ECONOMIC INEQUITY AS A DEFENSE TO THE HOUSING CODE: *CITY OF ST. LOUIS v. BRUNE*

An important contemporary problem confronting federal, state and local governments is the existence of urban blight.[1] In an effort to combat inner city decay, municipalities have sought to improve existing housing conditions and increase the quantity of habitable low-income housing.[2]

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1. Commentators have predicted "economic disaster and strangulation to the central city" if the problem is not solved. McFarland, *Urban Renewal,* in URBAN HOUSING 428 (1966) [hereinafter cited as McFarland]. *See* P. WALD, LAW AND POVERTY: 1965, at 12 (1965). Many factors can be associated with the decline of an inner city area, such as improved transportation, shifts in industrial location, improved living standards, increasing crime rates, and ethnic congregation. L. GREBLER, HOUSING MARKET BEHAVIOR IN A DECLINING AREA 106-27 (1952). A study of housing and poverty in Baltimore found that the most frequent causes of housing problems were the filtering process, housing preferences, racial discrimination, low income, problem families, greedy investors, the exploitive system, and the deterioration of the social fabric of inner-city neighborhoods. U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, ABANDONED HOUSING RESEARCH: A COMPENDIUM 28 (1973) [hereinafter cited as ABANDONED HOUSING COMPENDIUM]. One commentator has described the problem of the slums as "one both of plumbing and morale." Sternlieb, *Slum Housing: A Functional Analysis,* in A. PAGE & R. SEYFRIED, URBAN ANALYSIS 335 (1970). *See also* R. MUTH, CITIES AND HOUSING 115-35 (1969).

As housing ages it tends to move downward on both quality and value scales in a "filtering down process." L. GREBLER, *supra.* The result is occupancy change such that housing inhabited by one income group becomes available to the next lower-income group through a decline in unit price. *Id.* This "bargain" appeals to low-income groups and also to people who may be able to afford better housing. R. FISHER, 20 YEARS OF PUBLIC HOUSING 48 (1959) [hereinafter cited as FISHER]. The ultimate effect of the downward flow is that rented dwellings become inhabited by persons that have less to spend on housing than the prior inhabitants. Consequently, the return on the landlord's investment declines, and he often responds by reducing his costs, particularly for maintenance. *See* J. HEILBRUN, REAL ESTATE TAXES AND URBAN HOUSING (1966); Lowry, *Filtering and Housing Standards: A Conceptual Analysis,* in A. PAGE & W. SEYFRIED, URBAN ANALYSIS 339, 343-44 (1970).

2. It is unquestioned that there is a substantial shortage of low-income housing in urban areas today. *See* NATIONAL COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 66, 70 (1968) [hereinafter cited as BUILDING THE AMERICAN CITY]; Keith, *An Assessment of National Housing Needs,* 32 LAW & CONTEMP. PROB. 209 (1967). Studies have shown that in 1968 one of every eight American families could not afford to pay the market price for non-slum dwellings. REPORT OF THE PRESIDENT'S COMM. ON URBAN HOUSING: A DECENT HOME 7-11, 113-21 (1968). It has been estimated that gross annual housing production of approximately 2.5 million units per year is needed to accommodate

One method of effectuating rehabilitation is the enforcement of minimum housing codes[3] that attempt to ensure proper building maintenance in accordance with municipally-set standards.[4] By requiring code conformance, cities seek to halt deterioration and ensure proper health and safety conditions for tenants.[5]

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population growth and replace present substandard dwellings. Keith, *supra* at 211-12. *See also* REPORT OF THE PRESIDENT'S COMM. ON URBAN HOUSING, *supra* at 39-45; Gladstone & Associates, *The Outlook for United States Housing Needs,* in D. MANDELKER & R. MONTGOMERY, HOUSING IN AMERICA: PROBLEMS AND PERSPECTIVES 92-100 (1973).

3. Code enforcement is but one effort to rehabilitate our nation's slums. The common result, however, has been higher costs to both tenants and landlords. Existing public policy and statutes have been largely ineffective. L. FRIEDMAN, GOVERNMENT AND SLUM HOUSING 174 (1968). Many codes are not strictly enforced because particular housing markets are so unstable that code enforcement would lead to abandonment by owners or higher rents that result in occupant displacement. *See* BUILDING THE AMERICAN CITY, *supra* note 2, at 286; ABANDONED HOUSING COMPENDIUM, *supra* note 1, at 28, 61-62; Teitz & Rosenthal, *Housing Code Enforcement in New York City,* in D. MANDELKER & R. MONTGOMERY, HOUSING IN AMERICA: PROBLEMS AND PERSPECTIVES 480, 485-86 (1973). Abandonment often occurs even without code enforcement. It is caused by a "conversion of urban ills: crime, shifting population, economic squeeze and the American propensity to waste." *When Landlords Walk Away,* TIME, Mar. 16, 1970, at 88. In St. Louis, abandonment occurs primarily among rental properties and operates to diminish the low-income housing supply in the city. A major factor in the recent increase in abandonment in St. Louis "has been the rapid influx of very low-income black tenants into certain inner-city neighborhoods." ABANDONED HOUSING COMPENDIUM, *supra* note 1, at 15. The effect has been a decline in building maintenance, increased wear and tear on living units, and further emigration of whites. *Id.* Whether the substandard housing problem can be solved depends on checking and reversing economic and social trends which have precipitated present conditions. *See* Levi, *Problems in the Rehabilitation of Blighted Areas,* 21 FED. B.J. 310 (1961).

