the Effects of Habitability Laws Upon Rent: An Empirical Observation on the Ackerman-Komesar Debate*, 63 CALIF. L. REV. 1098, 1117-18 (1975).

2. *See* R. WEAVER, *supra* note 1.

3. Rent control has been shown to halt capital investment in housing. For example, while rent control was maintained in France no new housing was constructed. F. HAYEK, THE CONSTITUTION OF LIBERTY 344 (1972). Recently the United States Department of Housing and Urban Development, in basic agreement with the findings of the French study, issued a statement that "local rent control [in the United States] is a significant factor in causing owners of FHA projects, especially subsidized projects, to default on their mortgage payments." HUD Press Release No. R-75-314 (Feb. 26, 1975). *See also* Kosoff, *Incentives for Urban Apartment Construction*, 32 AM. J. ECON. & SOCIOLOGY 295 (1973).

Rent control has been considered a deterrent to renovation as well as to construction of housing: "[building codes] and rent controls were two causes for owners' hesitancy to remodel in New York City. Simultaneously, ability to free buildings from controls by demolition and rebuilding encouraged the leveling of many fine residences." C. ABRAMS, THE CITY IS THE FRONTIER 190 (1965).

4. U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, ANALYSIS OF THE BOSTON, MASSACHUSETTS HOUSING MARKET 6-7 (1971).

5. Act of Aug. 31, 1970, ch. 842, [1970] Mass. Act & Resolves 732.

6. ___ Mass. ___, 314 N.E.2d 118, 122 (1974).

rehabilitation. In doing so it focused on the conflict between reasonably priced housing for low-income people and the need and cost of rehabilitation as a housing strategy.

In *Mayo* an apartment building owner applied to the Boston Rent Control Administrator for certificates of eviction against twenty-one tenants under Section 9(a)(10) of the Massachusetts Rent Control Act, which permits eviction for "just cause."[7] The landlord planned to renovate the apartments, located in an urban renewal area, from low- and moderate- to high-income dwellings. The Administrator's allowance of the landlord's request[8] was reversed by the housing court, which held that eviction for optional upgrading was inconsistent with the Act's purpose of assuring housing for low- and moderate-income families.[9] The Supreme Judicial Court of Massachusetts affirmed the housing court decision.[10]

At common law a landlord holding a fee simple subject to a leasehold could evict a tenant upon expiration of the lease.[11] This right, however,

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7. (a) No person shall bring any action to recover possession of a controlled rental unit unless: . . . the landlord seeks to recover possession for any other just cause, provided that his purpose is not in conflict with the provisions and purposes of this act.

Act of Aug. 31, 1970, ch. 842, § 9(a)(10), [1970] Mass. Acts & Resolves 737.

8. The landlord argued that the Boston Redevelopment Authority threatened to take his building by eminent domain unless renovations were accomplished and that therefore he was obliged to renovate __ Mass. at __, 314 N.E.2d at 120. His building consisted of 51 units, 31 of which were not controlled and had already been renovated. The landlord wanted to vacate the remaining twenty controlled units in order to renovate them. *Id.* at __, 314 N.E.2d at 120. Afterwards, the rents would have been raised $120 per month to cover the cost of renovation. *Id.* at __, 314 N.E.2d at 122.

9. *Id.* at __, 314 N.E.2d at 119 (1974) (lower court decision unreported).

10. *Id.*

11. 1 AMERICAN LAW OF PROPERTY § 3.36 (A. Casner ed. 1952). *See also* Pernell v. Southall Realty, 416 U.S. 363 (1974). When a lessee remains after the lease has expired, and the lessor elects not to treat him as tenant, he becomes a tenant at sufferance. Margosian v. Markarian, 288 Mass. 197, 192 N.E. 612 (1934). The landlord's usual remedy is to recover in assumpsit the fair rental value of the property. Arnold Realty Co. v. William K. Toole Co., 46 R.I. 204, 208, 125 A. 363, 365 (1924). He can also recover special damages for the lessee's breach of his duty to surrender possession. McCullagh v. Goodyear Tire & Rubber Co., 342 Mich. 244, 69 N.W.2d 731 (1955).

Two exceptions to the landlord's remedies existed at common law. During a housing shortage in 18th century Ireland, the "equity right to renewal" arose. This prevented an Irish tenant paying a fair rent from being ousted by someone willing to pay more. The same right developed in Europe during the Middle Ages for the benefit of Jews, who, unable to own property, could be threatened with eviction to obtain higher rents. Cohen, *Rent Control After World War I — Recollections*, 21 N.Y.U.L. REV. 267, 273-74 (1946).

could be limited by the state under the police power.[12] State intervention in landlord-tenant relations began in the early twentieth century[13] and shared a common rationale with state intervention in other commercial activities.[14]

The first rent control laws appeared during post-World War I housing shortages.[15] Rents were regulated by postponing for the duration of the

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12. All property is held subject to the right of the state to regulate its use under the police power. Nebbia v. New York, 291 U.S. 502 (1934); Rideout v. Knox, 148 Mass. 368, 19 N.E. 390 (1889); Ruona v. City of Billings, 136 Mont. 554, 323 P.2d 29 (1958). Zoning is an example of police power authority over real property. *See* 1 R. ANDERSON, AMERICAN LAW OF ZONING § 2.06 (1968).

