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HOUSING CODE ENFORCEMENT BY PRIVATE ATTORNEYS GENERAL: A BETTER WAY?

The continued existence of substandard housing in American cities seems to indicate that present enforcement of minimum housing codes is inadequate. Generally, the acts establishing minimum housing requirements provide for a particular agency or officer to enforce the code.¹ This enforcement procedure has not been effective in obtaining maximum compliance, as was originally hoped.² Lack of funds has caused uneven enforcement.³ Personnel shortages mean deficiencies are discovered in some areas of a city, while entirely undetected in others.⁴ The policy of an enforcement agency is to encourage voluntary compliance.⁵ If the landlord can be found, he will be allowed a hearing where he can challenge the findings of the inspector. He may be completely excused from repairing, granted an extension of time in which to repair or, as a last resort, be recommended for prosecution. Slow court procedures and large backlogs retard the process of effective enforcement.⁶ The "ultimate weapon"⁷ of the enforcement agency, the power to condemn, is seldom used for the obvious reason that it makes tenants homeless.

Clearly, other means of achieving compliance must be found. Private enforcement has been considered as a possible alternative. The idea of a private attorney general enforcing the laws concurrently with public agencies is not new in other areas of the legal system.⁸ But, historically, the tenant has had few remedies available to him.

1. See Note, *California's New Legislation On a Landlord's Duty to Repair*, 3 U.C.D.L. REV. 131, 139 (1971).

2. Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1964).

3. *Id.* at 804.

4. *Id.* at 860.

5. *Id.* at 814.

6. *Id.* at 830.

7. Moskowitz & Honigsberg, *The Tenant Union—Landlord Relations Act: A Proposal*, 58 GEO. L.J. 1013, 1014 (1970).

8. See *California's New Legislation On a Landlord's Duty to Repair*, *supra* note 1, at 140.

At common law the landlord owed few duties to the tenant. He was not liable for injuries to the tenant caused by defects in his property.⁹ There was no duty even though the landlord promised to make repairs, if no consideration was given for the promise.¹⁰ There is some authority that landlords had a duty to those injured in common use areas, but this did not extend to the tenant's leasehold.¹¹ Landlords were liable to strangers who were injured on leased property if the defect causing the injury existed at the time the lease was made.¹²

This common law denial of tenants' remedies has been corrected somewhat by cases decided since housing codes have been formulated. Many courts now recognize that minimum housing standards, as described in the codes, impose a duty on the landlord to repair.¹³ It has even been said that this duty is owed to the tenant, and not just to the city.¹⁴ Therefore, if a tenant is injured because of the landlord's negligence in maintaining the premises in compliance with a local housing code, the tenant can bring an action against him. The landlord's violation of the code can be seen as evidence of that negligence,¹⁵ presumption of negligence¹⁶ or negligence per se.¹⁷

Other courts have expanded the tenants' remedies by allowing a defense of constructive eviction in an action brought by the landlord for rent,¹⁸ by granting an action of mandamus¹⁹ or by permitting a

9. See W. PROSSER, *LAW OF TORTS* 400 (4th ed. 1971); Note, *Landlord-Tenant—Liability for Incipient Nuisance Existing at Demise—Trapdoor as an Incipient Nuisance*, 6 WAYNE L. REV. 263 (1960).

10. *E.g.*, *Gray v. Block*, 416 S.W.2d 848, 850 (Tex. Civ. App. 1967).

11. Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 540 (1966).

12. See *Landlord-Tenant—Liability for Incipient Nuisance Existing at Demise—Trapdoor as an Incipient Nuisance*, *supra* note 9.

13. Margolis, *Plotting the Long Overdue Death of Caveat Emptor in Leased Housing*, 4 U. SAN FRANCISCO L. REV. 168 (1971).

14. *Id.*

15. *Whetzel v. Jess Fisher Management Co.*, 288 F.2d 943 (D.C. Cir. 1960).

16. *Ewing v. Balan*, 168 Cal. App. 2d 619, 622, 336 P.2d 561, 564 (1959).

17. *Morris v. Oney*, 217 Cal. App. 2d 864, 871, 32 Cal. Rptr. 88, 92 (1963); *McNally v. Ward*, 192 Cal. App. 2d 871, 876-77, 14 Cal. Rptr. 260, 263-64 (1961).

18. Note, *Javins v. First National Realty Corp.—The Implied Warranty and Rent Withholding in Urban Leases*, 66 NW. U.L. REV. 227, 235 (1971).