4. For a detailed discussion of the role of housing codes in urban renewal see Guandolo, *Housing Codes in Urban Renewal,* 25 GEO. WASH. L. REV. 1 (1956).

5. One commentator views code enforcement as "an effort to do by government regulation what the private sector and more constructive government programs have been unable to do: insure that all families are living in decent housing." C. HARTMAN, HOUSING AND SOCIAL POLICY 64 (1975) [hereinafter cited as HARTMAN]. *See also* Mood, *The Development, Objective, and Adequacy of Current Housing Code Standards,* in NATIONAL COMM'N ON URBAN PROBLEMS, HOUSING CODE STANDARDS: THREE CRITICAL STUDIES 1 (1969); Garrity, *Redesigning Landlord-Tenant Concepts for an Urban Society,* 46 J. URBAN L. 695, 702 (1969); Note, *Enforcement of Municipal Housing Codes,* 78 HARV. L. REV. 801 (1965).

The St. Louis housing code requires that every dwelling unit have a tub or shower bath connected to hot and cold water pipes.[6] In *City of St. Louis v. Brune*[7] the city attempted to enforce the "hot bath" ordinance against landlord Brune who owned a pair of seventy-year old apartment buildings located in a neighborhood of primarily vacant, unrentable property.[8] Neither property had any sale or loan value, and most of the tenants were living on welfare or social security.[9] Conceding a violation of the "hot bath" ordinance, the landlord contended that the cost of compliance would be prohibitive,[10] that the ordinance bore no reasonable relation to health, and that as applied, was an illegal, unreasonable and confiscatory exercise of the police power.[11] The Supreme Court of Missouri, reversing the lower court, held the code provision, as applied to defendant, an unconstitutional deprivation of due process bearing no substantial or reasonable relation to the public health, welfare or safety.[12]

Since 1949, it has been the official policy of the United States to attain a decent home and suitable living environment for every American family.[13] The first notable slum controls, however, were the tenement house laws of the early 1900's.[14] Modern housing codes are primarily

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6. The code provided that "[e]very dwelling unit shall have a tub or shower bath in good working condition, properly connected to approved hot and cold water and sewer systems in the toilet room or in a separate room adjacent to such dwelling unit." ST. LOUIS, MO., REV. CODE § 391.040 (1963).

7. 515 S.W.2d 471 (Mo. 1974).

8. *Id.* at 476.

9. *Id.*

10. The court accepted evidence that compliance would cost over $7,000 per building and that the buildings had no sale or loan value. *Id.* at 473, 476. The court then noted that the net result of compliance would be vacancies, leading to what defendant termed the "disappearance" of the buildings. *Id.* at 476. Buildings "disappear" in the sense that they serve no useful function when worthless, uninhabited and scarred by vandalism. These buildings vanish from the housing market and serve only as eyesores, with no positive purpose for their existence. "Disappearance" implies both tenant and landlord abandonment. *See* ABANDONED HOUSING COMPENDIUM, *supra* note 1, at 28.

11. 515 S.W.2d at 472.

12. *Id.* at 476-77. The court felt that the tenants could still bathe and that the lack of hot water presented no "great danger that diseases will be spread." *Id.* at 476.

13. This goal was established in the preamble to the Housing Act of 1949, 42 U.S.C. § 1441(a) (1970). What a "decent home" entails is uncertain. *See* BUILDING THE AMERICAN CITY, *supra* note 2, at 275-76.

14. The first tenant oriented housing code was enacted as the Tenement House Act for New York City.

products of urban renewal and urban redevelopment laws. Federal legislation required that a city have in effect a housing code and a "workable program" for community improvement before it could receive federal funds for urban renewal.[15] The general goal of these separate housing codes is to improve urban living conditions through the enforcement of minimum standards of decency and maintenance.[16] Overcrowding is prohibited, sanitary conditions are required, and minimum safety precautions are prescribed. Today, over 4,900 local governments have adopted housing codes.[17]

Municipal corporations are empowered to draft, enact and enforce reasonable ordinances and regulations to govern buildings within the municipality.[18] Since housing code enactments are exercises of the police power,[19] they are subject to all the limitations on that power.[20] Thus an

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> [H]ousing codes and code enforcement for the benefit of the inhabitants are of very recent origin, when compared, for instance, with the common law antiquities of the law of landlord and tenant. Prior to our century . . . there had been building codes and other laws related to dwellings, but their major concern had been the protection of the city from conflagration and building collapse.

Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1259 (1966) [hereinafter cited as Gribetz & Grad]. A comprehensive study of the history and enforcement of housing codes is set forth in Note, *Enforcement of Municipal Housing Codes, supra* note 5.

15. 42 U.S.C. § 1451 (1970). For an in-depth discussion of the contributions to code enforcement expected from various approaches in federal legislation see Note, *Federal Aids for Enforcement of Housing Codes,* 40 N.Y.U.L. REV. 948 (1965).

16. Housing codes are usually enforced by local administrative agencies authorized to prosecute code violations as misdemeanors. *See* BUILDING THE AMERICAN CITY, *supra* note 2, at 281-82, 298. Code enforcement agencies, however, usually resort to legal action only as a last resort. *See* F. GRAD, LEGAL REMEDIES FOR HOUSING CODE VIOLATIONS 56 (1968).

17. Hartman, Kessler & LeGates, *Municipal Housing Code Enforcement and Low-Income Tenants,* 40 J. AM. INST. PLANNERS No. 2, at 90-97, 101 (1974). One recent study concluded that only 42% of the nation's population lived in areas regulated by housing codes. *See* HARTMAN, *supra* note 5, at 63.

18. 7 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 24.505 (3d rev. ed. 1968). These ordinances may control the erection, removal, repair, alteration, reconstruction and use of buildings.

19. The police power is reserved to the states by the tenth amendment. Police powers of municipal corporations, however, are only those which are granted to them by statute, constitutional provision, or home-rule charter, pursuant to state delegation. *Id.*

20. The retroactive application of housing legislation to require the repair and alteration of buildings is a recognized proper exercise of the police power.

exercise of the police power in the form of a housing code must bear a reasonable relation to the public health, safety, morals or general welfare,[21] as well as satisfying the requirements of procedural[22] and substantive[23] due process.[24] In determining reasonableness, most courts recognize a presumption of validity in favor of legislative determinations[25] and will not declare an ordinance invalid unless clearly inequitable.[26] Some minimum housing requirements, such as those for fire exits[27] or

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Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946); Health Dep't v. Trinity Church, 145 N.Y. 32, 39 N.E. 833 (1895). *But see* Coffin v. Blackwell, 116 Wash. 281, 199 P. 239 (1921).

21. Chicago, B. & Q. Ry. v. Illinois *ex rel.* Drainage Comm'rs, 200 U.S. 561 (1905); Chicago v. Miller, 27 Ill. 2d 211, 188 N.E.2d 694 (1963); Fleming v. Moore Bros. Realty Co., 363 Mo. 305, 251 S.W.2d 8 (1952); Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955). *See also* F. GRAD, *supra* note 16, at 8.

22. Crossman v. City of Galveston, 112 Tex. 303, 247 S.W. 810 (1923) (adequate notice of proceedings required).

23. City of Louisville v. Thompson, 339 S.W.2d 869 (Ky. App. 1960) (prohibition against deprivation of property without just compensation).

24. The constitutional validity of the enactment of housing codes per se as an exercise of the police power has been consistently upheld. Apple v. City & County of Denver, 154 Colo. 166, 390 P.2d 91 (1964) (en banc); State v. Schaffel, 4 Conn. Cir. Ct. 234, 239 A.2d 552 (1966); City of Louisville v. Thompson, 339 S.W.2d 869 (Ky. App. 1960); Adamec v. Post, 273 N.Y. 250, 7 N.E.2d 120 (1937); Dale v. City of Morgantown, 270 N.C. 567, 155 S.E.2d 136 (1967). *See also* Dankner v. City of New York, 20 Misc. 2d 557, 194 N.Y.S. 2d 975 (Sup. Ct. 1959).

25. *See* Note, *Municipal Housing Codes,* 69 HARV. L. REV. 1115, 1118 (1956). *See also* Berman v. Parker, 348 U.S. 26, 32 (1954); Borden Co. v. Thomason, 353 S.W.2d 735, 743 (Mo. 1962); State v. Gunn, 326 S.W.2d 314, 324 (Mo. 1959); State v. Metropolitan St. Louis Sewer Dist., 275 S.W. 2d 225, 234 (Mo. 1955); Poole & Creber Mkt. Co. v. Breshears, 343 Mo. 1133, 125 S.W.2d 23 (1938).