13. The first regulations in the housing field were housing codes. L. FRIEDMAN, GOVERNMENT AND SLUM HOUSING 25-39 (1968).

14. *See, e.g.*, Munn v. Illinois, 94 U.S. 113 (1876) (upholding the regulation of grain storage rates). *See also* Foster, *The Doctrine of the United States Supreme Court of Property Affected by a Public Interest, and Its Tendencies*, 5 YALE L.J. 49 (1895). Prior to this time business was controllable only if it had received some special favor, such as a tax exemption, a franchise, or power of eminent domain. Home Tel. & Tel. Co. v. City of Los Angeles, 211 U.S. 265 (1908); Vicksburg v. Vicksburg Waterworks Co., 206 U.S. 496 (1907); *In re* Mayor of the City of New York, 135 N.Y. 253, 31 N.E. 1043 (1892). If a particular enterprise vital to the public welfare monopolized its field, or otherwise overreached, the legislature would deem it "affected with a public interest" and subject to regulation. *See* Goble, *Are Property Interests Secure?*, 9 KY. L.J. 149 (1920-21). The basis for this intervention in the free market was the government's need to protect its citizenry when the laws of supply and demand broke down. Schaake v. Dolley, 85 Kan. 598, 605-06, 118 P. 80, 83 (1911):

> [W]henever, through changed social conditions, or otherwise, a business becomes essentially public in character and assumes proportions, takes on features, or is attended by consequences which make free participation in it destructive of the ends for which it is pursued and a menace to the welfare of society, society, through its duly constituted authorities, may, in the absence of constitutional prohibitions, protect itself by limiting the right to engage in such business, as far as may be necessary to attain the desired security.

In effect, the states imposed a fictitious public trust on businesses characterized to be performing a state function. Courts upheld the constitutionality of this exercise of the police power by concluding that to the extent a business was "public," it was not protected by the constitutional prohibition against the impairment of contracts, German Alliance Ins. Co. v. Kansas, 233 U.S. 389 (1914); Golden v. State, 133 Cal. App. 2d 640, 285 P.2d 49 (Dist. Ct. App. 1955); U.S. CONST. art. I, § 10; or the taking of private property without due process, Munn v. Illinois, 94 U.S. 113 (1876); U.S. CONST. amend. V.

15. *E.g.*, Ball Rent Act of 1919, ch. 80, 41 Stat. 298; Law of April 1, 1920, chs. 130-39, [1920] Laws of N.Y. 224-32. Since 1919 many rent control statutes have been enacted at various times to meet immediate housing problems. *See* note 20 *infra*. The broadest measure was a national federal regulation during and after World War II. *See* note 22 *infra*. From 1953, when the last federal act terminated, until 1969, New York was the only area to have rent control. Now rent control exists in Massachusetts through a state enabling act, Act of Aug. 31, 1970, ch. 842, [1970] Mass. Acts & Resolves 732, and in New Jersey and Florida by local initiative. *See* Blumberg, *Municipal Rent Control Upheld by New Jersey Supreme Court*, 7 CLEARINGHOUSE REV. 83, 84 (1973); Indritz, *The Tenants' Rights*

shortage a landlord's right to bring an action of ejectment against a tenant and by allowing a defense of "unfairness" to a landlord's action for rent.[16] The Supreme Court of the United States upheld the constitutionality of a Washington, D.C., rent control regulation on the ground that the extreme shortage and the vital necessity of housing was a matter that "affected [it] with a public interest."[17] The Court warned, however, that the bar to evictions was non-confiscatory only as a temporary response to an emergency situation.[18]

The Supreme Court later dropped the "affected with a public interest" rationale and justified the regulation of both rents and evictions solely on the basis of the emergency police power.[19] Thus, every rent control act has been introduced by a declaration of emergency, and in almost every case each has been upheld on this basis.[20] To be a reasonable exercise of

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Movement, 1 NEW MEXICO L. REV. 1, 63 (1971); Sternlieb & Brody, *Pitfalls in Rent Control*, 4 REAL ESTATE REV. No. 2, at 120, 121 (1974).

16. *E.g.*, Law of April 1, 1920, ch. 136, [1920] Laws of N.Y. 228. The statute controlled rents by allowing a judge to fix a fair amount when a landlord brought an action for rent. To be effective a rent control statute must also control evictions, otherwise a landlord would be able to obtain a rent raise by threatening eviction.

17. Block v. Hirsh, 256 U.S. 135 (1921). The Supreme Court justified rent rate regulation on the same basis that it had previously justified the regulation of business in Munn v. Illinois, 94 U.S. 113 (1876). *See* Note, *Residential Rent Control in New York City*, 3 COLUM. J.L. & SOC. PROB. 30, 31 (1967); text at note 14 *supra*.