19. See *In re Ciminera v. Sahn*, 4 N.Y.2d 400, 151 N.E.2d 832, 176 N.Y.S.2d 257 (1958); *cf. In re Gilbert v. German*, 183 Misc. 132, 50 N.Y.S.2d 583 (Sup. Ct. 1944).

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tenant to institute a class action on behalf of himself and other tenants.²⁰ As a practical matter, however, each of these remedies has serious drawbacks which may make them limited in value. The tenant is not likely to receive much for his trouble. At best, he may get some deficiencies corrected in his building. The actions are not likely to induce the landlord to do any more than is necessary nor deter him from allowing other violations to continue.

The most popular tenants' remedies are variations of rent withholding. Several states²¹ allow for a general form of rent withholding which ordinarily requires either some form of tenant organization, appointment of a receiver or deposit of rents directly to the clerk of the court.²² New York has listed certain violations as "rent impairing."²³ If such a violation goes uncorrected for six months, the right of the landlord to collect rent is suspended.²⁴ New York also has a law allowing for the whole building to be put into receivership with rents payable to the city which, in turn, corrects the violations.²⁵

It is generally agreed that stronger tenants' remedies are required to assure adequate compliance with the codes. The California Housing Coalition would expand the tenants' right to seek relief in the civil courts. Such a proposal is submitted in its 1971 Legislative Package,²⁶ which suggests that

[A]ny premises rented or leased for dwelling purposes which are in substantial violation of the standards of fitness for human habitation established under any state law or regulation thereunder or any county or municipal ordinance or regulation, is a nuisance.²⁷

The bill would provide the following remedy:

If said nuisance may materially endanger the health, safety, or comfort of any legal occupant of such premises, the owner of said

20. Levi, *Focal Leverage Points in Problems Relating to Real Property*, 66 COLUM. L. REV. 275, 283 (1966).

21. *E.g.*, MASS. ANN. LAWS ch. 111, § 127F (Supp. 1971); MICH. STAT. ANN. §§ 5.2891(10), (14) (Supp. 1972); PA. STAT. ANN. tit. 35, §§ 1700-01 (Supp. 1972).

22. *E.g.*, N.Y. MULT. DWELL. LAW § 302a (McKinney Supp. 1972).

23. *Id.*

24. *Enforcement of Municipal Housing Codes, supra* note 2, at 847.

25. N.Y. MULT. DWELL. LAW § 309 (McKinney Supp. 1972).

26. CALIFORNIA HOUSING COALITION, 1971 LEGISLATIVE PACKAGE, Proposed Bill No. 3, at 18.

27. *Id.*

premises shall be liable to any such occupant or occupants for actual damages for discomfort, humiliation, or physical injury, plus any punitive damages which may be awarded in accordance with law.²⁸

This clearly expands the traditional remedy for nuisance. Absent such an explicit statute, a tenant would have to show that there was no adequate remedy at law available.²⁹ Also, it has been held that a tenant cannot get relief in an action for nuisance if the nuisance is on leased premises.³⁰ This stems from the common law rule that the tenant has control over the leased premises and the landlord is not liable for any such nuisance.³¹ The explicit granting of the right to seek relief from a nuisance should reverse this rule. However, some will claim that since this was not a nuisance at common law, the legislature cannot make it into an actionable nuisance merely by creating this cause of action.³²

The proposed bill calls for punitive damages "which may be awarded in accordance with law."³³ Punitive damages are not unknown in landlord-tenant law. The California Civil Procedure Code expressly allows punitive damages against tenants who do not pay their rent.³⁴ However, assessment of punitive damages against landlords is rare. Since the proposed bill would allow such damages for the tenant "in accordance with law," it appears that the tenant will have to prove more than the existence of the nuisance. He will probably have to prove oppression, fraud or malice.³⁵ Possibly the landlord's action must be shown to have been purposeful misconduct reckless indifference which amounts to an intentional violation.³⁶ Thus, it appears that punitive damages will be anything but automatic.

28. *Id.*

29. Comment, *Tenants' Remedies in the District of Columbia: New Hope for Reform*, 18 CATHOLIC U.L. REV. 80, 81 (1968).

30. Schoshinski, *supra* note 11, at 539.

31. 58 AM. JUR. 2D. *Nuisance* § 49 (1970).

32. See Mandelker, *Housing Codes, Building Demolition and Just Compensation: A Rationale for Exercise of Public Powers Over Slum Housing*, 67 MICH. L. REV. 635 (1969).