26. City of Anchorage v. Richardson Vista Corp., 242 F.2d 276 (1957); Fellom v. Redevelopment Agency, 157 Cal. App. 2d 243, 320 P.2d 884 (Dist. Ct. App. 1958); Passler v. Johnson, 304 S.W.2d 903 (Mo. 1957); State *ex rel.* Vogt v. Reynolds, 295 Mo. 375, 244 S.W. 929 (1922); City of Springfield v. Mecum, 320 S.W.2d 742 (Mo. App. 1959); Hillerege v. City of Scottsbluff, 164 Neb. 560, 83 N.W.2d 76 (1957); Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955). If a reasonable relationship is at least "fairly debatable," legislative determination should prevail. *See, e.g.,* Lester v. City of St. Petersburg, 183 So. 2d 589 (Fla. App. 1966). *But cf.* Tinder v. Clark Auto Co., 238 Ind. 302, 149 N.E.2d 808 (1958); Poole & Creber Mkt. Co. v. Breshears, 343 Mo. 1133, 125 S.W.2d 23 (1938); Gauthier v. Gabel, 44 Misc. 2d 887, 255 N.Y.S.2d 200 (Sup. Ct. 1962).

27. Kalbfell v. City of St. Louis, 211 S.W.2d 911 (Mo. 1948); City of St. Louis v. Warren Comm'n & Inv. Co., 226 Mo. 148, 126 S.W. 166 (1910); City of Seattle v. Hinckley, 40 Wash. 468, 82 P. 747 (1905).

heat,[28] have a direct, obvious effect on public well-being and generally have been upheld as valid exercises of the police power.[29] Other code provisions, such as those requiring outdoor screens,[30] protection of exterior wood surfaces,[31] and repair of cracked windows,[32] have a less obvious relation to public well-being. It is under these latter types of code provisions that problems and challenges most often arise.

The question in *Brune*, whether or not the "hot bath" requirement is reasonable as applied, is one of first impression in Missouri. While other jurisdictions have generally found such requirements reasonable,[33] the Missouri Supreme Court decided that a hot bath or shower was not reasonably necessary to protect the public health, welfare or safety.[34] In support of the result, the court advanced three interrelated arguments: (1) the ordinance was not paramount to the public well-being; (2) the cost of compliance was prohibitive; and (3) enforcement would inconvenience the tenants.[35]

Courts in other jurisdictions have generally upheld similar provisions, often citing health and sanitation advantages.[36] The *Brune* decision is

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28. Dankner v. City of New York, 20 Misc. 2d 557, 194 N.Y.S.2d 975 (Sup. Ct. 1959).

29. Various other provisions have been held reasonable and necessary due to their inherent health, safety or welfare characteristics. *See* Kaukas v. City of Chicago, 27 Ill. 2d 197, 188 N.E.2d 700, *appeal dismissed*, 375 U.S. 8 (1963) (provision prohibiting glass doors as secondary means of exit); Abbate Bros., Inc. v. City of Chicago, 11 Ill. 2d 337, 142 N.E.2d 691 (1957) (safety devices for elevators); City of St. Louis v. Nash, 260 S.W. 985 (Mo. 1924) (water closets).

30. Apple v. City & County of Denver, 154 Colo. 166, 390 P.2d 91 (1964) (en banc); Paquette v. City of Fall River, 338 Mass. 368, 155 N.E.2d 775 (1959); Boden v. City of Milwaukee, 8 Wis. 2d 318, 99 N.W.2d 156 (1959).

31. State v. Schaffel, 4 Conn. Cir. Ct. 234, 229 A.2d 552 (1966); City of Columbus v. Stubbs, 223 Ga. 765, 158 S.E.2d 392 (1967).

32. Apple v. City & County of Denver, 154 Colo. 166, 390 P.2d 91 (1964) (en banc).

33. Wheat v. Ramsey, 284 Ala. 295, 224 So. 2d 649 (1969); Apple v. City & County of Denver, 154 Colo. 166, 390 P.2d 91 (1964) (en banc); City of Louisville v. Thompson, 339 S.W.2d 869 (Ky. App. 1960); Givner v. Commissioner of Health, 207 Md. 184, 113 A.2d 899 (1955); Paquette v. City of Fall River, 338 Mass. 368, 155 N.E.2d 775 (1959); City of Newark v. Zemel, 17 N.J. Super. 295, 86 A.2d 36 (Essex County Ct. 1952); City of Newark v. Charles Realty Co., 9 N.J. Super. 442, 74 A.2d 630 (Essex County Ct. 1950); Dankner v. City of New York, 20 Misc. 2d 557, 194 N.Y.S.2d 975 (Sup. Ct. 1959).

34. 515 S.W.2d at 476; *see* note 12 *supra*.