Opponents of rent control argued that limitation of a landlord's right to lease his apartment to the tenant of his choice would impair his freedom to contract and that this limitation on the use of his property amounted to a taking without due process. Wickersham, *The Police Power and the New York Emergency Rent Laws*, 69 U. PA. L. REV. 301 (1921); 34 HARV. L. REV. 426 (1921). One commentator, however, felt that the rent control statutes did not impair contracts or deprive of property without due process because: 1) there is no vested right in an ejection remedy; 2) a contract for rent procured by duress is unenforceable; and 3) when a contract is voidable by duress, the measure of recovery is the reasonable value of the use and occupation. Aron, *The New York Landlord and Tenant Laws of 1920*, 6 CORNELL L.Q. 1, 3 (1920). *See generally* Boyd, *Rent Regulation Under the Police Power*, 19 MICH. L. REV. 599 (1921); 9 CALIF. L. REV. 337 (1920).

18. Block v. Hirsh, 256 U.S. 135, 157 (1921): "A limit in time, to tide over a passing trouble, may well justify a law that could not be upheld as a permanent change."

19. Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922). The Supreme Court in *Levy* followed the reasoning of the New York Court of Appeals in People *ex rel.* Durham Realty Corp. v. La Fetra, 230 N.Y. 429, 130 N.E. 601 (1921), *appeal dismissed*, 257 U.S. 665 (1922), to justify rent and eviction control. The main difference between *Levy* and *Block* is the expansion in *Levy* of the states' police power to control any business during an emergency. *See* Note, *Residential Rent Control in New York City*, *supra* note 17, at 31-32.

20. For example, each of the following acts states the existence of emergency housing conditions, and the constitutionality of each was upheld on this basis: Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23, *upheld in* Yakus v. United States, 321 U.S. 414 (1944), Emergency Commercial Space Rent Control Law of 1945, ch. 3, [1945] Laws of

the police power, however, the acts must allow evictions under certain limited circumstances,[21] such as for the personal use of the landlord, for the removal of an objectionable tenant, or for withdrawal from the housing market.[22]

N.Y. 11, *upheld in* Finn v. 415 Fifth Ave. Co., 153 F.2d 501 (2d Cir.), *cert. denied*, 328 U.S. 838 (1946); An Act Relative to Rent Control, ch. 434, § 1, [1953] Mass. Acts & Resolves 338, *upheld in* Russell v. Treasurer & Receiver Gen., 331 Mass. 501, 120 N.E.2d 388 (1954). "[W]e consider the contract clause and the decisions which have expounded it in harmony with the essential reserved power of the States to protect the security of their peoples . . . ." Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 443 (1934).

Courts will usually not question these declarations. *See* Amsterdam-Manhattan, Inc. v. City Rent & Rehabilitation Administration, 15 N.Y.2d 1014, 207 N.E.2d 616, 260 N.Y.S.2d 23 (1965) (mem.), *aff'g* 21 App. Div. 2d 965, 252 N.Y.S.2d 395 (Sup. Ct. 1964), *aff'g* 43 Misc. 2d 889, 252 N.Y.S.2d 758 (Sup. Ct. 1964) (upholding the existence of an emergency housing situation in New York twenty years after it was declared). *But see* Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924), in which an action contesting extension of the Ball Rent Act of Aug. 24, 1921, ch. 91, 42 Stat. 200, was remanded to determine the current existence of an emergency: "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases. . . ." 264 U.S. at 547. *See also* Birkenfeld v. City of Berkeley, 49 Cal. App. 3d 464, 122 Cal. Rptr. 891 (Dist. Ct. App. 1975), in which the court, relying on *Chastleton*, recently struck down a municipal rent control ordinance. The court found that no emergency existed and criticized the ordinance's failure to provide a definite termination point, thereby creating a permanent emergency. It also denied the city's contention that rent control should be upheld if supported simply by a rational basis. This decision might herald a new willingness on the part of the judiciary to question the careless use of the word "emergency" on the part of the legislatures. *See* Baar & Keeting, *The Last Stand of Economic Substantive Due Process — The Housing Emergency Requirement for Rent Control*, 7 URBAN LAW. 447 (1975) (a criticism of the retention of the requirement of an emergency as a holdover from the days of substantive due process).

21. *See* Rivera v. R. Cobian Chinea & Co., 181 F.2d 974 (1st Cir. 1950) (holding unconstitutional an order prohibiting a landlord from evicting a tenant in order to return the rooms to his own use); Taylor v. Bowles, 145 F.2d 833 (Emer. Ct. App. 1944) (affirming a landlord's right to evict his tenants if he wishes to remove his building from the housing market); Wilson v. McDonnell, 265 F. 432 (D.C. Cir. 1919), *appeal dismissed*, 257 U.S. 665 (1921) (striking down a complete bar to eviction on due process and equal protection grounds).