33. CALIFORNIA HOUSING COALITION, *supra* note 26.

34. CAL. CIV. PRO. CODE § 1174 (Deering Supp. 1970).

35. See, e.g., *Roberts v. Permanente Corp.*, 188 Cal. App. 2d 526, 532, 10 Cal. Rptr. 519, 523 (1961).

36. E.g., *Yerian v. Linkletter*, 80 Cal. 135, 138, 22 70, 71 (1887).

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This proposed bill attempts to correct one of the major problems of civil remedies. Civil suits have not been favored in the past because they required the tenant to go through the long process of delays and backlogs that afflict our civil courts. However, the proposed bill attempts to overcome this:

If a request for an abatement order is made, and if the complaint alleges that the condition may constitute an imminent danger to the health or safety of the occupant(s) or the public, then the court shall order that a hearing be set as soon as possible, said hearing to have priority over all other civil cases, and the court shall order service of a copy of the complaint and notice of hearing on the landlord as soon as is reasonable under the circumstances.³⁷

This may not eliminate all attempts by the landlord to stall nor will it eliminate time-consuming appeals. The tenant may need some sort of legal assistance to pursue this particular remedy. Overworked legal aid attorneys are reluctant to take this type of case because the most they can hope for in damages is the lost rental value³⁸ or the cost of repair.³⁹ Perhaps the provision for actual and punitive damages will make this remedy more attractive to tenants and their attorneys and be a more effective deterrent to landlords.

One of the main goals of minimum housing codes and tenants' remedies is to get dilapidated or unsafe property repaired. Most remedies attempt to do this by various means of pressure on the landlord. Through letters, summonses and court appearances, the landlord is encouraged, pressured and finally ordered to make the needed repairs. Even if he eventually does have the work done, tenants have already lived with the condition for many months.

Five states have enacted statutes that appear to give tenants the right to make their own repairs and deduct the cost from the rent.⁴⁰ All of these statutes are similar to California's which states:

If within a reasonable time after notice to the lessor, of dilapidations which he ought to repair, he neglects to do so, the lessee

37. CALIFORNIA HOUSING COALITION, *supra* note 26, at 19.

38. Schoshinski, *supra* note 11, at 540.

39. See Note, *Tenants in Court: The Class Action*, 3 U.C.D.L. REV. 101 (1971).

40. CAL. CIV. CODE § 1942 (Deering 1972); MONT. REV. CODES ANN. § 42-202 (1961); N.D. CENT. CODE § 47-16-13(1) (1960); OKLA. STAT. ANN. tit. 41, § 32 (Supp. 1971); S.D. COMP. LAWS ANN. § 43-32-9 (Supp. 1972).

may repair the same himself, where the cost of such repairs does not require an expenditure greater than one month's rent of the premises, and deduct the expenses of such repairs from the rent, or the lessee may vacate the premises, in which case he shall be discharged from further payment of rent, or performance of other conditions.⁴¹

Section 1941 of the California Civil Code read originally:

The lessor of a building intended for the occupation of human beings must . . . put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenable, except such as are mentioned in section nineteen hundred and twenty-nine.⁴²

In 1874, section 1941 was amended to include the words, "in the absence of an agreement to the contrary."⁴³ After this amendment, it would seem that shrewd landlords would include an agreement in their leases waiving the tenants' rights under sections 1941 and 1942. The law was even further restricted as late as 1970 by adding to section 1942: "This remedy shall not be available to the lessee more than once in any 12-month period."⁴⁴

It would appear that these repair and deduct laws allow for more immediate repair. Section 1942 (b), as amended in 1970, allows the tenant to repair and deduct after the thirtieth day following notice.⁴⁵ Thus, theoretically no tenant should have to endure any hazardous condition for more than one month. But since, in California, the tenant is restricted to an amount equal to one month's rent, there is a definite limit to the amount of repairs he can make. Also, the statute stipulates that the repairing is to be done by the tenant himself. Probably, few tenants will be qualified to repair plumbing and wiring or do large carpentry jobs.

The lack of cases in this area of the law seems to indicate that this remedy has not been widely used by tenants. Most tenants apparently waive their rights when they sign the lease. Courts have also found

41. CAL. CIV. CODE § 1942 (Deering 1972).

42. *Id.* § 1941.

43. *California's New Legislation On a Landlord's Duty to Repair*, *supra* note 1, at 132.

44. CAL. CIV. CODE § 1942a (Deering 1972).

45. *Id.* § 1942b.