35. 515 S.W.2d at 476.

36. *See* cases cited note 33 *supra*.

not, however, entirely unprecedented. Several courts have determined that hot water requirements impose an unreasonable demand upon landlords[37] and are not vital to the public well-being.[38] Most authorities, however, believe it reasonable and necessary to require hot water if a dwelling is to be fit for human habitation.[39] Nearly all state and city housing codes require a hot bath or shower,[40] and the Federal Housing Administration views dwellings without hot water as "sub-standard."[41]

In *Brune*, the court also considered the cost of renovation to the landlord, estimated to be between $7,000 and $8,000 per building.[42] The resulting economic burden on the landlord to invest in a building with no market value is evident. Financial imposition on owners has previously been recognized as a factor when determining reasonableness.[43]

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37. Most of these decisions are at least partially based on consideration of the cost of improvements to the owner of the building. City of Columbus v. Stubbs, 223 Ga. 765, 158 S.E.2d 392 (1967); Dente v. City of Mount Vernon, 50 Misc. 2d 983, 272 N.Y.S.2d 65 (Sup. Ct. 1966); Gates Co. v. Housing Appeals Bd., 10 Ohio St. 2d 48, 225 N.E.2d 222 (1967); Early Estates, Inc. v. Housing Bd. of Review, 93 R.I. 227, 174 A.2d 117 (1961).

38. In Safer v. City of Jacksonville, 237 So. 2d 8 (Fla. App. 1970), cited in *Brune*, the Florida Court of Appeals stated that a hot water provision was required primarily for aesthetic reasons, and that in the "good old days," our forefathers got along quite well without such modern facilities. *Id.* at 13. *But see* Berman v. Parker, 348 U.S. 26 (1954) (exercise of police power for aesthetic purposes proper); City of St. Louis v. Brune, 515 S.W.2d 471, 480 (Finch, J., dissenting); Bergs, *Aesthetics as a Justification for the Exercise of the Police Power or Eminent Domain*, 23 GEO. WASH. L. REV. 730 (1955).

39. Mood, *supra* note 5, at 25; Sutermeister, *Inadequacies and Inconsistencies in the Definition of Substandard Housing*, in HOUSING CODE STANDARDS: THREE CRITICAL STUDIES 97-98 (1969).

40. Mood, *supra* note 5, at 24, 53.

41. Sutermeister, *supra* note 39, at 87. *See also* FISHER, *supra* note 1, at 31.

42. 515 S.W.2d at 476.

43. *See* Note, *Municipal Housing Codes*, *supra* note 25, at 1118. A series of decisions by the New York Court of Appeals reversed the criminal convictions of owners for housing violations for no discernible reason other than economic impossibility of compliance. People v. Rowen, 9 N.Y.2d 732, 174 N.E.2d 331, 214 N.Y.S.2d 347, *rev'g* 11 App. Div. 2d 670, 204 N.Y.S.2d 74 (1961) (mem.); People v. Frank, 8 N.Y.2d 1049, 170 N.E.2d 392, 207 N.Y.S.2d 71 (1960) (mem.); People v. Broadway-Sheridan Arms, 200 N.Y. 559, 89 N.E.2d 522 (1949). For a discussion of these New York cases see Gribetz & Grad, *supra* note 14, at 1270-72. It is interesting to note that the court in *Brune* did not consider the extent of all the landlord's real estate holdings in deciding that he could not reasonably comply with the housing code. Instead, the court only considered the landlord's economic position with respect to the buildings at issue.

While the cost of improvements has often been weighed against the circumstances and object to be accomplished and found reasonable,[44] a comparison of improvement costs to a building's market value has also been held determinative of the issue of enforcement.[45] The rationale of these latter decisions is that to force compliance would abuse the police power, constituting an oppressive and unreasonable taking of property.[46] Although other courts have declared that statutes and ordinances should not be held invalid merely because compliance would be expensive to the landlord,[47] this view was apparently rejected in *Brune*.

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44. Perepletchikoff v. City of Los Angeles, 174 Cal. App. 2d 697, 345 P.2d 261 (Dist. Ct. App. 1959) ($30,000 cost to recondition building to proper standards held reasonable in light of unsafe, unhealthy state of building); Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955) ($400-$600 renovation cost for each of 75 rental houses which were substandard held reasonable).