22. Rivera v. R. Cobian Chinea & Co., 181 F.2d 974 (1st Cir. 1950); Taylor v. Bowles, 145 F.2d 833 (Emer. Ct. App. 1944); Willson v. McDonnell, 265 F. 432 (D.C. Cir. 1919). *See also* Zussman v. Rent Control Bd. of Brookline, ___Mass. ___, 326 N.E.2d 876 (1975), in which the Supreme Judicial Court of Massachusetts struck down a rent control regulation prohibiting landlords from turning their apartments into condominiums as without the statutory authority of the Rent Control Board. These exceptions may be enlarged or restricted only according to the purpose of the statute. For example, post-World War II rent control statutes in New York have narrowly limited a landlord's ability to evict tenants in order to take his buildings off the housing market. *See* Loab Estates, Inc. v. Druhe, 300 N.Y. 176, 90 N.E.2d 25 (1949) (forbidding a landlord from removing his apartments from the housing market unless he has relocated his tenants in similar quarters at the same rent). Another common exception to the prohibition against eviction is renovation and alteration. Sometimes this exception is only qualified by a "good faith"

In 1969 the Massachusetts legislature passed a rent control enabling act[23] which declared the existence of an emergency housing shortage threatening the public health, safety and welfare. This emergency consisted of a "shortage of rental housing accommodations for families of low and moderate income and abnormally high rents," caused by housing demolition and deterioration, and insufficient new housing.[24] The Act set maximum rents at the rate charged six months prior to its enactment, subject to adjustment in order to provide a "fair net operating income."[25] Eviction is permitted only after issuance of a certificate by the Administrator upon proof of certain conditions.[26]

requirement, as under the regulations for Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23. *See* Webb v. Goforth, 27 Tenn. App. 595, 183 S.W.2d 312 (1944) (allowing landlord to evict in order to remodel, as long as in good faith, notwithstanding her purpose to raise rental income thereby). Often, however, eviction for renovation is allowed only when "reasonably necessary to protect and conserve the housing accommodations." Housing and Rent Act of 1947, ch. 163, 61 Stat. 193, 200. *See also* 23 N.Y.U.L. REV. 503, 505-06 (1948) (criticizing the Housing and Rent Act of 1948, ch. 161, 62 Stat. 93, for allowing eviction for renovation even if not necessary for maintenance). For eviction provisions in various rent control laws see B. FRIEDLANDER & A. CURRERI, RENT CONTROL: FEDERAL, STATE, AND MUNICIPAL (1948). The Ball Rent Act, upheld in *Block*, also provided exceptions to its eviction restriction for personal occupancy and for razing the building in order to construct new rental property. Ball Rent Act of 1919, ch. 80, § 109, 41 Stat. 297, 301.

23. Act of Aug. 31, 1970, ch. 842, [1970] Mass. Acts & Resolves 732. The statute resulted in part from the invalidation of a Brookline rent control ordinance on the ground of state preemption. Marshall House, Inc. v. Rent Review & Grievance Bd., 357 Mass. 709, 260 N.E.2d 200 (1970). In Marshall House, Inc. v. Rent Control Bd., 358 Mass. 686, 266 N.E.2d 876 (1971), the Supreme Judicial Court of Massachusetts upheld the constitutionality of the 1969 Rent Control Act.

24. Act of Aug. 31, 1970, ch. 842, § 1, [1970] Mass. Acts & Resolves 732.

25. *Id.* §§ 6, 7, [1970] Mass. Acts & Resolves 737.

26. Evictions. (a) No person shall bring any action to recover possession of a controlled rental unit unless:

(1) the tenant has failed to pay the rent to which the landlord is entitled;

(2) the tenant has violated an obligation or covenant of his tenancy other than the obligation to surrender possession upon proper notice and has failed to cure such violation after having received written notice thereof from the landlord;

(3) the tenant is committing or permitting to exist a nuisance in, or is causing substantial damage to, the controlled rental unit, or is creating a substantial interference with the comfort, safety, or enjoyment of the landlord or other occupants of the same or any adjacent accommodation;

(4) the tenant is convicted of using or permitting a controlled rental unit to be used for any illegal purpose;

(5) the tenant, who had a written lease or rental agreement which terminated on or after this act has taken effect in a city or town, has refused, after written request or demand by the landlord, to execute a written extension or renewal thereof for a further term of like duration and in such terms that are not inconsistent with or violative of any provisions of this act;

(6) the tenant has refused the landlord reasonable access to the unit for the purpose of making necessary repairs or improvements required by the laws of the United States, the commonwealth, or any political subdivision thereof, or for the purpose of inspection as permitted or required by the lease or by law, or for the purpose of showing the rental unit to any prospective purchaser or mortgagee;