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that when a tenant exercises his right under the law, he waives certain other rights, such as the right to vacate.⁴⁶

The California Housing Coalition proposes several changes in the repair and deduct law:

Civil Code Section 1941: The lessor of a building intended for the occupation of human beings shall, notwithstanding any agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenable, except such as are mentioned in section 1929. . . .

Section 1942: (a) *Notwithstanding any agreement to the contrary*, if, within a reasonable time after notice to the lessor of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself or contract to have such repairs done at a reasonable cost, and deduct the expenses of such repairs from the rent, or the lessee may vacate the premises, in which case he shall be discharged from further payment of rent, or performance of other conditions. Any notice given in excess of twenty days shall not be deemed to be made within an unreasonable time. (Emphasis added.)

. . . .
(c) Where the cost of such repairs requires an expenditure greater than one month's rent of the premises, the lessee may apply his rents to such repairs only if (1) he contracts with reasonable and capable persons to make such repairs and (2) he submits, with the notice required by this section, copies of cost estimates from three such persons with the assurance that the person supplying the lowest estimate will be employed, and that the tenant will be responsible for any expenditure which exceeds 110% of the estimate.⁴⁷

These proposed changes would make the law more useful for tenants in two important areas: (1) the addition of "notwithstanding any agreement to the contrary," should void the waiver that has been so widely used; and (2) the provision for repairs which cost more than one month's rent will allow the correction of major problems which have previously been too expensive.

46. See, e.g., *Wallace v. Williams*, 313 P.2d 784 (Okla. 1957); *Staples v. Baty*, 206 Okla. 288, 242 P.2d 705 (1952).

47. CALIFORNIA HOUSING COALITION, 1971 LEGISLATIVE PACKAGE, Proposed Bill No. 6, at 35-36.

The Model Residential Landlord-Tenant Code contains a repair and deduct remedy similar to that existing in California.⁴⁸ It improves on the existing law by shortening the time the tenant must endure the objectionable condition. However, it shares the problem of the present law by limiting the cost to \$50 for work done by the tenant or one month's rent for work contracted out.⁴⁹

It should be pointed out that both proposals and the present law allow the landlord to claim that the tenant has waived any rights to vacate or even to bring a tort action once he has taken advantage of the repair and deduct remedy.

Although the Housing Coalition's plan seems preferable from the tenant's viewpoint, both solve one problem of substandard housing: if there are to be any prolonged legal problems, they should occur after the repairs have been made, not before.

These proposed changes in landlord-tenant law have one common thread running through them: both attempt to provide various incentives for tenant action or landlord compliance, but both eventually require the use of some kind of enforcement agency or the court system. As long as agencies and courts are overworked,

48. AMERICAN BAR FOUNDATION, MODEL RESIDENTIAL LANDLORD-TENANT CODE (Tent. Draft 1969) provides:

Section 2-206 Tenant's Remedy of Repair and Deduct for Minor Defects

(1) If the landlord of an apartment building or single family dwelling fails to repair, maintain, keep in sanitary condition, or perform in any other manner required by section 2-203 or as agreed to in a rental agreement, and fails to remedy such failure within (two weeks) after being notified by the tenant to do so, the tenant may further notify the landlord of his intention to correct the objectionable condition at the landlord's expense and immediately do or have done the necessary work in a workmanlike manner. The tenant may deduct from his rent a reasonable sum, not exceeding (fifty) dollars, for his expenditures by submitting to the landlord copies of his receipts covering at least the sum deducted. If the tenant submits a written estimate by a qualified workman at least (four weeks) before having the work done, and substitutes workmen and materials as the landlord may reasonably request in writing, the tenant may deduct from his rent a reasonable sum not exceeding one month's rent by submitting to the landlord copies of his receipts covering at least the sum deducted.

(2) In no event may a tenant repair at the landlord's expense when the condition complained of was caused by the want of due care of the tenant, a member of his family, or other person on the premises with his consent.

(3) Before correcting conditions affecting facilities shared by more than one dwelling unit, the tenant shall notify all other tenants sharing such facilities of his plans, and shall so arrange the work as to create the least practicable inconvenience to such other tenants.

Id. at 44.

49. *Id.* The \$50 figure is merely suggested and could, of course, be changed when enacted.

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understaffed and underfinanced, they cannot be effective in their efforts. Tenants will not be encouraged to act as private attorneys general if they meet with constant delay and inefficiency in the legal system. Landlords will not be discouraged from allowing substandard housing to exist if they know that the courts will not enforce the law swiftly and strictly. If tenants are to get relief in fact, the legal system will have to provide a more effective way to carry out the recent expansions of tenants' rights.

Jimmy J. Cook