45. Safer v. City of Jacksonville, 237 So. 2d 8 (Fla. App. 1970) ($19,000 improvement cost held reasonable when assessed property valuation was $40,000); Gates Co. v. Housing Appeals Bd., 10 Ohio St. 2d 48, 225 N.E.2d 222 (1967); Dente v. City of Mount Vernon, 50 Misc. 2d 983, 272 N.Y.S.2d 65 (Sup. Ct. 1966). *But see* Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946); American Wood Prods. Co. v. City of Minneapolis, 21 F.2d 440 (D. Minn. 1927), *aff'd*, 35 F.2d 657 (8th Cir. 1929). *See also* LaSalle Nat'l Bank v. City of Chicago, 5 Ill. 2d 344, 351, 125 N.E.2d 609, 613 (1955); Pondfield Rd. Co. v. Bronxville, 141 N.Y.S.2d 723, 726 (Sup. Ct. 1955).

46. *See* Safer v. City of Jacksonville, 237 So. 2d 8 (Fla. App. 1970); Dente v. City of Mount Vernon, 50 Misc. 2d 983, 272 N.Y.S.2d 65 (Sup. Ct. 1966). These two decisions were predicated in part on two prior opinions written by Mr. Justice Holmes. In one the Supreme Court of the United States stated: "[A]s there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law." Block v. Hirsch, 256 U.S. 135, 156 (1921). Similarly, the Supreme Court of Massachusetts stated: "It may be said that the difference is only one of degree. . . . Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil; larger ones could not be, except by the exercise of the right of eminent domain." Rideout v. Knox, 148 Mass. 368, 372-73, 19 N.E. 390, 392 (1889). For a detailed discussion and a proposal on just compensation for clearance or rehabilitation of slum dwellings see Mandelker, *Housing Codes, Building Demolition, and Just Compensation; A Rationale for the Exercise of Public Powers over Slum Housing*, 67 MICH. L. REV. 635 (1967).

47. Interstate Circuit, Inc. v. City of Dallas, 247 F. Supp. 906 (D. Tex. 1965); Adamec v. Post, 273 N.Y. 250, 7 N.E.2d 120 (1937); Health Dept. v. Trinity Church, 145 N.Y. 32, 39 N.E. 833 (1895); Cockroft v. Mitchell, 187 App. Div. 189, 173 N.Y.S. 903 (1919), *aff'd mem.*, 230 N.Y. 630, 130 N.E. 921 (1921); Dankner v. City of New York, 20 Misc. 2d 557, 194 N.Y.S.2d 975 (Sup. Ct. 1959). *See also* Standard Oil Co. v. City of Tallahassee, 183 F.2d 410 (5th Cir. 1950).

The *Brune* court also recognized the hardship and inconvenience which enforcement would bring upon the tenants.[48] By implication, it recognized that requiring alterations would lead to an unobtainable rent increase,[49] resulting in "vacancies, vandalism, and probably a total loss of the buildings."[50]

Although the court in *Brune* declares the ordinance unconstitutional only as applied to defendant's two properties, the impact of the decision may be substantial. If economic imposition upon an owner is deemed controlling, then it is conceivable that landlords may seek to challenge other code provisions by pleading, as in *Brune*, that their property is not worth saving.[51] Under the *Brune* analysis, many of these challenges could be successful, and even the worst substandard housing exempted from public health and safety requirements. The uneven enforcement that follows might seriously impede the effectiveness and objectives of housing codes.[52]

The prospect that *Brune* further erodes the significance of the housing code diminishes, however, when other difficulties with code enforcement are considered.[53] Local enforcement efforts are hampered by

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48. 515 S.W.2d at 476. "While the situation is by no means ideal, it really involves a matter of inconvenience to those tenants who choose to pay a minimum rent in return for incomplete facilities." *Id.*

49. The defendant testified that he would have to charge monthly rentals of $60 for five years and that this could not be obtained. *Id.* at 473. *See generally* GREBLER, *supra* note 1, at 182-83; G. STERNLIEB, THE TENEMENT LANDLORD 180, 234 (1966). In a study of census data, seven out of ten families renting substandard housing could not have paid the median gross monthly rent for standard housing. FISHER, *supra* note 1, at 48. The premise that slum dwellers prefer to spend their money for things other than improved housing is supported in Grebler, *Capital Formation*, in RESIDENTIAL REAL ESTATE 131 (1956), and in FISHER, *supra* note 1, at 48. It should also be noted that if alterations were performed, the kitchens in each apartment would be reduced to closet size. 515 S.W.2d at 476.

50. 515 S.W.2d at 476.

51. The premise here is that landlords seek profit maximization and will attempt to avoid rehabilitation expenditures whenever possible. *See* HARTMAN, *supra* note 5, at 76-84. *See also* A. SCHORR, SLUMS AND SOCIAL INSECURITY 89-90 (1963); MacFarland, *supra* note 1, at 437-41.

52. Many authorities attribute the failure of housing codes, in part, to lax judicial response and stress the need for vigorous, uniform enforcement. *See* J. ROSE, LANDLORDS & TENANTS 51 (1973); Gribetz & Grad, *supra* note 14; Note, *Enforcement of Municipal Housing Codes*, *supra* note 5.