Mayo dealt with an application under the provision allowing the landlord to evict for "just cause" if his purposes do not conflict with the purpose of the Act,[27] and necessitated an interpretation of those purposes.[28] The Supreme Judicial Court first affirmed the housing court's findings that extensive renovation required the vacating of the units, but that renovation of the apartments was unnecessary to keep the building in the housing market.[29] The inquiry then became "whether evictions may be ordered, not for necessary maintenance, but for optional upgrading of the apartments."[30] The court's answer was syllogistic: (1) the purpose of the Act is to preserve and expand the supply of low- and moderate-income housing;[31] (2) renovation would

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(7) the person holding at the end of a lease term is a subtenant not approved by the landlord;

(8) the landlord seeks to recover possession in good faith for use and occupancy of himself, or his children, parents, brother, sister, father-in-law, mother-in-law, son-in-law, or daughter-in-law;

(9) the landlord seeks to recover possession to demolish or otherwise remove the unit from housing use; and

(10) the landlord seeks to recover possession for any other just cause, provided that his purpose is not in conflict with the provisions and purposes of this act.

Id. § 9, [1970] Mass. Acts & Resolves 737. For cases other than *Mayo* construing this section see Zussman v. Rent Control Bd., __Mass. __, 326 N.E.2d 876 (1975) (§ 9(a)(10)); Gentile v. Rent Control Bd., __Mass. __, 312 N.E.2d 210 (1974) (§ 9(a)(1)). *See also* Trovato v. Walsh, ____, Mass. ____, 295 N.E.2d 899 (1973).

27. Act of Aug. 31, 1970, ch. 842, v 9(a)(10), [1970] Mass. Acts & Resolves 737.

28. The Housing Court of the City of Boston has original jurisdiction over complaints filed against the Boston Rent Control Administrator. This court has de novo review over the Administrator's decisions because they are not determined in a judicial proceeding and therefore do not satisfy due process hearing requirements. __Mass. at __, 314 N.E.2d at 119. *See* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.07 (1958). State and federal courts have uniformly held that availability of de novo judicial review satisfies this due process requirement of a hearing. Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950); Hagar v. Reclamation Dist., 111 U.S. 701 (1884); Horseman Dolls v. Unemployment Compensation Comm'n, 7 N.J. 541, 82 A.2d 177 (1951); Mallatt v. Luihn, 206 Ore. 678, 294 P.2d 871 (1956). 1 K. DAVIS, *supra*, § 7.10. A few months prior to *Mayo* in Gentile v. Rent Control Bd., __ Mass. __, 312 N.E.2d 210 (1974), the Supreme Judicial Court found that the hearing before the Rent Control Board of Somerville was not determinative, since it was not mandatory under the Rent Control Act, nor was the Rent Control Board an agency under the Administrative Procedure Act, MASS. ANN. LAWS, ch. 30A, § 1 (1973), qualified to conduct an official hearing. The court held that if any relevant disputed factual issues were resolved by the Rent Control Board the district court should decide such questions after a trial unaffected by the decision of the board. __ Mass. at __ , 312 N.E.2d at 215. The characterization of the hearing as nonjudicial in *Mayo* allowed the housing court to base its decision on its own findings rather than those of the Administrator. __Mass. at __, 314 N.E.2d at 119. For a discussion of the procedural aspects of the decision see 55 B.U.L. REV. 437, 449-63 (1975).

29. __ Mass. at __, 314 N.E.2d at 122.

30. *Id.*

raise the rent by $120; and (3) eviction, therefore, violates the purpose of the Act.[32] Thus the court acted to prevent the immediate removal of the low- and moderate-income units from the housing market.

The dissent supported the Administrator's decision to allow eviction, on the grounds that renovation did not conflict with the purpose of the Act, prevention of necessary renovation would deprive the landlord of property without compensation, and placement of the burden of remedying the housing shortage exclusively on the landlord would be inequitable and inefficient as a housing strategy.[33]

Although both the dissent and the majority looked to the declaration of emergency[34] to discern the legislature's intent and agreed on the need for low- and moderate-income housing, the dissent found sufficient justification for the Administrator's approval of the eviction.[35] The fact that condemnation proceedings had not been instituted did not preclude the Administrator from finding a need for renovation, under the dissent's view. Given this need, the Administrator would be conforming to the purposes of the Act by permitting the landlord to construct luxury units instead of risking the total loss of the apartments through deterioration.[36]

The dissent also argued that a constitutional issue was raised by the majority result—whether the impairment of the right to evict constituted a taking of property without compensation.[37] This was

31. The court supported its identification of the purpose of the 1970 Act by pointing to the addition of the words "low and moderate income," which were not included in the original 1969 version. __ Mass. at __, 314 N.E.2d at 121-22. *See* note 23 *supra.*

32. __ Mass. at __, 314 N.E.2d at 122.

33. *Id.* at __, 314 N.E.2d at 123-28.