53. *See* L. FRIEDMAN, *supra* note 3, at 54-55; Gribetz, *Housing Code Enforcement in 1970—An Overview*, 3 URBAN LAW. 526 (1971). *See also* BUILDING THE AMERICAN CITY, *supra* note 2, at 237.

insufficient financial support, overlapping municipal authority, and inconsistent judicial response.[54] Housing inspection and code enforcement, for various reasons, often exclude the worst neighborhoods.[55] From the landlord's perspective, compliance efforts are obstructed by financial problems, tax assessment increases, and resulting rent increases.[56] There is also a tendency to consign hard core deteriorated areas to the dubious prospect of clearance and new construction in the unforeseen future.[57] Additionally, code enforcement has been criticized because, although it might improve individual housing conditions, it does not accomplish neighborhood-wide upgrading.[58]

In *Brune,* the court also decided that the "hot bath" ordinance was not reasonably necessary to ensure proper health, welfare or safety needs.[59] If this criterion is viewed as controlling, then many other similar and lesser provisions might also be challenged as not being reasonably necessary and therefore not a proper basis for exercising the police power. That the Missouri Supreme Court intended this interpretation seems implausible. The court, recognizing the hard market realities,[60] appears to be judging the exercise of the police power on the basis of its consequences.[61] The court *seems* to realize that in *Brune* enforcement would

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54. *See* J. ROSE, *supra* note 52, at 50-51. For a discussion of the dilemmas of strategies and techniques in code enforcement see Mandelker, *The Local Community's Stake in Code Enforcement,* 3 URBAN LAW. 601 (1971). *See also* Levi, *Focal Leverage Points in Problems Relating to Real Property,* 66 COLUM. L. REV. 275 (1966).

55. BUILDING THE AMERICAN CITY, *supra* note 2, at 274-75.

56. J. ROSE, *supra* note 52, at 51-52. *See also* MacFarland, *supra* note 1. A comprehensive study of the realities of the Newark housing market on the maintenance and rehabilitation of slum tenement houses in 1966 included an analysis of landlord attitudes and unwillingness to improve substandard housing. G. STERNLIEB, THE TENEMENT LANDLORD 152-83 (1966).

57. Gribetz, *supra* note 53, at 527.

58. MacFarland, *supra* note 1, at 440.

59. 515 S.W.2d at 476-77; *see* note 12 *supra.* It has already been noted that the court's holding on this point is a minority view. *See* notes 36-41 and accompanying text *supra.*

60. 515 S.W.2d at 476.

61. The issue of an ordinance's constitutionality should depend not only upon the appropriateness of it's stated goals, but also upon the effectiveness of the ordinance in promoting those goals. The notion that only the consequences of an ordinance effectively serve as its goals is advanced in Becker, *The Police Power and Minimum Lot Size Zoning Part I: A Method of Analysis,* 1969 WASH. U.L.Q. 263-299.

probably not promote the objectives of the housing ordinance, since the net result might be "vacancies, vandalism, and probably a total loss of the building."[62] Yet the court, by attempting to minimize the importance of "hot baths" to health, attacks the code provision as an improper exercise of the police power and, in effect, questions its very objectives and goals. This raises a question as to the wisdom of usurping legislative determinations.[63] Many code provisions could be classified in the "not reasonably necessary" category, resulting in judicial undermining of the legislative process.

In analyzing the dilemma of the *Brune* case, the consequences of denying code enforcement must be weighed against those of a compliance order. Were compliance ordered in *Brune,* the final outcome would still be unclear. If the owner actually proceeded to renovate, it is very possible that rents would be raised above the means of existing tenants,[64] ultimately leading to eviction. This could lead to a total vacancy of the building[65] and eventual abandonment.[66] If the owner did not comply, either from inability or refusal, the court would be faced with

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62. 515 S.W.2d at 476.

63. *See* notes 25-26 and accompanying text *supra.* The effect of *Brune* on a recent Missouri case, King v. Moorehead, 495 S.W.2d 65 (Mo. App. 1973), is uncertain. *King* recognized the implied warranty of habitability as an affirmative defense, i.e. a tenant's obligation to pay rent is dependent upon the landlord's performance of his obligation to provide a habitable dwelling during the tenancy. Under *King,* however, a breach of warranty must be material. In light of *King, Brune* can be read to preclude, as material breaches of warranty of habitability, violations of "hot bath" ordinances.

64. 515 S.W.2d at 476; *see* notes 49-50 and accompanying text *supra.*

65. One of the most serious problems with code induced displacement is the difficulty of obtaining relocation payments for those displaced. Only five states currently have legislation that specifically requires relocation payments for local code enforcement displacees. Hartman, Keisler & LeGates, *supra* note 17, at 95.

66. Abandonment occurs largely as a result of a deteriorating cash flow situation. A recent study found that abandonment is concentrated in low-income, all-black neighborhoods termed "crisis ghettos." ABANDONED HOUSING COMPENDIUM, *supra* note 1, at 9, 15-18. The location of the parcels in *Brune* resembles such an area because of the lack of private maintenance and rehabilitation, the unprofitable and burdensome predicament of landlords, and the extreme pervasiveness of vandalism. An enlightening case study of a St. Louis neighborhood located approximately two miles from the buildings at issue in *Brune* describes in detail the extent, cause and effects of abandonment. *Id.* at 57-65. *See generally* G. STERNLIEB, RESIDENTIAL ABANDONMENT (1973).

selecting a punitive measure against the landlord.[67] A likely result would be the continued disrepair of the building with tenants being allowed to remain at either a reduced or suspended rent schedule pending repair that might never occur.[68]

Although unique on its facts, *Brune* illustrates the problem of what is to be done with many old, occupied slum buildings in every large, urban area. The question is probably best viewed from a neighborhood perspective. Should entire areas be bulldozed[69] or exempted from housing code provisions until a solution is found? *Is* there a workable solution to the overall improvement of these blighted areas that are practically beyond rehabilitation?[70] *Is* the housing code an effective tool in hard-core slum areas?[71] The *Brune* case begs these questions for which

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67. Courts employ such sanctions as fines, jail sentences, placement of property in receivership, and orders to vacate to coerce property owners to comply with housing codes. *See generally* F. GRAD, *supra* note 16, at 7-77. The system of fines, however, has totally broken down. HARTMAN, *supra* note 5, at 66. *See generally* Grad, *New Sanctions and Remedies in Housing Code Enforcement,* 3 URBAN LAW. 577 (1971).

68. Bross, *Law Reform Man Meets the Slumlords: Interactions of New Remedies and Old Buildings in Housing Code Enforcement,* 3 URBAN LAW. 609, 627 (1971).

69. Sternlieb advocates the bulldozer approach to hard core slum areas. Sternlieb, *Slum Housing, supra* note 1, at 334, 338.

70. Despite the many proposals and theories that have been pursued, no one solution exists to improve maintenance of slum tenements. *Preface to* G. STERNLIEB, THE TENEMENT LANDLORD xiii (1966). Demolition of old buildings is an old technique of slum reform which causes depletion of the housing stock and eviction. L. FRIEDMAN, *supra* note 3, at 68-71. Rebuilding is discouraged by the increased cost of construction, HARTMAN, *supra* note 5, at 17-18, difficulty in obtaining loans, *id.* at 26-33, and by the probability that newly erected units will command rents which are beyond the means of current neighborhood residents, FISHER, *supra* note 1, at 50. These problems are graphically illustrated by a study of the rehabilitation potential of Harlem, New York, reported in H. CHUNG, THE ECONOMICS OF RESIDENTIAL REHABILITATION (1973). The alternative of public housing also has serious weaknesses such as insufficient monetary support, precluding hope that it is a viable method of increasing the housing supply. For a discussion of the origins, history, costs and objectives of public housing see FISHER, *supra* note 1, at 73-214. *See generally* HARTMAN, *supra* note 5, at 113-29; BUILDING THE AMERICAN CITY, *supra* note 2, at 119; A. SOLOMON, HOUSING THE URBAN POOR (1974); Ledbetter, *Public Housing—A Social Experiment Seeks Acceptance,* 32 LAW & CONTEMP. PROB. 490 (1967); Sax & Heistand, *Slumlordism as a Tort,* 65 MICH. L. REV. 869 (1967).

71. This comment suggests that it is not. This does not, however, mean to suggest that we should abandon our efforts to attain minimum standards of health and safety in existing housing. *See* BUILDING THE AMERICAN CITY, *supra* note 2, at 294-307.

there is yet no answer. Rather than attempting to eliminate occupation of substandard housing by enforcing the "hot bath" ordinance, the Missouri Supreme Court has opted to recognize the grim realities of the situation and disregard the violation.[72] While the result alone in *Brune* may be admirable, the court's reasoning is vague and misleading.[73] Considering the policy alternatives and the market realities involved, the court was in the unfortunate position of choosing the lesser of two evils. The result is a decision which may be confusing, and whose impact may be great.

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72. The *Brune* case might be read to effectively prevent enforcement of the housing code when such enforcement would result in the removal of a dwelling from the market. If such is the case, the court is making the concession that substandard housing is better than no housing. *See* notes 64-66 and accompanying text *supra.*

73. Of particular concern is the implication that hot baths are not necessary to public health. *See* notes 12, 59-63 and accompanying text *supra.*