34. Act of Aug. 31, 1970, ch. 842, § 1, [1970] Mass. Acts & Resolves 732.

35. The dissent found that since the housing emergency (as listed by the legislature) was caused by insufficient housing and housing deterioration, then housing renovation must be within the purpose of the Act: "[W]e cannot ignore the conditions that led to the housing shortage. . . . The administrator may well have reasoned that denial of the certificates would have aggravated the very conditions that caused the shortage. . . ." __ Mass. at __, 314 N.E.2d at 127 (dissenting opinion).

36. *Id.* at __, 314 N.E.2d at 126-27. The dissent added: "[T]here is nothing in the act indicating an intention to restrict the expansion of the higher income housing market." *Id.* at __, 314 N.E.2d at 127. The purpose of exempting newly constructed or rehabilitated buildings from rent control is to provide an incentive for landlords to increase the housing supply. *See* Willis, *The Federal Housing and Rent Act of 1947,* 47 COLUM. L. REV. 1118, 1121 (1947). Although the Massachusetts Rent Control Act did not contain an exemption for renovation, the Administrator interpreted the "just cause" provision to remove from rent control any building that is rehabilitated at a cost of more than $10,000 per unit, or is substantially "as good as new." Brief for Dorchester Tenants Council as Amicus Curiae at 405, Mayo v. Boston Rent Control Adm'r, __ Mass. __, 314 N.E.2d 118 (1974).

37. __ Mass. at __, 314 N.E.2d at 123. Although rent control acts have been upheld as a

premised on the fact that there is a point beyond which any exercise of the police power "goes too far" and becomes a taking,[38] considering the nature of the affected right, the harshness of the restriction imposed, and the degree of emergency.[39] Balancing these factors, the dissent found that the degree of emergency did not warrant the restriction on the right involved, viewing the right to use private property as basic.[40] The conclusion of the dissent was that the denial had the effect of converting the landlord's apartments into public housing, an action which required compensation.[41]

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proper exercise of the police power (*see* notes 19-20 and accompanying text *supra*), rent control would not be constitutional in every situation. *E.g.*, Rivera v. R. Cobian Chinea & Co., 181 F.2d 974 (1st Cir. 1950). Many others have posed the same question. *See* Bowles v. Willingham, 321 U.S. 503, 529 (1944) (dissenting opinion); Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 199 (1921) (dissenting opinion). *See also* Wickersham, *The Police Power and the New York Emergency Rent Laws*, 69 U. PA. L. REV. 301 (1921); 34 HARV. L. REV. 126 (1921).

The *Mayo* dissent relied on zoning cases to support its argument. ___ Mass. at ___, 314 N.E.2d at 125. Zoning, like prohibitions on evictions, is a police power restriction on a landowner's use of his property. An overly-restrictive zoning measure will be struck down as a taking. Hoffman v. Kinealy, 389 S.W.2d 745 (Mo. 1965); City of Akron v. Chapman, 160 Ohio St. 382, 116 N.E.2d 697 (1953). The dissent argued that the majority's decision resulted in a similar overrestriction on the use of defendant's property, and thus a taking. The dissent failed, however, to account for the distinction that while both zoning and eviction control are exercises of the police power, the latter is also justified by emergency conditions. *See* text at notes 23-24 *supra*.

38. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). In this case the Court struck down as a taking a law prohibiting the mining of coal underneath houses. The law was passed after defendant had sold plaintiff the right to mine under his house. Prior to *Pennsylvania Coal* mere regulation of property use was not considered a taking. *See* Mugler v. Kansas, 123 U.S. 623 (1887).

39. ___ Mass. at ___, 314 N.E.2d at 125-26.

40. *Id.* at ___, 314 N.E.2d at 125. Freedom to own private property is the basis of our economic and political systems. *See generally* F. HAYEK, *supra* note 3.

41. ___ Mass. at ___, 314 N.E.2d at 125. To support this result the dissent cited Rivera v. R. Cobian Chinea & Co., 181 F.2d 974 (1st Cir. 1950), which held unconstitutional a rent control law banning all evictions. The dissent failed, however, to cite other cases striking down partial eviction restrictions. Actually, similar restrictions have been upheld. Levin v. Mede, 189 Misc. 852, 855, 72 N.Y.S.2d 669, 673 (City of New York Mun. Ct. 1947), decided under the Housing and Rent Act of 1947, ch. 163, 61 Stat. 196, held that "tenants can be dispossessed only if the premises in question are a hazard to the health and safety of the occupants or the surrounding area and the altering or remodeling cannot be performed with the tenants in possession." Post v. Cashin, 323 Mass. 316, 81 N.E.2d 842 (1948), upheld the 1947 federal restriction on eviction to renovate and subdivide when not reasonably necessary to protect and conserve the accommodations. Many laws have forbidden evictions for renovation, optional or otherwise. *E.g.*, Law of April 1, 1920, ch. 136, [1920] Laws of N.Y. 228. *See also* note 22 *supra*.

The dissent also noted that denying the eviction certificates left the landlord with an indefinite choice between demolishing the building or letting it fall into disrepair. ___ Mass. at ___, 314 N.E.2d at 127. The Act was to expire on December 31, 1975, but could be extended indefinitely. Governor Dukakis has enforced a permanent extension. 2 HOUSING

The equity and efficiency of the majority opinion may be questioned on its finding that renovation was not necessary.[42] To require an apartment owner to surrender the right to improve his property in favor of a tenant who holds no vested interest is to place on him the burden of resolving society's housing problem. The dissent warned that a strong desire to improve a public condition does not justify a denial of the usufructs of private property.[43]

The majority failed to consider the constitutional and policy issues raised by the dissent.[44] Accordingly, the landlord's interests were found not to be unconstitutionally or unfairly restricted as he still was left with reasonable use of his property. The landlord could continue to rent his apartments, receiving the "fair net operating income" guaranteed under the Act.[45] The court found that emergency conditions in the area of low- and moderate-income housing took priority over maximization of the landlord's profits.[46] It directed that "desirability" arguments be

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& DEV. REP. 1011 (1975). *But see* Birkenfeld v. City of Berkeley, 49 Cal. App. 3d 464, 122 Cal. Rptr. 891 (Dist. Ct. App. 1975). *See also* note 20 *supra*. Under the analysis of the *Birkenfeld* court, the permanent extension of the rent control statute would be of doubtful constitutional validity.

Technically, the land lord has four options: personal use, use for a nonhousing purpose, demolition, or continued rental. Act of Aug. 31, 1970, ch. 842, §§ 9(a)(8)-(9), [1970] Mass. Acts & Resolves 737. The dissent argued that only the third choice is realistically open to the landlord. __ Mass. at __, 314 N.E.2d at 125.

The severity of the "emergency" was also questioned. The dissent compared the 1969 emergency with the World War II emergency when virtually all nonwar related construction was stopped. *Id.* at __, 314 N.E.2d at 123-24.

42. "In the face of a public emergency in the area of housing, the fundamental question is on whom the burden . . . should fall. . . . [T]he landlord here is being told to shoulder an unfair share of the burden." __ Mass. at __, 314 N.E.2d at 127-28.

43. *Id.* at __, 314 N.E.2d at 128.

44. One possible reason is that the Massachusetts court did not want to raise a federal question open for United States Supreme Court review, since the Supreme Court is relatively more conservative than the Massachusetts court. *See* Israel v. City Rent & Rehabilitation Administration, 285 F. Supp. 908 (S.D.N.Y. 1968), which found no substantial federal question in a complaint challenging rent control on due process, equal protection, or impairment of contract grounds. The court also denied relief under the civil rights statutes because complainant failed to show a purposeful deprivation of constitutional rights. The Supreme Court, however, has not reviewed rent control since its decision in United States v. Shoreline Cooperative Apartments, Inc., 338 U.S. 897 (1952), and does not seem likely to do so now. *See* Siegel, *Constitutionality of the Housing and Rent Act of 1949*, 11 FED. B.J. 47 (1950).

45. Act of Aug. 31, 1970, ch. 842, § 7, [1970] Mass. Acts & Resolves 735.

46. __ Mass. at __, 314 N.E.2d at 123. The court infers that since the landlord receives a "fair net operating income" according to a statute which has been held constitutional, he is not entitled to a greater profit, and therefore any arguments that he should receive one are "desirability" or policy arguments and should be directed toward the legislature. *Cf.*

addressed to the legislature and not the court.[47]

Rent control as a housing strategy attempts to provide a temporary solution to a housing shortage.[48] There is a presumption that demand has driven prices to an excessive level,[49] allowing rents to be stabilized without depriving the landlord of a fair return on his investment.[50] Some studies show, however, that elimination of the profit margin of the tenement landlord causes housing deterioration and abandonment.[51] The long term effect of the regulation is to discourage investment of capital for expansion and renovation of housing supplies and thus to exacerbate any housing shortage.[52]

By exempting newly constructed and renovated housing from rent

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Teeval Co. v. Stern, 301 N.Y. 346, 93 N.E.2d 884, *cert. denied*, 340 U.S. 876 (1950) (owners of rental property in New York did not have vested interest in any particular rent increase rule and therefore were not constitutionally entitled to maximize their profits).

47. The inference probably drawn by the court was that since no legal rights were being infringed, the plaintiffs' case amounted to a complaint that the act was undesirable because he was not making enough money.

48. It is temporary because it treats the symptoms rather than the cause of the problem, which is the housing shortage itself. *See* Blumberg, Robbins & Baar, *The Emergence of Second Generation Rent Controls*, 8 CLEARINGHOUSE REV. 240 (1974).

49. The Act states that rents are "abnormally high." Act of Aug. 31, 1970, ch. 842, § 1, [1970] Mass. Acts & Resolves 732.

50. Some housing experts have disputed this assertion, noting that "[M]any rent controlled buildings in New York were in severe financial straits." I. LOWRY, REFORMING RENT CONTROL IN NEW YORK CITY 3 (1970). *See also* Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor*, 80 YALE L.J. 1093 (1971); Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 82 YALE L.J. 1175 (1973).

In the context of housing codes, another method of regulating landlord-tenant relationships, Friedman argues: "Since reform laws imposed costs on landlords without reimbursing them in any way, and since no one expected or wanted rents to rise, it was morally necessary to believe that rents were exorbitant and that costs could be absorbed without giving up a fair return." L. FRIEDMAN, *supra* note 13, at 40. Others believe that placing extra burdens on inner-city landlords causes housing abandonment: "The reality is that the white owner in an urban core area increasingly is unable to rent his mortgage-free structures to poor blacks and still derive necessary profit." G. STERNLIEB & R. BURCHELL, RESIDENTIAL ABANDONMENT 336 (1973).

51. E. OLSEN, THE EFFECTS OF A SIMPLE RENT CONTROL SCHEME IN A COMPETITIVE MARKET 5 (1969); Olsen, *An Econometric Analysis of Rent Control*, 80 J. POL. ECON. 1081 (1972). These studies tend to show that if landlords cannot pass on their costs to tenants, they would not be able to recoup their investment and would thus be left with the option of either selling or abandoning their property. In fact, the typical urban landlord is not getting rich from his properties. *See* G. STERNLIEB & R. BURCHELL, *supra* note 50, at 53. *Contra*, Levi, *Focal Leverage Points in Problems Relating to Real Property*, 66 COLUM. L. REV. 275, 276 (1966).

52. F. HAYEK, *supra* note 3, at 344.

control, the Administrator in *Mayo* tried to provide an incentive for landlords to renovate low-income neighborhoods. The Supreme Judicial Court, however, considered the problem of high rents and housing supply for lower-income families to be more pressing than that of urban decay.[53] The dislocation problem is particularly acute in the Boston area which has one of the lowest rental vacancy rates in the United States[54] as many high- and middle-income persons compete with the poor for apartment space.[55] In *Mayo* the Dorchester Tenants' Council (amicus curiae) argued that under the Administrator's decision, all tenants of low- or middle-income neighborhoods were likely to be evicted and priced out of their homes.[56] This, however, has been averted by the decision in *Mayo*. Whether the decision will increase the market supply for lower-income persons is debatable.[57]

Mayo demonstrates the need for legislative specificity when dealing with the conflicting policies of neighborhood renovation and the economics of low-income housing management. The decision represents a makeshift judicial policy decision forced by legislative failure to resolve the conflict. It is a problem which every city must face in redevelopment efforts and which must be met by balancing competing policies.[58] Rent control legislation is but one aspect and at

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53. High rents and lack of low-income housing is a problem in Boston. *See* text at notes 54-55 *infra*. Deterioration and abandonment, however, are also considered to be part of the problem and a cause of high rents. It was reported that three dwellings are abandoned daily in Boston. *See* The Real Paper 5, June 25, 1975 (weekly Boston newspaper). The *Mayo* court considered that the immediate loss of one building to high rent housing would add to the problem. Local tenants organizations would appear to agree. *See* URBAN PLANNING AID, INC., LESS RENT MORE CONTROL: A TENANT'S GUIDE TO RENT CONTROL IN MASSACHUSETTS 99 (1973): "If the apartment is being converted into high rent housing which you can't afford, the landlord is obviously violating the purpose of rent control — unless he agrees to provide another apartment for you at a comparable rent."

54. U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, ANALYSIS OF THE BOSTON, MASSACHUSETTS HOUSING MARKET 6-7 (1971).

55. The presence of over 100,000 full time students living in the Boston area is partially responsible for the low vacancy rate. M. LEVIN & N. ABEND, UNIVERSITY IMPACT ON HOUSING SUPPLY AND RENTAL LEVELS IN THE CITY OF BOSTON (1970).

56. Brief for The Dorchester Tenants Council as Amicus Curiae at 6-10, Mayo v. Boston Rent Control Adm'r, ___Mass. ___, 314 N.E.2d 118 (1974). The urban renewal area in which the apartments at issue were located had been a poor neighborhood, but because of the renovation, is now one of the most desirable living places in Boston. The amicus curiae feared that the Administrator's decision would set a precedent threatening the tenure of all the low-income residents of Boston.

57. For a citation to sources on both sides of the rent control issue see Blumberg, Robbins & Baar, *supra* note 48, at 249 n.126.

58. Some authorities believe that urban renovation can benefit both low-income urban

best represents an attempt to maintain the status quo. The broader implications of urban problems require much more.

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residents and higher-income Americans who choose to live or work in the city:

> The migration of business, capital and people from central cities has left them with immense physical, human and economic problems. . . .
>
> [Those] who prefer to live in central cities or who lack the financial resources to leave them, have an interest in strengthening the physical and economic attractiveness of the city. In fact, however, strengthening the central cities would benefit the entire nation.

Kosolt, *Incentives for Urban Apartment Construction*, 32 AM. J. ECON. & SOCIOLOGY 295, 295-96 (1973).